

September 20, 2021

To:

The Office of the President
of the United States

Re:

**Unconstitutional and Unjust:
Dismantling 20 Years of
Discriminatory 'National
Security' Policy**

Unconstitutional and Unjust: Dismantling 20 Years of Discriminatory ‘National Security’ Policy

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I. *Introduction*

September 2021 marks two decades since the advent of the U.S. government’s global “War on Terror” and the implementation of a range of policies and programs justified under the broad and ill-defined rubric of national security.¹ These policies are intentionally designed to police, surveil, criminalize, and deny immigration benefits to individuals and communities under the bigoted premise that Black, African, Arab, Middle Eastern, Muslim, and South Asian (“BAMEMSA”) communities and individuals are inherently suspect. This memorandum documents some of these policies, all of which continue today, and many of which are at once uncritically accepted and yet remain largely unknown or unacknowledged by both government officials and mainstream civil society. That they are justified as necessary to protect national security without consideration of their impacts on civil rights, civil liberties, and social, political, and human rights only underscores the urgent need to reexamine (and end) them.

All of the policies and programs discussed in this memorandum infringe upon freedoms and rights otherwise guaranteed by the Constitution. They have also subjected entire communities, but in particular BAMEMSA communities, to real or potential targeting based primarily and sometimes exclusively on the basis of religion, race, ethnicity, or perceived identity. These policies pervade many aspects of targeted communities’ lives: whether they are traveling, applying for immigration benefits or simply engaging in activities traditionally protected by the First Amendment, impacted communities have and continue to be marked for suspicion and subjected to extensive scrutiny and surveillance. These secretive policies almost never provide for meaningful redress or due process. Further, they have a chilling impact on impacted communities, preventing them from fully living their lives without fear of scrutiny or differential treatment, expressing the saliency of their religious, ethnic, and racial identities, or participating fully in U.S. society. They have also eroded the faith and trust these communities have not just in the federal government and its agencies, but almost all levels of government.

Many of these counterterrorism policies and programs have been criticized by the government’s own investigations as being deceptive and plagued by deficiencies.² Some have been found to be unconstitutional³ and in violation of local laws.⁴ It is time to reexamine these policies, account for their harms, and chart a new course where the assumptions, premises and frameworks that underlie the U.S. government’s national security structures, linked inextricably to the so-called War on Terror, are critically reconsidered. The current administration has the opportunity to address the harms caused by these policies and to remedy the wrongs that have resulted from them. The authors of this memorandum, identified in Appendix A, together with

¹ For grassroots calls to action and additional resources connecting domestic U.S. government counterterrorism policies to the larger War on Terror framework, see *Abolishing the War on Terror, Building Communities of Care Grassroots Policy Agenda*, available at <https://www.muslimabolitionistfutures.org/agenda>.

² See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE DEPARTMENT OF JUSTICE’S INTERNAL CONTROLS OVER TERRORISM REPORTING (2007), available at <https://oig.justice.gov/reports/plus/a0720/final.pdf> (finding “that the Department components and the Department as a whole did not accurately report terrorism-related statistics . . . [t]he Department components lacked adequate internal controls for gathering, verifying, and reporting terrorism-related statistics,” and that the FBI overstated the number of terrorism-related convictions “because the FBI initially coded the investigative cases as terrorism-related when the cases were opened, but did not recode cases when no link to terrorism was established”).

³ Center for Constitutional Rights, Case Page for *Hassan v. City of New York*, available at <https://ccrjustice.org/home/what-we-do/our-cases/hassan-v-city-new-york>.

⁴ Ryan Devereaux, FBI and San Francisco Police Have been Lying about Scope of Joint Counterterrorism Investigations, Document Suggests, *The Intercept* (Nov. 1, 2019), available at <https://theintercept.com/2019/11/01/fbi-joint-terrorism-san-francisco-civil-rights/> (noting that “the bulk of what police officers did on the San Francisco JTIF were inquiries that would typically be prohibited under SFPD rules and local law”).

those who have signed in support, identified in Appendix B, urge the administration and relevant executive agencies to take action to terminate all of the harmful and discriminatory programs and policies implemented under the guise of protecting national security.

The memorandum provides background information about each of the policies discussed, along with guidelines to help end these harmful policies. Section II of the memorandum highlights programs that have resulted in the surveillance, policing and criminalization of BAMEMSA communities, with little more than these communities' religious or ethnic identities as markers for suspicion. Section III discusses policies justified under national security considerations but which deeply harm and target immigrants. The section discusses the Muslim and African bans, denaturalization of citizens and their families, and passport revocations, which in certain cases effectively lead to *de facto* denaturalization. Finally, Section IV discusses border rights, including the arbitrarily applied and executed Terrorist Screening Database and the government's self-regulated (and thus unchecked) practice of discriminatory searches of BAMEMSA travelers at the border.

The drafters of this memorandum emphasize that this document is not exhaustive, as its substance covers only a select set of policies and programs impacting, largely, communities residing in the U.S. Nonetheless, we hope this memorandum will help the administration, all relevant federal agencies, and other government actors, policymakers, and stakeholders to better understand the ongoing harms of the two decades since September 11, 2001, and serve as a guide for terminating the policies and frameworks that have resulted from the U.S. government's global War on Terror. We urge the administration to reexamine these policies, acknowledge the harms they have caused, and to end the biased frameworks, including systemic Islamophobia, xenophobia, and anti-Blackness that sustain their persistence.

II. *Policing, Surveillance and Criminalization*

A. *Joint Terrorism Task Forces*⁵

Joint Terrorism Task Forces (JTTFs) are collaborative and multi-agency law enforcement efforts between federal, state, and local law enforcement agencies led by the U.S. Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI). JTTFs are housed in FBI facilities and, together with state and local agencies, conduct investigations into terrorist threats. Today, there are about 200 task forces around the country, including at least one in each of the FBI's 56 field offices, with hundreds of networks of collaborations between JTTFs and state, local, and other federal agencies, including the U.S. Department of Homeland Security (DHS).⁶

JTTFs, their structure, and their activities are shrouded in secrecy. For instance, there is no publicly available list of agencies that participate in JTTFs in many jurisdictions. What we do know is that JTTFs involve collaborations between federal law enforcement agencies like the FBI and local law enforcement, including local police departments and sheriff's offices, with the former providing training, resources, and

⁵ This section was primarily drafted by ALC with support from CCR. Staff at Secure Justice also contributed to this section.

⁶ The DHS's Homeland Security Investigations (HSI), by its own account, "represents the largest federal contributor of personnel outside of the FBI to the JTTFs. HSI special agents and intelligence personnel are directly embedded within the FBI's Counterterrorism Division's operational and command elements." See U.S. Citizenship and Immigration Services, *Joint Terrorism Task Force: Supporting the Global Fight Against Terrorism*, available at <https://www.ice.gov/partnerships-centers/jtjf>. HSI is the principal investigative arm of the U.S. Department of Homeland Security.

coordination. Local law enforcement officers are in turn deputized as federal field agents tasked with carrying out investigations and operations. The rules, protocols and chain of command governing these deputizations are unclear.⁷

In 2008, then Attorney General Mukasey rewrote the guidelines that govern the conduct of FBI and JTTF agents, giving them unfettered authority to investigate anyone without any factual basis for suspected wrongdoing.⁸ Under these guidelines, FBI and JTTF agents have the power to open what are called “assessments” on individuals, even without any factual indication of wrongdoing or threat to national security.⁹ Through such assessments, agents may use intrusive investigative techniques, including confidential informants, interviews under false pretenses, and unlimited physical surveillance typically reserved for investigations supported by a factual criminal predicate.¹⁰ These investigative authorities are often broader than those permitted under state and local law, policies, and regulations.

That such techniques can be diffused throughout the country through the FBI’s JTTF collaborations with support from local law enforcement agencies indicates the all-encompassing and dragnet nature of policing, surveillance, and potential criminalization of communities traditionally targeted by counterterrorism investigations. These include Black activists and others engaged in anti-policing, civil rights, animal rights, environmental justice, and other protest and resistance movements, including those the FBI has previously marked as “Black Identity Extremists,” as well as those among BAMEMSA communities. Given the DHS’s involvement in JTTFs, immigrants from these and other communities are particularly vulnerable to profiling and surveillance without suspicion.

JTTFs inflict harm on local communities through racial profiling, harassment, suspicionless surveillance and investigations, and exploitation of immigration enforcement, all of which are authorized under federal guidelines loosened after September 11, 2001. The White House and leading federal agencies, including the DOJ, FBI, and DHS, must take the steps outlined below to begin addressing the harms inflicted by this abusive and harmful program.

Recommendations

- The DOJ should dismantle the JTTF, all of its field offices and collaborative networks, including with state and local agencies and those established internationally, and any future such iterations that may go by other names;
- The DOJ Office of the Inspector General (DOJ OIG) must examine and publish findings on what types of information the JTTF shares and has shared with other federal agencies,

⁷ See, e.g., *Standard Memorandum of Understanding Between the Federal Bureau of Investigation and the San Francisco Police Department*, available at <https://www.brennancenter.org/sites/default/files/analysis/SFPD%20MOU-JTTF.pdf>; *Standard Memorandum of Understanding Between the Federal Bureau of Investigation and the City of Portland and the Portland Police Bureau*, available at <https://www.brennancenter.org/sites/default/files/analysis/PORTLAND%20JTTF%20MOU%20Draft.pdf>; *Standard Memorandum of Understanding Between the Federal Bureau of Investigation and the Oakland Police Department*, available at <https://cao-94612.s3.amazonaws.com/documents/Sept-5-Agenda-Packet.pdf>.

⁸ U.S. DEP’T OF JUSTICE, *The Attorney General’s Guidelines for Domestic FBI Operations* (Oct. 2008), available at <https://www.justice.gov/archive/opa/docs/guidelines.pdf>.

⁹ *Id.* at 17-18.

¹⁰ *Id.* at 19-20.

including DHS, DHS Fusion Centers, and other components of DHS, and how these agencies have used this information;

- The DOJ OIG must (1) examine and evaluate the data that the FBI has collected and holds on U.S. and non-U.S. persons and purge all records which did not lead to predicated investigation; (2) evaluate and publish findings regarding violations of state and local law resulting from JTTF collaborations; (3) evaluate and publish findings about how many “assessments” are opened based in whole or in part on First Amendment protected activity; (4) evaluate and publish findings about how many “assessments” JTTFs open into those it classifies as engaging in so-called Black Identity Extremism, Islamic extremism, domestic terrorism, and other such classifications; and (5) evaluate and publish findings regarding the disproportionate impacts of JTTFs on BAMEMSA, immigrant, and communities of color;
- The DOJ must publicly publish all Memorandums of Understanding (MOUs) establishing JTTF partnerships between the FBI and local, state, tribal, and other federal agencies, the names of each agency participating in the JTTF across the country, and the number of officers from each agency assigned to the JTTF in a full- or part-time capacity;
- The DOJ must release data regarding funding allocations to local and state agencies, including law enforcement agencies, participating in the JTTF;
- Establish a Congressional Commission or Congressional hearings led by impacted and targeted communities to evaluate and remedy the harms and impacts of the JTTF and its operations.

B. Countering Violent Extremism¹¹

Countering Violent Extremism (CVE) constitutes a series of government and private sector programs, policies, and frameworks designed to ostensibly identify individuals perceived to be susceptible to “radicalization” and “violent extremism.” While CVE in the U.S. is rooted in programs and policies initially developed and implemented by the federal government, including DHS, DOJ, and FBI, CVE programs and frameworks are disseminated globally, with concerns of human rights violations echoed worldwide.¹² The term “CVE” itself has now transformed into a broader reference for domestic and international frameworks intended to address violent extremism and radicalization, now with multiple iterations that go by varied names.¹³

¹¹ This section was drafted primarily by ALC with support from CCR. Staff from Muslim Justice League and Vigilant Love also contributed to this section.

¹² See, e.g., The Transnational Institute, *The Globalisation of Countering Violent Extremism Policies: Undermining Human Rights, Instrumentalising Civil Society*, available at <https://www.tni.org/en/publication/the-globalisation-of-countering-violent-extremism-policies>.

¹³ CVE’s varied names and identifications pose a considerable impediment to grassroots and community mobilization and public recognition of these programs, which all fall under the general framework of CVE. See, e.g., U.S. Dep’t of Homeland Sec., *DHS Countering Violent Extremism Grant*, available at <https://www.dhs.gov/cvegrants>; U.S. Dep’t of Homeland Sec., *DHS Targeted Violence and Terrorism Prevention Grant Program (TVTP)*, available at <https://www.dhs.gov/tvtpgrants> (“The TVTP Grant program is an evolution of the FY16 CVE Grant Program.”); Fed. Bureau of Investigation, *Preventing Violent Extremism in Schools*, available at https://rems.ed.gov/Docs/FBI_PreventingExtremismSchools.pdf (noting the “FBI’s Countering Violent Extremism (CVE) program”); U.S. Dep’t of Homeland Sec., *DHS Center for Prevention Programs and Partnerships (CP3)*, available at <https://www.dhs.gov/CP3> (listing both the DHS TVTP grant program and the CVE grant program).

CVE's theoretical foundations lie in the controversial and empirically questionable "radicalization theory."¹⁴ Under the theory, CVE frameworks mark expressions of political dissent, cultural and religious saliency, and feelings of alienation as indicators of potential radicalization and violent extremism, thus casting everyday activities and expressions as indicators of "pre-terrorism" warranting potential arrest and prosecution. Some examples of activities and expressions that have served as indicators of extremism under CVE frameworks include wearing traditional religious attire; increased attendance of a house of worship or prayer group; travel abroad; increased political or social activism; and critique of U.S. domestic or foreign policy. While these indicators may appear neutrally applicable, given long-standing federal law enforcement targeting of Muslim, Black, and other communities traditionally perceived to be suspect, as well as empirical evidence that past CVE programs have almost exclusively targeted Muslim, Black, and LGBTQ groups, the indicators themselves reveal a racialized focus that leaves targeted communities vulnerable to surveillance and criminalization under CVE frameworks.¹⁵ CVE thus reinforces the racialized fallacy that people from a particular religious, racial or ethnic group are more likely to commit acts of terrorism or violent extremism, while doing nothing to address the systemic barriers hampering their progress and wellbeing.

CVE frameworks claim to "empower local partners to prevent violent extremism,"¹⁶ but in effect constitute little more than racial or religious profiling under the guise of "counterterrorism" policy. Often billed as "community-led" programs, they are, in fact, intelligence gathering operations resulting in the disproportionate if not exclusive targeting of Muslim, Black, and other communities historically regarded as suspect and criminal.¹⁷ Unlike traditional surveillance employed by law enforcement, CVE disseminates surveillance models throughout targeted communities without the physical presence of agents. In the U.S., CVE has often taken the form of grant programs distributing federal funding to local organizations, including academic institutions and non-profit organizations, and partnering grant recipients with federal and local law enforcement agencies who in turn provide training to help identify "violent extremism" and collect information on the communities and individuals such grant recipients serve. Some examples of grant recipients and their grant focus include non-profit organizations providing "terrorism-prevention" training to teachers who are then tasked with identifying violent extremism amongst primarily students of color; community-based organizations providing social services, including mental health services, to Arab and Muslim refugees who have fled conditions of violence; and academic institutions establishing programs to monitor and report online "extremist" content. Under the Obama administration, DHS awarded 31 grants totaling \$10 million, all to Muslim-serving groups save one.¹⁸ This disproportionate focus on Muslim communities, despite widespread community opposition, underscores the biased nature of counterterrorism policing which has almost exclusively targeted Muslim and Black communities.

¹⁴ See *Why Countering Violent Extremism Programs are Bad Policy*, Brennan Center for Justice, Sept. 9, 2019, available at <https://www.brennancenter.org/our-work/research-reports/why-countering-violent-extremism-programs-are-bad-policy> ("CVE programs are designed around the erroneous idea that there is a discernible process of radicalization that results in terrorist violence. The key assumption of radicalization theory is that individuals who adopt 'extremist' ideologies start down a conveyor belt that leads inexorably toward becoming a terrorist.").

¹⁵ See Faiza Patel, *Countering Violent Extremism Programs in the Trump Era*, Brennan Center for Justice, June 15, 2018, available at

<https://www.brennancenter.org/our-work/analysis-opinion/countering-violent-extremism-programs-trump-era>.

¹⁶ See U.S. Dep't of Homeland Sec., *Empowering Local Partners to Prevent Violent Extremism in the United States* (Aug. 2011), available at https://www.dhs.gov/sites/default/files/publications/empowering_local_partners.pdf.

¹⁷ See Michael Price, *Community Outreach or Intelligence Gathering?*, Brennan Center for Justice, Jan. 29, 2015, available at

<https://www.brennancenter.org/our-work/research-reports/community-outreach-or-intelligence-gathering>.

¹⁸ *Supra* note 14.

CVE's law enforcement underpinnings have an undeniably chilling effect on the communities such programs target, as well as their exercise of civil rights and liberties. It also has the practical effect of both stigmatizing individuals from "suspect communities"--particularly Muslim and other communities--and unwittingly placing them into referral networks where they are in turn more likely to be the targets of unwarranted law enforcement interdiction. Finally, because of the so-called "community-led" approach to surveillance under CVE frameworks, CVE programs foment distrust not only between targeted communities and government institutions and actors, but also service providers, teachers, community leaders and others tasked with implementing CVE frameworks in their communities.

CVE has been shown to be ineffective, and no government agency to date has provided any evidence that CVE frameworks are successful at "preventing" or "countering" violent extremism.¹⁹ Community groups have called for an end to such programs, however, not only because of their ineffectiveness, but because of the premises they fundamentally rely on.²⁰ Given CVE's flawed assumptions that certain communities may be especially susceptible to violent extremism and that any such violent extremism can be predicted and prevented through the identification of so-called indicators, opposition to CVE has called for an abandonment of CVE frameworks altogether, citing them as deeply stigmatizing and corrosive.²¹ This is the case even with the alarming expansion of CVE frameworks to address what policymakers name as "domestic violent extremism," with community groups raising concerns that more funding and resources for law enforcement to engage in CVE programs risks inevitably intensifying the long-standing targeting of Muslim, Black and other communities by the counterterrorism law enforcement apparatus, while doing nothing to address systemic white supremacy, whether across America's law enforcement agencies,²² its institutions, or its social and economic structures.²³

Recommendations

- End all CVE frameworks and programs, including DHS's Center for Prevention Programs and Partnerships (CP3), federal grant programs like the Targeted Violence and Terrorism Prevention (TVTP) Grant Programs, State Homeland Security Grant Program, Urban Areas Security Initiative, and all grants addressing "domestic violent extremism" (DVE);
- End all DHS, FBI, and DOJ programs based on the "radicalization theory" and the use of community-policing frameworks designed to counter or prevent so-called "radicalization";

¹⁹ *Id.*

²⁰ For additional resources, background, and community demands regarding CVE frameworks and programs, see StopCVE Coalition, <http://www.stopcve.com/>; see also Muslim Justice League, *StopCVE Primer*, available at <https://www.muslimjusticeleague.org/wp-content/uploads/2020/09/MJL-StopCVE-Primer-2020.pdf>. The recommendations to end all CVE frameworks and programs, establish Congressional hearings and community forums, and reallocate all CVE funding have been drafted by the StopCVE Coalition through an iterative, grassroots process.

²¹ See Lydia Wilson, *Gone to Waste: The 'CVE' Industry After 9/11*, *Newlines Magazine*, Sept. 10, 2021, available at <https://newlinesmag.com/argument/understanding-the-lure-of-islamism-is-more-complex-than-the-experts-would-have-you-believe/> (arguing that CVE frameworks, methodologies, and programs are all part of a "flawed industry" that stigmatizes "entire communities as terrorist-producing").

²² See Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, Brennan Center for Justice, Aug. 27, 2020, available at <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law>.

²³ For additional information regarding the limitations and critique of the supposed utility of CVE and similar policing programs even as to white supremacist violence, see Nicole Nguyen & Yazan Zahzah, *Why Treating White Supremacy as Domestic Terrorism Won't Work and How to Not Fall for It*, Vigilant Love (2021), available at https://static1.squarespace.com/static/593f2dbaebbd1a0b706908ea/t/5fa0518556b08d66e6c5d4e8/1604342152141/white_supremacy_toolkit.pdf.

- Establish Congressional hearings and community forums led by impacted communities on the harms of CVE, including reparations;
- Reallocate all CVE-related funding under DHS and DOJ to other non-law enforcement federal agencies under the guidance of impacted and targeted communities;
- Direct the DHS's Office of Inspector General to conduct an evaluation of past and ongoing CVE programs, including the FY2016 CVE Grant Program, the FY2020 TVTP Grant Program, and the FY2021 TVTP Grant Program, and the work of the DHS CP3 and any programs and initiatives involving training, collaboration, or advisement provided by DHS officials to state and local government agencies implementing local CVE programs, including investigating the nature and extent of any information and data collected by DHS from grant recipients.

C. FBI Informant Recruitment and Coercion Practices²⁴

The FBI has aggressively recruited informants within Muslim, Arab, and South Asian communities. The deployment of informants in these communities' private, religious and political spaces has had devastating impacts. Moreover, the recruitment of informants is stigmatizing and often coercive. FBI agents' unfettered access to a growing arsenal of coercive measures include the ability to delay or withhold immigration benefits, interrogate individuals at the border, and place people on watch-lists.²⁵ They can thus derail individuals' ability to travel, be with family, or secure important immigration benefits in exchange for information or affirmative information gathering.²⁶ These recruitment efforts have gone virtually unregulated, unrestrained, and present limited avenues for judicial oversight.²⁷ While many of these coercive measures, including watchlisting and coercive border searches, are addressed elsewhere in this memorandum, the practice of FBI informant coercion is of paramount concern to Muslim, Arab, South Asian and other immigrant communities.

Recommendations

- The FBI's Domestic Investigations and Operations Guide (DIOG) should be amended to prohibit the deployment of informants into religious and community spaces;
- The DOJ OIG should investigate FBI abusive informant coercion and recruitment practices and publish its findings and recommendations. This should include an assessment of the scope and impact of these practices, and the FBI's compliance with even the minimal existing FBI Guidelines²⁸;

²⁴ This section was primarily drafted by CCR.

²⁵ Sana Sekkarie, Note, *The FBI Has a Racism Problem and it Hurts Our National Security*, Geo. Sec. Stud. Rev (2020).

²⁶ See, e.g., Nina Totenberg, *Supreme Court Says Muslim Men Can Sue FBI Agents in No-Fly List Case*, NPR, Dec. 10, 2020, available at

<https://www.npr.org/2020/12/10/945000341/supreme-court-says-muslim-men-can-sue-fbi-agents-in-no-fly-list-case> (describing how three Muslim men, who were not "suspected of illegal activity," were put on a No-Fly list for years and were unable to travel for work or to visit family when they refused to become FBI informants).

²⁷ This issue is not new. A 2005 DOJ OIG special report on the FBI's compliance with its own Manual of Investigative Operations and Guidelines "found one or more Guidelines deficiencies in 104 of the 120 confidential informant files [reviewed], or 87 percent of those we examined." OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines* (2007), available at <https://oig.justice.gov/sites/default/files/archive/special/0509/chapter3.htm>.

²⁸ Directorate of Intelligence, Fed. Bureau of Investigation, *Confidential Human Source Policy Guide* (Sept. 21, 2015), available at <https://theintercept.com/document/2017/01/31/confidential-human-source-policy-guide/>.

- Congress should consider legislation giving a right of action to anyone who has been threatened, blackmailed, or otherwise coerced into providing information to the federal government and provide reparations to victims of entrapment and coercion;
- The CARRP program, the No-Fly List and the Selectee List must be abolished to prevent their abuse by FBI agents from interfering with individuals' rights;
- The FBI should be prohibited from rewarding FBI agents for their cultivation of Confidential Human Sources amongst particular ethnic or religious groups.²⁹

D. Material Support³⁰

The material support to terrorists and designated foreign terrorist organizations provisions of the Antiterrorism and Effective Death Penalty Act, 18 U.S.C. §§ 2339(A)-2339(B), raise serious First Amendment and civil liberties concerns and disproportionately impact Arab, Muslim and South Asian communities in the U.S. and abroad. Federal authorities have utilized broad and expansive interpretations of these provisions following 9/11 to target Muslim, Black, and immigrant communities for surveillance and investigation.

The federal material support statutes criminalize extremely broad categories of conduct, including protected speech under the First Amendment. While the Supreme Court upheld the constitutionality of the statute in *Holder v. Humanitarian Law Project*,³¹ the Court's decision left gaps that have resulted in a significant chilling effect on political and religious activity, particularly of politically and culturally marginalized segments of the U.S. population. For instance, the Court held that while fully independent political advocacy was beyond the reach of the statute, it appeared to agree that Congress intended to prohibit the entire gray area of loosely coordinated advocacy.³² This state of affairs creates tremendous uncertainty for human rights and political advocacy groups, humanitarian actors, student campus advocates, academics, and journalists alike. In the years since the *Humanitarian Law Project* decision, numerous journalists, academics, researchers, potential donors, student campaigners, and human rights advocates have sought legal advice ahead of engaging in advocacy or other work. Humanitarian organizations and donors have pulled out of or heavily restricted their work in parts of the world where U.S.-designated Foreign Terrorist Organizations (FTO) operate. Advocates have sought legal advice ahead of joining conference calls or other human rights advocacy campaigns where one person on the call *might* be an agent of a designated organization. Academics have questioned whether they could participate in a conference that may be organized by or have participants from designated organizations.

The uncertainty is exacerbated in a context where private actors have frequently adopted the tactic of smearing those with whom they disagree as “affiliated with terrorists.” Various private actors have created

²⁹ Decl. of Marc Sageman in Opposition to Defs.' Cross- Motion for Summary Judgement, *Latif v. Lynch*, No. 3:10-cv-00750-BR (D. Or. Aug. 7, 2015), ECF No. 268, *available at* https://www.aclu.org/sites/default/files/field_document/268_declaration_of_marc_sageman_8.7.15.pdf (“FBI special agents are promoted and rewarded—even with monetary bonuses—based on providing derogatory information on U.S. persons, while admission of error or new information that exonerates someone from suspicion tends not to be rewarded. In other words, the incentive in the system is to report suspicious activity but not correct the information when it turns out to have been a false alarm.”); *see also supra* note 25 (“FBI special agents are promoted and rewarded based on the negative information they provide on the communities they are monitoring. Information that exonerates people from suspicion is not similarly rewarded.”).

³⁰ This section was primarily drafted by CCR.

³¹ 561 U.S. 1 (2010).

³² *Id.* at 23-25.

a cottage industry to abuse the gray areas left open by *Humanitarian Law Project*, threatening human rights advocacy groups, their funders and the platforms that they use with civil lawsuits, either via 18 U.S.C. § 2333, which creates a civil damages action for violations of the criminal provisions, or through the abuse of the False Claims Act. Short of litigation, there have been concerted campaigns to pressure various funding and web hosting platforms to suspend services to advocacy organizations that they disagree with politically. As a result, the impacts of the material support framework are innumerable. While awareness of these efforts have become increasingly prevalent across BAMEMSA communities and advocacy spaces, Palestinian and Muslim communities have been among the most impacted, and the chilling effects are felt more broadly across the humanitarian, academic, and philanthropic sectors.

Recommendations

- Call for a Congressional Commission to review the impacts of the “War on Terror” on U.S. human rights and civil rights;
- In the lead-up to the more comprehensive Congressional Commission:
 - Call for a Congressional Committee to review the impacts of 18 U.S.C. § 2339A; 18 U.S.C § 2339B; and 18 U.S.C. § 2333 on First Amendment protected speech, advocacy, religious exercise, the provision of direct services and humanitarian aid, and the disproportionate impact on Arab and Muslim communities.
 - Request the Congressional Research Service to issue a report on these impacts.
- Issue a Presidential Memorandum that:
 - Supports repeal of 18 U.S.C. § 2339B;
 - Directs the Department of State to issue a general license clarifying that no person shall be liable for material support that has acted in good faith without intent to further the aims or objectives of the FTO; and
 - Directs the DOJ’s Civil Rights Division to review and assess the impacts of 18 U.S.C. § 2339A; 18 U.S.C § 2339B; and 18 U.S.C. § 2333 on First Amendment protected speech, advocacy, and religious exercise, and the statutes’ disproportionate impact on Arab and Muslim communities.
- Work with Congress to:
 - Repeal 18 U.S.C. § 2339B;
 - Immediately amend 18 U.S.C § 2339B to remove any ambiguity around potential liability for coordinated advocacy with an FTO; and
 - Immediately amend 18 U.S.C. § 2333D to remove aiding and abetting liability for “acts of international terrorism” when the underlying criminal provisions for that act stems from 18 U.S.C. § 2339B.
- The DOJ and Department of State should conduct a review and evaluation of the FTO designation scheme and parallel Department of Treasury designation schemes under the International Emergency Economic Powers Act.

E. Incarceration and Detentions³³

1. *Communication Management Units*

In 2006 and 2007, the Federal Bureau of Prisons (BOP) secretly created Communications Management Units (CMUs), prison units designed to isolate and segregate certain prisoners in the federal prison system from the rest of the BOP population. There are two CMUs, located in Terre Haute, Indiana and Marion, Illinois. In 2014, hundreds of documents detailing the process for designating and keeping prisoners in CMUs were made public for the first time, including that the CMUs housed between 60 and 70 prisoners in total, and approximately 60 percent of the CMU population was Muslim, even though Muslims represented only 6 percent of the general federal prison population.³⁴

These isolation units have been shrouded in secrecy since their inception as part of a larger post-9/11 “counterterrorism” framework implemented by the Bush administration. Individuals are sent to CMUs without meaningful process or any disclosure of a legitimate reason for CMU designation. While BOP claims that CMUs are designed to hold some individuals convicted of terrorism and other high-risk inmates requiring heightened monitoring of their external and internal communications, many prisoners were sent to these isolation units for their Constitutionally-protected religious beliefs, unpopular political views, or in retaliation for challenging poor treatment or other rights violations in the federal prison system.

Unlike other federal prisoners, those housed in CMUs are forbidden from any physical contact with their children, spouses, family members and other loved ones who visit them. They face severe restrictions on phone access, are barred from interacting with prisoners in general population, and have limited access to educational and other opportunities, including programs that facilitate reintegration and employment efforts upon their release. The Court of Appeals for the District of Columbia Circuit has ruled that, because of these harsh conditions, prisoners have a liberty interest in avoiding placement in CMUs, and the government must provide fair procedures for prisoners who wish to challenge their placement, as well as periodic review to determine if they can leave the CMUs.³⁵

Recommendations

- The BOP must abolish the CMUs and all individuals previously held there must be granted adequate opportunities to repair the harm done to their relationships caused by their years of isolation;
- In the interim, BOP must make its procedures more transparent and complete, including providing those sent to CMUs with reasons as to why they were placed in such units, provide them an opportunity to refute such reasons, provide better periodic review of placement, and end the restrictions on telephone access and contact visitation with family members and other loved ones and visitors.

³³ This section was primarily drafted by CCR.

³⁴ Center for Constitutional Rights, Case Page for *Aref v. Garland* (formerly *Aref v. Holder*), available at <https://ccrjustice.org/home/what-we-do/our-cases/aref-et-al-v-barr-et-al>.

³⁵ *Aref v. Lynch*, 833 F.3d 242 (D.C. Cir. 2016).

2. *Special Administrative Measures*

Special Administrative Measures (SAMs)³⁶ were first implemented by the BOP in 1996, and expanded following 9/11 as part of a political “counterterrorism” framework. SAMs combine the torture of solitary confinement in maximum security units with additional communication restrictions that deny individuals almost any human connection. These restrictions include gag orders on prisoners, their family members, and their attorneys, and a complete ban on prisoners’ access to and from representatives of the media, effectively shielding this practice from public view.

SAMs can be applied to individuals in both pretrial detention, as in the Metropolitan Correctional Center in New York, and post-conviction incarceration, as in the Administrative Maximum prison in Florence, Colorado, and other federal facilities. The U.S. Attorney General has broad and sole discretion to impose SAMs on prisoners any time allegations of “terrorism” or “national security” arise, and a prisoner lacks the most basic procedural protections to contest the SAMs designation. SAMs can be imposed for up to one year at a time, and can be renewed continuously for the duration of a given sentence, such that prisoners can remain under these conditions indefinitely, including in some documented cases, for decades. Separate from the brutality of SAMs conditions, the lack of process and transparency surrounding SAMs makes them ripe for abuse and discriminatory application. While the exact list of individuals is under BOP control and not publicly available, other public sources and reporting suggest that since 9/11, the United States has used SAMs disproportionately against Muslim prisoners accused of terrorism.³⁷

The imposition of SAMs raises serious concerns under U.S. and international law. SAMs eviscerate fair trial protections and the presumption of innocence when they are imposed pre-trial and infringe on the rights to free speech and association, religious freedom, family integrity, due process, and equal protection under the Constitution and international law. In their prolonged conditions of solitary confinement and total isolation, SAMs constitute cruel and unusual punishment under all circumstances and, when used pre-trial or for any reason based on discrimination, they are tantamount to torture.

Recommendations

- The U.S. government should immediately cease imposing and renewing SAMs on people in prison both pre-trial and post-conviction and end the use of such measures entirely;
- Until then, and while individuals remain subject to SAMs, DOJ and BOP should release to the public basic information about detainees and prisoners currently and historically under SAMs, including their identities, their conditions of confinement, and the justifications for imposing SAMs on those individuals.

3. *Guantánamo*

Since 2002, the United States has detained approximately 780 Muslim men and boys at the Guantánamo Bay prison without charge or fair trials that meet international human rights standards.

³⁶ Much of this section is adapted from the report *The Darkest Corner: Special Administrative Measures and Extreme Isolation in the Federal Bureau of Prisons*, Center for Constitutional Rights & The Allard K. Lowenstein International Human Rights Clinic, Yale Law School (Sept. 2017), available at <https://ccrjustice.org/sams-report>.

³⁷ *Id.* at 26. Through public sources, the report authors compiled a list of all individuals known to have been incarcerated under SAMs. Out of the 39 current or former SAMs prisoners identified, at least 28 were Muslim.

Guantánamo has caused profound physical and psychological harm to these men, and is an enduring symbol of the United States' post-9/11 abandonment of the rule of law, brutal torture, impunity, and anti-Muslim discrimination. Both the Bush and Obama administrations called for the prison's closure, and in total released over 700 men. However, transfers came to a complete standstill under Trump, who transferred only one person. Thirty-nine men remain detained, and they make up an aging population in rapidly deteriorating physical and mental health, for whom continued detention could mean a death sentence. The Biden administration has stated its desire to close the prison, but it must use its existing legal authority to swiftly release individuals who have not been and will not be charged with crimes, resolve the failed military commissions, and permanently close the prison.

Recommendations

- Permanently close the Guantánamo Bay prison;
- Transfer all individuals that the government has not brought charges against after more than a decade of detention, starting with those whom the U.S. government has already cleared for transfer;
- The DOJ can and should choose not to reflexively contest habeas cases and instead engage in negotiations to resolve those cases consistent with the President's mandate to close the prison;
- Resolve the failed military commissions, including by exploring negotiated resolutions of those cases or transferring them to federal courts, which can be done within existing law;
- Provide reparations to survivors of Guantánamo and the U.S. torture program more broadly, commit to no longer appointing any officials who oversaw or participated in these programs to new agency positions, and end any remaining elements of these programs.

III. *Immigrants' Rights and National Security*

A. Muslim and African Bans³⁸

In the beginning of his presidency, Donald Trump issued Executive Order 13780, popularly referred to as "the Muslim Ban" ("Ban"). This Arab, African, and Muslim Ban was enacted by the Trump Administration (and ultimately upheld by the U.S. Supreme Court after lengthy challenges and prolonged uncertainty) to arbitrarily deny entry to individuals from Muslim-majority countries, including Yemen, Syria, Iran, Libya, and Somalia. Throughout Trump's tenure in office, the Ban was expanded several times. The final list of countries impacted by the Ban included Eritrea; Iran; Kyrgyzstan; Libya; Nigeria; North Korea; Myanmar (Burma); Somalia; Syria; Sudan; Tanzania; Venezuela; and Yemen.

Under the pretense of protecting national security, the Trump Administration used the Ban to execute and implement its racial, religious and ethnic animus against Arabs, Africans, and Muslims. Not only were individuals abroad arbitrarily denied entry and American families forcibly separated from their loved ones overseas, the bigoted policy was also used as a tool to strike fear into immigrant communities. Under the Ban, numerous students and workers have been afraid to visit their families abroad because their visas may not be reissued, and lawful permanent residents, including those who have lived in the United

³⁸ This section was primarily drafted by ADC with support from ALC and CCR.

States for decades, feared traveling to see their loved ones in their home countries because they feared being turned away at the border.

Though a waiver process was provided, the Trump Administration granted an estimated two percent of visa waivers when the Ban was first implemented, rendering any waiver process a sham at best. Many individuals' applications thus remain indefinitely pending or have been ultimately denied due to the Ban. For those who stand any chance of serious consideration, the additional step of "extreme vetting" – a policy under which the Department of State ("State Department" or "DOS") conducts draconian social media surveillance of applicants and from which officers may arbitrarily decide that an applicant constitutes a "threat" – adds a further barrier to an already impossible process. The Trump Administration issued no guidance or procedures regarding the waiver process, and officers have had no standards for how waivers should be issued, resulting in an arbitrary and opaque process that is subject to the whims of an individual officer.

In response to sustained pressure from impacted communities and community-based advocacy organizations, President Biden fulfilled his promise to repeal the Ban on his first day in office. The move was celebrated by communities who had been singled out for no other reason than their religious and ethnic backgrounds; four years after the Ban's implementation, all of our communities felt there may finally be meaningful relief. The outlook since the repeal, however, has been bleak. While the President directed the Secretary of State to provide his administration with a review within 45 days of the repeal to propose a plan for re-adjudication of those whose visa applications were denied, the State Department issued only a brief statement on March 8, 2021³⁹, despite much anticipation by those who continue to be adversely impacted by the Ban. The statement provided limited guidance to applicants and advocates alike, raising more questions than answering them and delivering heartbreaking news for Diversity Visa applicants, stating that the latter are statutorily barred from being issued visas.

As a result, individuals and families continue to feel the adverse impacts of the Ban. Those impacted by the Ban, including their loved ones, have had no material change in their circumstances since the repeal, making the repeal – at least at the time of this memorandum's publication – largely one in name only. Many individuals are students who remain abroad and unable to return to their studies. Others are family members and spouses of U.S. citizens desperately seeking to reunite with their loved ones.

The following recommendations are made to the Biden Administration to provide relief to those who continue to be impacted by the Ban:

Recommendations

- Provide Clarity for Communities:
 - DOS must issue clear guidance regarding next steps for applicants denied under the Muslim and African Bans, including publicly releasing the report to the White House that was ordered by President Biden's instructions in his January 20, 2021

³⁹ U.S. Dep't of State, *The Department's 45-Day Review Following the Revocation of Proclamations 9645 and 9983*, Mar. 8, 2021, available at <https://www.state.gov/the-departments-45-day-review-following-the-revocation-of-proclamations-9645-and-9983/>.

proclamation requiring the Secretary of State to “provide to the President a report” and any related guidance, policy memos, or implementing instructions.

- Redress Harm for those Denied Before January 20, 2020:
 - Immediately and automatically reconsider, reopen, and expedite all immigrant and non-immigrant visa applications subject to the Muslim and African Bans that have not yet been granted, including those denied during FY 17- FY 20;
 - Provide all applicants of this reconsideration and review an opportunity to supplement their applications, if necessary, for a complete review, and of the final outcome of the review;
 - Do not require any new applications or fees, treating these applications as not final denials as of January 20, 2021. This is consistent with the position taken by the prior administration in litigation, and would ensure that these prior applications are not treated as denials or as being subject to any prejudicial effect for any future applications.
- Diversity Visas:
 - Grant humanitarian parole to those who won the diversity visa lottery from FY 17 through FY 22, but whose visas were not issued as a result of the bans or related State Department guidance;
 - Request that Congress authorize green cards for this population.
- Restoration of Consular Services:
 - Issue DOS guidance to all consular staff that makes clear that core elements of the State Department’s mission is to unify families, provide safety to those in harm’s way, and to serve a welcoming role to all people, regardless of their nationality;
 - Any guidance should also instruct consular staff to exercise their discretionary authority and decision-making in ways that are consistent with these overarching goals;
 - Ensure that consular services are restored for visa applicants from banned countries.

B. Denaturalization⁴⁰

For most of the country’s history since the passage of legislation authorizing denaturalization, this extraordinary measure has been reserved for former Nazis and other war criminals. The Obama and Trump Administrations, however, expanded the use of denaturalization. The Trump Administration ramped up denaturalization efforts and widely publicized them, instilling fear in immigrant communities and raising concerns that the government would target them for minor mistakes in paperwork. In 2017, the Trump Administration announced the beginning of Operation Second Look, a program to investigate the pursuit of denaturalization against at least 1,600 citizens.⁴¹ Between 2008 and 2020, 40% of the 228 denaturalization cases filed by the DOJ were filed after 2017.⁴² Additionally, in 2020, the Trump Administration created an office within the DOJ focused exclusively on denaturalization efforts.

⁴⁰ This section was primarily drafted by CLEAR, with support from CCR and ALC.

⁴¹ U.S. Dep’t of Justice, *Justice Department Secures First Denaturalization as a Result of Operation Janus*, Jan. 9, 2018, available at <https://www.justice.gov/opa/pr/justice-department-secures-first-denaturalization-result-operation-janus>.

⁴² Katie Benner, *Justice Dept. Establishes Office to Denaturalize Immigrants*, N.Y. TIMES, Feb. 26, 2020, <https://www.nytimes.com/2020/02/26/us/politics/denaturalization-immigrants-justice-department.html>.

Denaturalization can have disastrous consequences for the targeted individual and their family members. Numerous U.S. Supreme Court decisions recognize the importance of citizenship, that its loss may result in the loss “of all that makes life worth living.”⁴³ The law permits automatic denaturalization of spouses and children of individuals who derived citizenship from the individual and where denaturalization was as a result of willful misrepresentation.⁴⁴ This essentially constitutes guilt by association – putting at risk the citizenship of individuals who had no involvement in any attempt to procure naturalization by willful misrepresentation. It is clear that the Trump Administration pursued denaturalization in order to further pursue deportation, and the DOJ has admitted as much.⁴⁵ Because there is no statute of limitations with respect to civil denaturalization, citizens who have lived decades in the United States, establishing families and working here, can suddenly become subject to banishment.

Resolving a denaturalization case through settlement is encouraged as a way for the government to efficiently secure denaturalizations. A review of closed denaturalization cases as of May 2019 revealed that 77% of denaturalization cases ended in a plea or settlement agreement.⁴⁶ Settlement demands have put targeted individuals in coercive situations where they must agree to waive immigration protections, relinquish immigration statuses, and/or agree to deportation, in exchange for the government’s decision not to strip the citizenship of derivative U.S. citizen children or spouses.⁴⁷ The government’s settlement tactics are especially concerning in light of the procedural safeguards that are lacking in civil denaturalization proceedings. For civil denaturalization, there is no statute of limitations, right to appointed counsel, right to trial by jury, or any requirement of personal service to guarantee against involuntary *in absentia* denaturalizations.

A review of denaturalization suits filed in the first two years of the Trump Administration revealed that the DOJ had filed nearly three times as many civil denaturalization suits than the average over the previous eight administrations.⁴⁸ At least a third of these cases appeared to fall within Operation Janus/Operation Second Look – using digital records of fingerprints to identify potential cases for denaturalization.⁴⁹ The same review determined that 49% of all civil denaturalization cases filed targeted citizens whose country of origin is a “special interest country” – a label often used as a proxy for Muslim-majority countries or countries with significant Muslim populations – which includes India, Nigeria, Bangladesh, and Pakistan.

One key tool for the government in identifying targets for denaturalization has been ATLAS – a screening functionality that is incorporated into the U.S. Citizenship and Immigration Services’ (USCIS) primary case management system.⁵⁰ ATLAS receives information from the individual’s form submission and

⁴³ *Knauer v. United States*, 238 U.S. 654, 659 (1946).

⁴⁴ 8 U.S.C. § 1451(d).

⁴⁵ Anthony D. Bianco, Paul Bullis & Troy Liggett, *Civil Denaturalization: Safeguarding the Integrity of U.S. Citizenship*, U.S. Att’y’s Bull., July 2017, at 5, 16-17, <https://www.justice.gov/usao/page/file/984701/download> [<https://perma.cc/MSB6-P6CQ>] (“Typically, the government does not expend resources on civil denaturalization actions unless the ultimate goal is the removal of the defendant from the United States.”).

⁴⁶ Open Society Justice Initiative (“OSJI”), *Unmaking Americans: Insecure Citizenship in the United States*, at 106 (Sept. 2019), available at <https://www.justiceinitiative.org/uploads/e05c542e-0db4-40cc-a3ed-2d73abcf37f/unmaking-americans-insecure-citizenship-in-the-united-states-report-20190916.pdf>.

⁴⁷ *Id.*

⁴⁸ *Id.* at 10.

⁴⁹ *Id.* at 11.

⁵⁰ Privacy Impact Assessment for the ATLAS, DHS Reference No. DHS/USCIS/PIA-084 (Oct. 30, 2020), https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis084-atlas-october2020_0.pdf.

biographic and biometric-based checks and then screens that through a predefined set of secret rules and, according to pattern-based algorithms and predictive analytics, determines whether the individual presents *potential* fraud, public safety, or national security concerns.⁵¹ When ATLAS finds something derogatory according to its secret list of rules, the software sends out a “System Generated Notification,” which is then triaged and elevated for further review or investigation.⁵² Upon investigation, that individual can potentially be subject to immigration or criminal enforcement actions, including denaturalization.⁵³ Given the role of ATLAS in denaturalization operations⁵⁴, ATLAS must be part of any review of denaturalization practices.

Additionally, both the Obama and Trump Administrations have pursued denaturalization in cases where an individual accepted a guilty plea relating to conduct in the five year statutory period prior to naturalization without receiving constitutionally adequate advice concerning the consequences of their plea. Many of these individuals pled guilty not knowing that someday, years down the line, the government could seek to denaturalize them based on their guilty plea, implicating their constitutional right to receive effective assistance of counsel.

Given the stakes at issue, and because individuals are not entitled to free representation in civil denaturalization proceedings, a review of current denaturalization priorities is of paramount importance.

Recommendations

- Halt denaturalization efforts and dismantle the denaturalization operations that were institutionalized at DHS, DOJ, and the State Department during the Obama and Trump administrations, including disbanding the denaturalization units within USCIS and DOJ;
- Support legislation designed to limit denaturalization and institute procedural protections for those subject to civil denaturalization. Support legislation to impose a statute of limitations in civil denaturalization (there is currently a ten-year statute of limitations for criminal denaturalization); right to appointed counsel, right to trial by jury, heightened personal service requirement, and heightened evidentiary standard of “clear, unequivocal and convincing” evidence; and require proof of intentional fraud. Pursue legislative reform to prohibit denaturalization in any case where it would result in statelessness and in cases involving derivative denaturalization;
- Impose a moratorium on filing new civil and criminal denaturalization (8 U.S.C. § 1451 and 18 U.S.C. § 1425) suits until adequate independent oversight by DOJ Office of Inspector General is in effect and the Administration has fully assessed and dismantled the current operations across the DOJ, DHS, and the State Department and placed appropriate safeguards as discussed above;
- Dismiss civil and criminal denaturalization cases that are currently being litigated or, alternatively, place in abeyance or seek stays until such review is complete;
- Publish a DHS and DOJ policy limiting investigations potentially leading to denaturalization;

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ For more information on ATLAS’s nexus to denaturalization, see Sam Biddle & Maryam Saleh, *Little-Known Federal Software Can Trigger Revocation of Citizenship*, *The Intercept*, Aug. 25, 2021, <https://theintercept.com/2021/08/25/atlas-citizenship-denaturalization-homeland-security/>.

- Publish clear and limiting DOJ guidance to U.S. Attorney’s offices on appropriate cases for denaturalization. Preclude denaturalization litigation where an individual is facing denaturalization due to admitted facts in a guilty plea and in criminal denaturalization cases where an individual is seeking to vacate a conviction on the grounds that they did not receive constitutionally adequate advice concerning the risk of denaturalization and deportation at the time of a guilty plea;
- Halt the use of ATLAS pending a disparate impact review and public disclosure of:
 - The rules that ATLAS is using to flag individuals for further investigation;
 - The population being flagged by ATLAS, disaggregated by race, country of origin, etc.; and
 - The number of screenings and flags, and the outcome of those flags, including data on how many flags end up in denaturalization investigation and prosecutions.
- Institute a process for reviewing all denaturalizations since 2016 with the aim of reinstating citizenship of denaturalized individuals and their derivatives, including by permitting such individuals to re-apply for citizenship *nunc pro tunc* and waiving fees;
- Publish the results of the review undertaken by Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans as it relates to denaturalization (Section 5(a)(v)). Ensure that the review encompasses the investigation, prosecution, and impact of denaturalization cases, and includes the following:
 - The policies, procedures, and priorities under which DHS, DOJ, and/or the State Department investigate and prosecute U.S. citizens for denaturalization;
 - Staff and funding deployed for denaturalization from each relevant operational component;
 - The number of denaturalization cases reviewed or investigated, referred for prosecution, filed in federal court, placed in removal proceedings, leading to removal, and leading to statelessness. Case data should be disaggregated by country of origin, religion, gender, manner of entry (including port of entry and immigration status upon entry), referring agency, and alleged denaturalization grounds; and
 - The number of Americans with derivative citizenship denaturalized due to their sponsor’s denaturalization.

C. Passport Revocations⁵⁵

In the past decade, the U.S. government has pursued a policy of arbitrary passport denials and revocations among primarily Yemeni-Americans. A similar policy has been adopted for the last two decades among Mexican-Americans, primarily along the southern border.⁵⁶

In January 2016, two organizations filed a request with the State Department’s Office of the Inspector General to investigate a pattern of passport confiscations and revocations at the U.S. Embassy in

⁵⁵ This section was primarily drafted by CLEAR with support from PANA.

⁵⁶ The practices along the Southern border involve separate but related issues around the assumption of fraud in recording births of predominantly Mexican-Americans. *See supra* note 46, at 124-36.

Sana'a, Yemen.⁵⁷ The report detailed a specific pattern that occurred primarily between 2012 – 2014 at the Sana'a Embassy. American citizens of Yemeni descent would visit the Embassy for routine consular services, such as renewing a passport or obtaining a passport or Consular Report of Birth Abroad for a child. Embassy employees would then subject the individual to hours long interrogations, threatening them with arrest or denaturalization, and coercing them into signing statements that purported to admit that the names on their Certificates of Naturalization were not their “true” names. It appeared that these Embassy employees assumed that all Yemeni-Americans engaged in some type of fraud to immigrate to the United States.

At the end of the coercive interrogations, the Embassy employees would then confiscate the passport and refuse to inform the individual how they might return to the United States. Many individuals were stuck in Yemen for a year or longer, until the Embassy finally provided them with appropriate instructions for how to apply for a limited validity passport, notice of revocation of their passport, and instructions on how to challenge the revocation. In effect, the U.S. government left these individuals in limbo for more than a year, denying them their rights to any type of due process, simply on the basis of their national origin.

In these cases, the Embassy employees were arguably taking action inconsistent with the Foreign Affairs Manual by deciding to revoke a passport by claiming there was fraud in obtaining the Certificate of Naturalization, even though no denaturalization proceedings had taken place.⁵⁸ The DOS Office of the Inspector General issued a report in October 2018 that laid out its findings, including key recommendations regarding improvement to systems of records, the burden of proof for passport revocation, and procedures related to passport confiscation.⁵⁹

Even after these individuals returned home and challenged their passport revocations, they continued to experience significant difficulty, as the State Department continued to proceed as though it had the power to indefinitely refuse to issue an individual a passport with a currently valid Certificate of Naturalization on the ground that they believed the name on the Certificate was not the name they were born with.⁶⁰ This practice also affected family members of those who had had their passports revoked, and continues to this day. This has meant that for years, many citizens residing in the United States with valid Certificates of Naturalization were unable to obtain passports and therefore unable to live and travel on the same terms as any other citizen – solely because of their country of origin.

⁵⁷ Asian Americans Advancing Justice – Asian Law Caucus & Creating Law Enforcement Accountability and Responsibility, *Stranded Abroad: Americans Stripped of Their Passports in Yemen* (Jan. 2016), available at <https://bit.ly/2Rwpt8C>.

⁵⁸ 8 FAM § 301.8-3(d) (2018).

⁵⁹ U.S. Dep't of State, Office of the Inspector Gen., *Review of Allegations of Improper Passport Seizures at Embassy in Sana'a, Yemen*, OIG-ESP-19-01, at 2 (Oct. 2018), available at https://www.stateoig.gov/system/files/esp-19-01_0.pdf.

⁶⁰ In August 2020, the Second Circuit held that this was not an acceptable practice. *Alzokari v. Pompeo*, 973 F.3d 65, 72 (2d Cir. 2020) (“If the Department suspects that a citizen's certificate of naturalization was fraudulently obtained, it can institute denaturalization proceedings . . . What the Department cannot do is circumvent these proceedings by revoking a citizen's passport.”).

Recommendations

- Review all current pending passport revocation/issuance decisions and cease proceedings in cases where the sole basis for revocation or refusal to issue is a claim that the individual's birth name is different from the name on their Certificate of Naturalization or Certificate of Citizenship;
- Review any final passport revocation decisions not currently in litigation in which the basis is the same as above and reverse the decision;
- Cease refusal to issue a passport solely where DOS believes the individual holds a name other than the name on a valid Certificate of Naturalization;
- Direct the DOS Office of the Inspector General to conduct a review of all passport revocations and confiscations from 2005 - 2021 to ensure an accurate accounting of all passports or Consular Reports of Birth Abroad improperly revoked or confiscated:
 - At the U.S. Embassy in Sana'a, Yemen or as a result of coercive interrogations at the Embassy (including family members of those who were coerced into signing statements at the U.S. Embassy);
 - Involving the authenticity of birth certificates issued near the U.S. - Mexico border.
- Review litigation posture in any pending cases involving passport revocation or passport issuance to ensure that passports are not being unfairly revoked or denied;
- Publish the results of the review undertaken by Executive Order on Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans as it relates to passport revocations (Section 5(a)(v)).

IV. *Border Rights and National Security*

A. *Terrorist Screening Database*⁶¹

Although watchlists existed in some form before 9/11, their use has exploded in the twenty years since then. These records are maintained in the Terrorist Identities Datamart Environment (TIDE) and the Terrorist Screening Database (TSDB). In June 2016, TIDE contained the identities of approximately 1.5 million people, including 15,000 U.S. citizens and lawful permanent residents.⁶² As of June 2016, there were approximately 81,000 people on the No Fly List, about 1,000 of whom were U.S. citizens or lawful permanent residents. As of June 2017, there were approximately 1,160,000 people in the TSDB. Agencies may nominate individuals for placement in the TSDB or TIDE, and through TSDB, their names can also be added to other watchlists, including the No Fly List and the Selectee List.

The current standards for placement on these lists is very low – it is simply a reasonable suspicion standard, which leaves open significant room for erroneous placement.

Placement on both of these lists affects important numbers of individuals residing in the United States, and disproportionately impact Muslim communities. For example, government documents show that

⁶¹ This section was drafted primarily by CLEAR with support from CCR.

⁶² Phillip J. Stevenson, Bart Elias, Cong. Research Serv., R44678, *The Terrorist Screening Database and Preventing Terrorist Travel* (2016), at 4.

as of 2014, people in Dearborn, Michigan, which has a significant Muslim and Arab population, were disproportionately watchlisted.⁶³

Placement on the Selectee List means that individuals are routinely delayed in domestic and international air travel and at land borders. These individuals must usually wait up to an hour to receive a boarding pass, always receive extra security screening including invasive pat downs, and are subject to long interrogations and searches of their electronic devices at the border. Many report being handcuffed at the land border, and interrogations often include questions about their religious practices and political beliefs. Many often miss connecting flights because they must go through security screening again during layovers. What would normally take two hours for any other traveler can turn into a six to eight hour ordeal, with constant prodding and searching.

The current redress mechanisms for watchlisting are wholly inadequate. For those on the Selectee List, individuals will never receive confirmation that they are on the list, why, or how they can rebut any information that led to their placement on the list.⁶⁴ Many are forced to file multiple complaints with the DHS Traveler Redress Inquiry Program, and will only know they have been removed from the list when they are able to travel without difficulty.

Individuals on the No Fly List are not permitted to board aircrafts that fly over U.S. airspace. U.S. citizens and permanent residents on the No Fly List receive somewhat more information. After being denied boarding and filing a DHS TRIP complaint, they will receive notification that they are on the No Fly List and that they may request further information. DHS TRIP will then either provide an unclassified summary of some of the reasons the individual is on the No Fly List, or inform them that they are no longer on the List. Upon receipt of the unclassified summary, the individual may respond to the unclassified summary. The Terrorist Screening Center, which manages the TSDB, will then determine whether the individual should be removed from the No Fly List. If the TSC believes the individual should remain on the No Fly List, it will issue a recommendation to the TSA Administrator, who will make the final determination. Many individuals may spend years on the No Fly List, unable to fly domestically or internationally to visit family, without any information. Even more, some face the possibility that they will remain on the No Fly List indefinitely, without an end in sight.

Neither group – those on the Selectee List or No Fly List – are ever given access to the full statement of reasons for why they are on the List. Those on the No Fly List often wait years to receive a short classified summary of the statement of reasons, and neither receive the opportunity for a live hearing before a neutral decision-maker as to whether they should remain on the List.

Recommendations

- End the federal terrorism screening database; However, in the interim:

⁶³ Jeremy Scahill & Ryan Devereaux, *Barack Obama's Secret Terrorist Tracking System, by the Numbers*, The Intercept (Aug. 5, 2014), <https://theintercept.com/2014/08/05/watch-commander/>.

⁶⁴ *Elbady v. Kable*, 391 F. Supp. 3d, 562, 571 (E.D. Va. 2019), *rev'd by Elbady v. Kable*, 993 F.3d 208 (4th Cir. 2021).

- DHS should review existing guidance or policy outlining bases for watchlist placement, with particular focus on bases or factors disproportionately impacting BAMEMSA communities;
- Review DHS TRIP procedures for those on the Selectee List and No Fly List to provide for:
 - Full statement of reasons for placement on either List;
 - Granting counsel with appropriate security clearance for any individual on Selectee or No Fly List access to any classified information purporting to support their placement on either List; and
 - Establishing procedures for a live hearing before a neutral arbitrator regarding placement on the List.
- Provide a mechanism for those on the TSDB other than DHS TRIP to challenge placement on the watchlist with possibility for removal from the database.

B. Terrorism-Related Inadmissibility Grounds⁶⁵

The passage of the USA PATRIOT Act of 2001⁶⁶ and the REAL ID Act of 2005⁶⁷ added terrorism-related inadmissibility grounds (TRIG) to U.S. immigration law. These statutory provisions in the Immigration and Nationality Act (INA) are routinely applied to certain refugees, asylum seekers, and applicants for various immigration benefits. The INA's broad definition of "material support", "terrorist activity" and "terrorist organization" gives the DHS and Immigration Judges dangerous discretion to target certain immigrants seeking admission and protection in the United States, especially Muslim immigrants and immigrants originating from countries with wars and conflicts.

TRIG are a long list of acts and associations related to "terrorism" set out in INA §212(a)(3)(B) that make a person inadmissible, and ineligible for certain immigration statuses in the United States. TRIG includes engagement in or material support of "terrorist activity", members of "terrorist organizations", and persons who received "military-type training". Spouses and children of anyone found to be inadmissible under these provisions are also inadmissible. In reality however, the government's interpretation of "terrorist", "terrorist activity," "terrorist organization" and "material support" has become overly broad and discriminatory. DHS regularly applies terms such as "terrorist organization" and "material support" in a manner that sweeps in conduct that no reasonable person would consider related to "terrorism". For example, a widow from Iraq who supported herself and her only daughter by working as a florist was denied resettlement to the United States because members of a group the U.S. had designated as a terrorist organization bought flowers from her shop.⁶⁸ DHS deemed this "material support" to the group in question. Similarly, a refugee from Burundi was detained for over 20 months when DHS and the immigration judge who would otherwise have granted him asylum took the position that he had provided "material support" to a rebel group because armed rebels robbed him of four dollars and his lunch.⁶⁹ Furthermore, many

⁶⁵ This section was primarily drafted by CCR with support from ALC.

⁶⁶ USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) of 2001, Pub. L. No. 107-56, 115 Stat. 272, §411(a)(1)(F).

⁶⁷ REAL ID Act of 2005 (REAL ID), Pub. L. No. 109-13, div. B, 119 Stat. 231, 302-23.

⁶⁸ *Addressing Barriers to the Resettlement of Vulnerable Syrian and Other Refugees*, Human Rights First (Feb. 10, 2014), available at

<https://www.humanrightsfirst.org/resource/addressing-barriers-resettlement-vulnerable-syrian-and-other-refugees>.

⁶⁹ *Id.*

designated groups obtain membership through mandatory drafts, like the Islamic Revolutionary Guard Corps (IRGC) in Iran, yet the current duress exemption does not cover people without recourse.

The INA does not specify which government agency may categorize a group as “terrorist” in nature and the government does not publish a list of undesigned terrorist organizations. The INA provisions define any rebellion against any established government as “terrorist activity,” and characterize any group of two or more people that engages in, or has a sub-group that engages in, the use of armed force as a non-designated (also sometimes referred to as Tier III) terrorist organization.⁷⁰ This means that DHS and Immigration Judges can designate any group, even a group seen as a resistance group or freedom fighters within their country or even groups supported by other branches of the U.S. government, as a terrorist organization. This broad discretion leads to organizations being designated Tier III terrorist organizations even though they are not considered terrorist organizations by the U.S. government in any other context. For example, the Democratic Unionist Party and the Ummah Party, two of the largest democratic opposition parties in Sudan, have been designated Tier III terrorist organizations barring many members and their children, who were forced to flee Sudan, from obtaining permanent residence in the U.S.⁷¹ This designation is also worrisome for many Syrian refugees seeking resettlement in the United States.

Recommendations

The U.S. government should immediately cease subjecting non-citizens to “terrorism-related inadmissibility grounds.” In the interim:

- The Biden administration must work with Congress to amend INA §212(a)(3)(B) to address the overly broad “terrorism-related inadmissibility grounds” by narrowing definitions of “terrorist activity,” “terrorist organization,” and what constitutes “material support” to a terrorist organization;
- The Biden administration must work with Congress to amend the INA §212(a)(3)(B)(vi) to remove the undesigned, or “Tier III,” definition of a terrorist organization;
- DHS, in consultation with the Department of State and DOJ, should implement broad exemptions for duress and extend exemptions for insignificant and limited assistance, such as routine commercial transactions and other incidental contacts, to cover non-citizens in case of such contacts between them and listed or designated groups for purposes of TRIG bars to admission.

C. Discriminatory Searches and Seizures Targeting BAMEMSA Travelers⁷²

BAMEMSA travelers are disproportionately stopped, searched, and interrogated at our international borders,⁷³ in part because of policies and procedures implemented post-9/11 that target BAMEMSA communities based on perceived ethnicity and religion, and in part because of the so-called

⁷⁰ Immigration and Nationality Act § 212(a)(3)(B)(vi)(III).

⁷¹ *Denial and Delay: The Impact of the Immigration Law's "Terrorism Bars" on Asylum Seekers and Refugees in the United States*, Human Rights First (Oct. 31, 2009), available at <https://www.humanrightsfirst.org/resource/denial-and-delay-report>.

⁷² This section was primarily drafted by PANA with support from ALC.

⁷³ Br. for Asian Americans Advancing Justice – Asian Law Caucus, *Alasaad v. Mayorkas*, No. 20-1077 (1st Cir. Aug. 7, 2020), available at https://www.eff.org/files/2020/08/14/2020-08-07_amicus_brief_asian_americans_advancing_justice_-_asian_law_caucus_et_al.pdf.

“border search exception” to the Fourth Amendment.⁷⁴ These stops often result in seizures of forensic data from smartphones and other electronic devices containing information that the Supreme Court has agreed is “private” and “intimate.”⁷⁵

Policing or surveillance based solely on protected characteristics like race or religion violates equal protection guarantees.⁷⁶ In the context of border surveillance, courts have made clear that officers cannot rely on factors like a traveler’s “race, without more,” or “Arab ethnicity alone” when deciding to detain and interrogate individuals.⁷⁷ While DHS’s own nondiscrimination policy “prohibit[s] the consideration of race or ethnicity in ... screening ... activities, in all but the most exceptional circumstances,” it is silent on religion as a basis for scrutiny, and broadly permits consideration of nationality in “anti-terrorism, customs, or immigration activities” at the border, thus allowing border agents to rely solely on such characteristics.⁷⁸ As a consequence, many BAMEMSA travelers face higher levels of scrutiny when entering the United States based on their national origin or perceived religious identity and are often forced to hand over their phones and other digital devices. They also experience prolonged detention and interrogations regarding their personal and professional relationships, religious practices, and political opinions.⁷⁹ For many, entering the country can feel like a hostile experience. Nearly one-in-five Muslim-Americans who participated in a 2017 Pew Research survey have been called offensive names or singled out by airport security.⁸⁰

The frequency of electronic device searches at the border more than doubled between fiscal year 2015 and 2016.⁸¹ CBP and ICE officers utilize digital forensic searches using sophisticated software and algorithms to search for information contained in the device including active files, deleted files, metadata related to activities, and password-protected encrypted data. Both agencies allow their agents to “perform ‘basic’ searches of electronic devices without reasonable suspicion and ‘advanced’ searches only with reasonable suspicion.”⁸² “Advanced” searches encompass forensic searches of digital services; they are “nonroutine border searches . . . [that] may be conducted only with reasonable suspicion of activity that violates the customs laws or in cases raising national security concerns.”⁸³ Restricting searches, and the discretion afforded to federal agents, to simply reasonable suspicion, however, poses a number of problems, not least of which is that the articulation of such reasonable suspicion depends mainly on the agents’ individualized and potentially biased judgement. However, courts are divided as to the extent of the forensic

⁷⁴ The “border search exception” allows officers to conduct routine searches and seizures at the border when a person is attempting to enter or is suspected to have entered the United States at the international border. *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004). Routine searches, such as inquiring about name and citizenship, do not require reasonable suspicion, probable cause, or a warrant. *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985). Non-routine searches, however, such as those involving extended detention or an intrusive body search, require “reasonable suspicion.” *United States v. Bravo*, 295 F.3d 1002, 1006 (9th Cir. 2002). Courts are divided as to the scope of digital forensic searches that fall within the “border search exception.”

⁷⁵ *Riley v. California*, 573 U.S. 373 (2014).

⁷⁶ *Whren v. United States*, 517 U.S. 806, 813 (1996).

⁷⁷ *Farag v. United States*, 587 F. Supp. 2d 436, 464 (E.D.N.Y. 2008).

⁷⁸ U.S. Dep’t of Justice, *Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity 2*, no. 2 (Dec. 2014), available at https://www.dhs.gov/sites/default/files/publications/use-of-race-policy_0.pdf.

⁷⁹ *Supra* note 73.

⁸⁰ Pew Research Ctr., *U.S. Muslims Concerned About Their Place in Society, But Continue to Believe in the American Dream* (July 26, 2017), <https://www.pewforum.org/2017/07/26/findings-from-pew-research-centers-2017-survey-of-us-muslims/>.

⁸¹ Chloe Meade, Note, *The Border Search Exception in the Modern Era: An Exploration of Tensions Between Congress, the Supreme Court, and the Circuits*, 26 B.U. J. Sci. & Tech. L. 189, 192 (2020), available at <http://www.bu.edu/jostl/files/2020/04/6.-Meade.pdf>.

⁸² *Alasaad v. Mayorkas*, 988 F.3d 8, at 12 (1st Cir. 2021).

⁸³ *United States v. Kolsuz*, 890 F.3d 133, 146 (4th Cir. 2018) (citing U.S. CUSTOMS AND BORDER PROT., CBP Directive No. 3340-049A, BORDER SEARCH OF ELECTRONIC DEVICES (2018)).

search when only reasonable suspicion exists and the search is conducted pursuant to the “border search exception.” The lack of a uniform, nationwide rule leads to inconsistent outcomes depending on where the travelers are entering the country and makes it hard for travelers to know their rights. For example, in the Ninth Circuit, a forensic search supported by reasonable suspicion “is restricted in scope to searches for contraband.”⁸⁴ A warrant is required if the officer seeks “evidence of past or future border-related crimes.”⁸⁵ In contrast, in the First Circuit, an officer can conduct an advanced search that extends to searching “for contraband, evidence of contraband, or for evidence of activity in violation of the laws enforced or administered by CBP or ICE.”⁸⁶

Body searches at the international border also fall within the “border search exception.” Searches of “outer clothing, luggage, a purse, wallet, pockets [that] do not substantially infringe on a traveler’s privacy rights” are considered routine and therefore do not require suspicion.⁸⁷ The “level of intrusion into a person’s privacy determines” the nature of the search.⁸⁸ Officers need reasonable suspicion to conduct non-routine, more intrusive searches. While travelers, including those wearing religious head coverings, may request a pat-down or removal of their covering to be conducted “by a person of [their] gender and that it occur[] in a private area,”⁸⁹ humiliating practices have been reported. In particular, BAMEMSA women have described being forced to remove their headscarves in front of male officers, in violation of their religious beliefs.⁹⁰ The result has been a chilling impact on BAMEMSA travelers, with some unwilling to travel altogether or avoid travel unless it is absolutely necessary, and special concerns as they relate to foreign travelers, with the risk of denial of entry in case of refusal to acquiesce to a demand for search or seizure of a traveler’s property. Additional precautions are now widespread amongst BAMEMSA travelers, including traveling with separate devices which contain limited data and allow for basic communicative functions, backing up and then erasing data from existing devices to maintain privacy, and letting family members and acquaintances know of the possibility of prolonged detention when attempting to enter the country.

Recommendations

- Modify existing DHS policy to explicitly prohibit agents from considering religion as a basis for consideration of further scrutiny, including the basis of searches and seizures of devices;
- Modify existing DHS policy to explicitly prohibit consideration of nationality in the examination of anti-terrorism, customs, or immigration activities at the border;
- Ensure that officers are properly trained to interact with BAMEMSA travelers, with DHS policy explicitly prohibiting questioning regarding religious practice or beliefs;
- Provide for efficient, prominently advertised methods (for instance at airports and other points of entry) to report incidents, including agents’ misconduct or instances of policy violations.

⁸⁴ *United States v. Cano*, 934 F.3d 1002, 1018 (9th Cir. 2019).

⁸⁵ *Id.* at 1018.

⁸⁶ *Alasaad*, 988 F.3d, at 21.

⁸⁷ *Tabbaa v. Chertoff*, 509 F. 3d 89, 98 (2d Cir. 2007) (citation omitted).

⁸⁸ *Id.*

⁸⁹ ACLU, Know Your Rights: Enforcement at the Airport, *available at* <https://www.aclu.org/know-your-rights/what-do-when-encountering-law-enforcement-airports-and-other-ports-entry-us/> (last visited Mar. 5, 2021).

⁹⁰ Carrie Decell, “Dehumanized” at the Border, *Travelers Push Back*, Knight First Amendment Inst. (Feb. 2, 2018), *available at* <https://knightcolumbia.org/content/dehumanized-border-travelers-push-back>.

D. Controlled Application Review and Resolution Program⁹¹

The USCIS created the Controlled Application Review and Resolution Program (CARRP) in 2008 to investigate and adjudicate applications the agency deems to present undefined national security concerns. When a case is subjected to CARRP, it results in discriminatory background check delays and inordinate and unlawful delay in adjudication of the application. Thousands of applicants, including those married to United States citizens and seeking naturalization, have faced delays which, for many, last indefinitely. The CARRP program discriminates based on factors such as country of origin, religion, travel history, charitable donations, law enforcement and FBI visits and questioning, and other arbitrary factors. Between 2008 and 2013, USCIS applied CARRP to over 41,800 immigration applications, primarily impacting Muslim immigrants from Iran, Iraq, Yemen, India, and Pakistan.⁹²

Little to no recourse exists for individuals whose immigration applications are subjected to CARRP. While individuals may schedule appointments with USCIS to inquire about the status of the application, USCIS at most only confirms that the application is being held in background checks. Individuals may also reach out to their congressional representatives to request a status update from USCIS on behalf of a constituent, but no documented cases to date have resulted in faster adjudication due to congressional outreach. Often, the only meaningful recourse available for impacted applicants is to file a mandamus suit in federal court which, if granted after often lengthy litigation, compels the government to take action on the application. Still, even if a court grants a plaintiff's petition for writ of mandamus and orders USCIS to take action on the application, USCIS may still deny the application without any other opportunity given to the applicant to cure any defects, address any issues, or be told the reasons for the denial, leaving open the possibility that the denial is on the basis of the factors mentioned above, including national origin and religion.

The Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.*, requires USCIS to carry out its duties within a reasonable time. Specifically, the APA provides that, “[w]ith due regard for the convenience and necessity of the parties or their representatives and *within a reasonable time, each agency shall proceed to conclude a matter presented to it.*” 5 U.S.C. § 555(b) (emphasis added). Congress has also directed USCIS to process immigration benefit applications, including for adjustment of status, within 180 days under 8 U.S.C. § 1571(b). During this time, individuals’ and families’ lives are placed on hold with no explanation for the delay and no indication about when to expect a final answer. Not knowing if they will be able to stay in the country, travel, buy property, or plan their lives results in tremendous anxiety and emotional distress. And while the fact that the CARRP policy exists and continues to be actively implemented by USCIS is no longer unknown to the public and to advocates, USCIS’s own consideration and review of applications subject to CARRP, as well as the factors determining whether an application is to be delayed or denied after being marked for CARRP, remain secret and undisclosed even to affected applicants’ attorneys.

Recommendations

- End the CARRP program;

⁹¹ This section was primarily drafted by ALC with support from CLEAR.

⁹² CARRP was a secret policy until the ACLU of Southern California, the Council on American-Islamic Relations Greater Los Angeles Chapter, and the National Immigration Law Center filed a Freedom of Information Act request in 2012 and obtained thousands of documents exposing CARRP. The policy is also subject to ongoing litigation in the Western District of Washington, *Wagafe v. Trump*, 2:17-cv-00094-RAJ.

- Direct the Secretary of Homeland Security to ensure that all field officers cease applying CARRP and factors used under the program to pending and future immigration benefit applications;
- Expedite consideration of and adjudicate with final decisions immigration benefit applications currently pending and subject to CARRP, including all those subject to litigation;
- Reconsider or reopen, if possible, the immigration benefit applications of those previously denied under CARRP and expedite the renewed or newly filed applications of previously denied applicants;
- For those applications that will be reopened or reconsidered, provide the grounds for denial so that applicants know whether the application was denied based on statutory criteria and, if so, can prepare to address these grounds. As prior immigration benefit denials may harm an individual's future applications, DHS should instruct USCIS officials to prevent prior CARRP-based denials from adversely impacting any future applications.

E. Social Media Vetting⁹³

Over the past four years the federal government has begun collecting and screening social media information of certain people seeking to travel or be admitted to the United States, or who are applying for immigration related benefits. Civil and human rights organizations have repeatedly opposed this practice, and raised concerns about the chilling effect on speech, intrusion into privacy, and disparate impact of the government's policies, as well as the government's discriminatory deployment of this practice.⁹⁴

Through a series of rulemaking and Executive Orders, DHS implemented the Trump Administration's Extreme Vetting Initiative. These actions set in motion vast collection and retention of social media information, and ongoing monitoring of all individuals entering the United States on both immigrant and nonimmigrant visas as well as asylum seekers. This is troubling on many fronts, including because individuals will be subject to recurring monitoring even after entry into the United States and

⁹³ This section was primarily drafted by ADC, with support from PANA.

⁹⁴ See, e.g., Comments of the Brennan Center, *DS-160 and DS-156, Application for Nonimmigrant Visa*, OMB Control No. 1405-0182; *DS-260*, (Apr. 2, 2021), available at <https://www.brennancenter.org/sites/default/files/analysis/Comments%20-%20Department%20of%20State%20-Visa%20Applicant%20Social%20Media%20Collections%20-%20Public%20Notices%2010260%20-%201010261.pdf>; Comments of the Brennan Center, *Application for Nonimmigrant Visa & Electronic Application for Immigrant Visa and Alien Registration*, OMB Control No. 1405-185 (Apr. 2, 2021), available at https://www.brennancenter.org/sites/default/files/analysis/OIRA%20Letter_9.27.2018.pdf; Comments of the Electronic Privacy Information Center, *Supplemental Questions for Visa Applicants* (Apr. 2, 2021), available at <https://epic.org/EPIC-DOS-Visas-SocialMediaID-Dec2017.pdf>; Comments of Center for Democracy & Technology, *Coalition Letter Opposing DHS Social Media Retention* (Oct. 18, 2017), available at <https://cdt.org/insight/coalition-letter-opposing-dhs-social-media-retention/>; Comments of the Brennan Center, *Supplemental Questions for Visa Applicants* (Oct. 2, 2017), available at <https://www.brennancenter.org/sites/default/files/StateDeptcomments-10.2.2017.pdf>; Comments of the ACLU, *Supplemental Questions for Visa Applicants* (Apr. 2, 2021), available at <https://www.aclu.org/letter/aclu-comment-supplemental-questions-visa-applicants>; Comments of the Brennan Center, *Notice of Information Collection Under OMB Emergency Review: Supplemental Questions for Visa Applicants* (Apr. 2, 2021), available at https://www.brennancenter.org/sites/default/files/State%20Dept%20Information%20Collection%20Comments%20-%2051817_3.pdf; Comments of the Brennan Center, *Arrival and Departure Record (Forms I-94 and I-94W) and Electronic System for Travel Authorization* (Apr. 2, 2021), available at <https://www.brennancenter.org/our-work/research-reports/brennan-center-submits-comments-dhs-plan-collect-social-media-information>.

throughout their stay and because the information collected is retained even after the individual becomes a lawful permanent resident or U.S. citizen.

Under the prior administration, CBP began penalizing individuals for others' online speech and used social media content as a basis for denying student and other visas.⁹⁵ This kind of monitoring by the government is not—and will not be—isolated to a few incidents, because of policies adopted by DHS. In fact, DHS recently announced its intent to expand the collection of social media identifiers from immigrants and visitors to the United States, risking a significant impact on both immigrants and citizens.⁹⁶

To date, the Biden Administration has not changed the usage of social media vetting of visa applicants, and CBP officials are still permitted to search the electronic devices, including cell phones, of incoming travelers seeking admission to the United States. Accordingly, CBP can—and does—use social media posts as a basis of denying entry to the country.

Recommendations

- Rescind all extreme vetting processes implemented under the Trump Administration;
- Direct DOS to abandon its practice of collecting social media identifiers and other information from visa applicants;
- No longer permit CBP to use social media posts as a basis for denying entry;
- Abandon government practice of the creation and use of fictitious accounts to monitor and review social media accounts as authorized and outlined in a July 2019 DHS Privacy Impact Assessment (PIA-013-01(a));
- Purge all social media data and records collected since the implementation of the Extreme Vetting initiative implemented under the Trump Administration.

⁹⁵ Karen Zraick and Mihir Zaveri, *Harvard Student Says He Was Barred From U.S. Over His Friends' Social Media Posts*, N.Y. Times (Apr. 2, 2021), <https://www.nytimes.com/2019/08/27/us/harvard-student-ismail-ajjawi.html>.

⁹⁶ See Agency Information Collection Activities: Generic Clearance for the Collection of Social Media Information on Immigration and Foreign Travel Forms, 84 Fed. Reg. 46,557 (Sept. 3, 2019), available at <https://www.regulations.gov/document?D=DHS-2019-0044-0001>; see also U.S. Dep't of Homeland Sec., U.S. Citizenship and Immigration Services, DHS/USCIS/PIA-013-01(a), Privacy Impact Assessment Update for the Fraud Detection and National Security Directorate (July 26, 2019), https://www.dhs.gov/sites/default/files/publications/privacy-pia-uscis-013-01-fdns-july2019_0.pdf.

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Appendix A – Summaries and Interests of Core Groups

1. *American-Arab Anti-Discrimination Committee*

The American-Arab Anti-Discrimination Committee (ADC) is a civil rights organization committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. ADC combats stereotypes and discrimination against the Arab-American community in the U.S. This includes helping end the Muslim and African bans, advocating for systemic change to law enforcement's national security posture, and pressing for administrative accountability for targeted and discriminatory surveillance of communities of color. ADC also assists clients with delays in immigration petitions and applications, the threat or experience of detention or deportation, and general immigration assistance.

2. *Asian Americans Advancing Justice – Asian Law Caucus*

Asian Americans Advancing Justice – Asian Law Caucus (ALC) is a national legal and civil rights organization serving Asian and Pacific-Islander communities. Its National Security & Civil Rights program defends those targeted by so-called national security, counterterrorism, and other related policies, especially Arab, Middle Eastern, Muslim, and South Asian communities. ALC has worked to end the Muslim and African bans, leads efforts to challenge the state of California's homeland security operations, and actively represents individuals targeted by the government's national security regime.

3. *Center for Constitutional Rights*

The Center for Constitutional Rights (CCR) works with communities under threat to fight for justice and liberation through litigation, advocacy, and strategic communications. CCR has fought to obtain justice for individuals who have been impacted by government abuses perpetrated in the name of the so-called "War on Terror." Our challenges to discriminatory profiling, torture, and illegal detentions began with representing immigrants who were part of the mass round-ups, detentions, and deportations in the weeks and months following 9/11 and continue to this day.

4. *Creating Law Enforcement Accountability & Responsibility*

The Creating Law Enforcement Accountability & Responsibility (CLEAR) project's mandate is to support Muslim and all other client, communities, and movements nationwide that are targeted by local, state, or federal government agencies under the guise of national security and counterterrorism.

5. *Partnership for the Advancement of New Americans*

The Partnership for the Advancement of New Americans (PANA) is a community organizing, public policy, and leadership development hub dedicated to advancing the full economic, social, and civic inclusion of refugees. Led by the communities it serves, PANA amplifies refugee voices to advocate for basic fairness and dignity for all. PANA also provides support to Black African, Arab, Middle Eastern, Muslim and South Asian communities in San Diego by hosting public education, know your rights, and town hall sessions, providing legal assistance, and by engaging in media and advocacy for refugees and their families.

Appendix B – List of Signatories in Support

1. American Friends Service Committee
2. Asian Americans Advancing Justice | AAJC
3. Black Alliance for Just Immigration
4. CAGE Advocacy UK
5. Coalition for Civil Freedoms
6. Council on American-Islamic Relations (CAIR)
7. Defending Rights & Dissent
8. Justice for Muslims Collective
9. MPower Change
10. Muslim American Society–Public Affairs and Civic Engagement
11. Muslim Justice League
12. National Iranian American Council
13. No Muslim Ban Ever Campaign
14. Poligon Education Fund
15. Secure Justice
16. South Asian Americans Leading Together (SAALT)
17. Vigilant Love