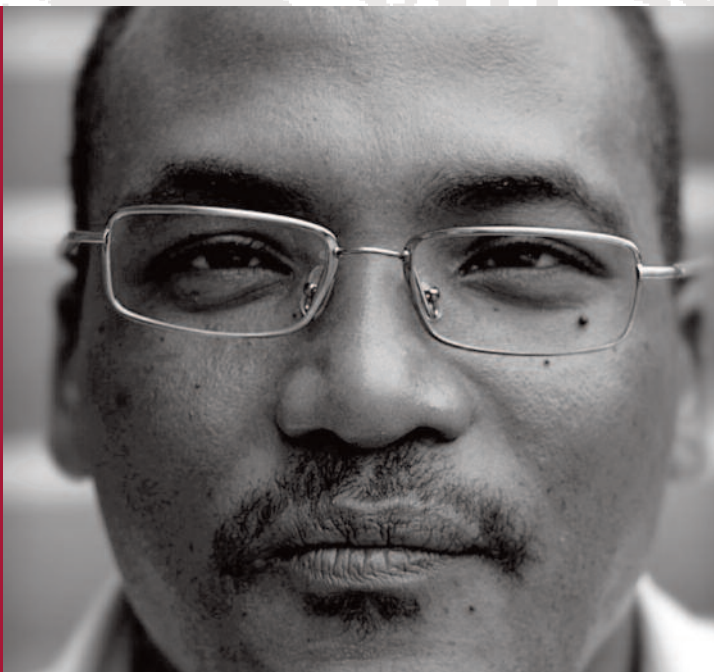
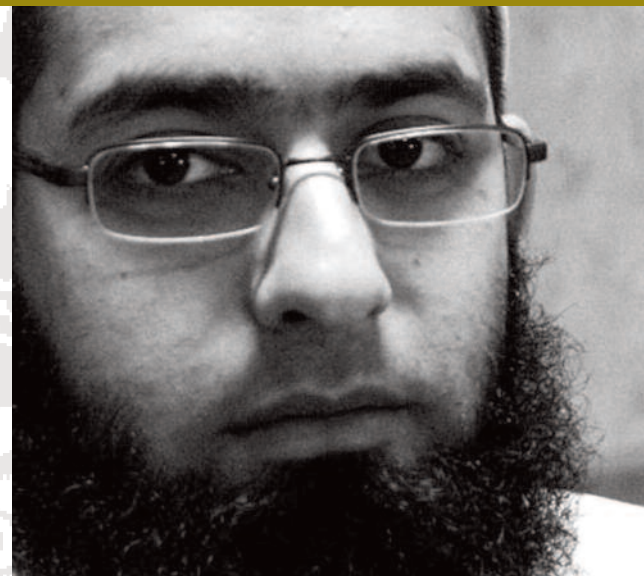


Asian Law Caucus

AN ASIAN LAW CAUCUS REPORT

# RETURNING HOME:

**How U.S. Government Practices Undermine Civil Rights At Our Nation's Doorstep**



Jointly Prepared by  
Asian Law Caucus Staff and  
the Stanford Law School  
Immigrants' Rights Clinic

April 2009

This report is made possible in part with support from The Proteus Fund.

© 2009 Asian Law Caucus and  
Stanford Law School  
Immigrants' Rights Clinic.

All Rights Reserved.

No part of this publication may  
be reproduced in any form by  
any means without attribution.

Printed in the United States of  
America.

## **Returning Home:**

# **How U.S. Government Practices Undermine Civil Rights At Our Nation's Doorstep**

An Asian Law Caucus Report

## **ACKNOWLEDGMENTS**

This publication is an Asian Law Caucus report jointly prepared by Asian Law Caucus staff and the Stanford Law School Immigrants' Rights Clinic. The report was written by Shirin Sinnar and Veena Dubal of the Asian Law Caucus in collaboration with Jayashri Srikantiah, Hewan Teshome, Anna Finn, and Jennifer Koh of the Stanford Law School Immigrants' Rights Clinic. We thank Christopher Drake, Luz Henriquez, Hewan Teshome, Hozefa Bottee, and Tamara Nakhjavani for their excellent pro bono research assistance.

We are also grateful to the many Asian Law Caucus attorneys, community advocates, and law clerks who assisted with this project, including Neela Chakravartula, Cat Bao Le, Neelam Ihsanullah, Celine Mui, Menaka Fernando, Sophia Lai, Simah Bargzie, and Rosha Jones. We thank Amal Mongia for photographing the individuals in this report and Tim Sparapani (American Civil Liberties Union), Michelle Alexander (Ohio State University Moritz College of Law), and Lee Tien (Electronic Frontier Foundation) for reviewing portions of the draft.

We would like to thank Nuzhat Alavi, Shahid Iqbal, Abdulkader Khatri, Zafar Malik, and Bijal Vakil for their generous support of our work in South Asian, Muslim, and Arab communities and to recognize the leadership and vision that former Board Chair, Monty Agarwal, provided to make this report possible.

Last but not least, we extend our deepest gratitude to those individuals who were willing to share their stories featured in this report: Haitham Abul-Haija, Zakariya Reed, Amir Khan, Hassan Ahmed Mohammed, Mohamed Shommo, Tahir Anwar, Anila Ali, Nabila Mango, and Motasem Benothman. Thank you for your courage and commitment to social justice.

This report was designed by Debbie Dare and printed by Inkworks Press.

## **THE ASIAN LAW CAUCUS**

55 Columbus Avenue  
San Francisco, CA 94111  
Phone: (415) 896-1701  
Fax: (415) 896-1702  
[www.asianlawcaucus.org](http://www.asianlawcaucus.org)

The mission of the Asian Law Caucus is to promote, advance and represent the legal and civil rights of the Asian and Pacific Islander communities. Recognizing that social, economic, political and racial inequalities continue to exist in the United States, the Asian Law Caucus is committed to the pursuit of equality and justice for all sectors of our society with a specific focus directed toward addressing the needs of low-income Asian and Pacific Islanders.

The Civil Rights and National Security Program of the Asian Law Caucus is committed to U.S. national security policies that protect the civil rights of individuals and communities, including Asian American and immigrant communities in Northern California and the broader United States. Since 2007, the Asian Law Caucus has combated profiling and discrimination against the Arab, Middle Eastern, South Asian, Sikh and Muslim communities, including launching a campaign against intrusive questioning and searches of U.S. citizens and residents at U.S. borders. The Asian Law Caucus has assisted individuals with complaints about border profiling, conducted “know your rights” outreach to affected communities, and with the Electronic Frontier Foundation, sued the U.S. Department of Homeland Security under the Freedom of Information Act to bring greater transparency to Customs and Border Protection policies.

In 2009, the Asian Law Caucus will be launching the Fred T. Korematsu Institute for Civil Rights and Education. The Korematsu Institute at the Asian Law Caucus advances the cause of Asian American civil rights and human rights through pan-Asian American alliances and programs that focus on education, activism, and leadership.

## **THE STANFORD LAW SCHOOL IMMIGRANTS' RIGHTS CLINIC**

Immigrants' Rights Clinic  
Administration Building — Law Clinic  
Crown Quadrangle  
559 Nathan Abbott Way  
Stanford, CA 94305-8610  
Phone: (650) 724-9068  
[immigrants.rights@law.stanford.edu](mailto:immigrants.rights@law.stanford.edu)

The Immigrants' Rights Clinic at Stanford Law School is committed to protecting the human rights of all non-citizens, regardless of immigration status. Students and faculty in the clinic represent individual immigrants in a variety of settings, including seeking humanitarian relief from deportation on behalf of non-citizens with criminal convictions, obtaining asylum protection for non-citizens fleeing persecution, and assisting immigrant survivors of domestic violence in gaining lawful status in the United States. The clinic also conducts a wide range of advocacy on behalf of non-profits like the Asian Law Caucus, including impact litigation, legislative and administrative advocacy, public education, grassroots work, and local advocacy.

**CONTENTS**

4 ▲ SUMMARY & KEY RECOMMENDATIONS

7 ▲ INTRODUCTION

10 ▲ CHAPTER ONE: **INTRUSIVE QUESTIONING, INVASIVE SEARCHES**  
    Zakariya Reed ▲ 10  
    Amir Khan ▲ 14  
    “Reema” ▲ 16  
    Hassan Ahmed Mohammed ▲ 18  
    Mohamed Shommo ▲ 19  
    Imam Tahir Anwar ▲ 21

24 ▲ CHAPTER TWO: **RACIAL, RELIGIOUS, AND NATIONAL ORIGIN PROFILING**  
    Anila Ali ▲ 25  
    Nabila Mango ▲ 27

33 ▲ CHAPTER THREE: **THE BLOATED AND MISMANAGED TERRORIST WATCHLIST**  
    Haitham Abul-Haija ▲ 34  
    Motasem Benothman ▲ 36

41 ▲ CHAPTER FOUR: **CONCLUSION AND RECOMMENDATIONS**

45 ▲ APPENDIX

## **SUMMARY**

Most Americans returning to the United States after traveling abroad can look forward to the feeling of comfort, belonging, and security that comes from setting foot once again on U.S. soil. But for some Americans, overbroad and invasive U.S. government practices have transformed that homecoming into an encounter of anxiety, fear, and insecurity. In recent years, many U.S. citizens, permanent residents, and others who call America home have faced lengthy detentions, intrusive questioning, and invasive searches when they return to the United States. Individuals around the country report that U.S. Customs and Border Protection (CBP) officers routinely question them about their political views, religious practices, and other lawful activities or search through their books, laptop computers, private papers, and other possessions – often for hours – before permitting them to enter their own country.

### **Intrusive Border Questioning and Searches**

Many people in America's Muslim, South Asian, and Middle Eastern communities have come to expect harassment and discriminatory treatment at our nation's doorstep. Since 2007, the Asian Law Caucus has received more than 40 complaints from individuals who have faced intrusive questioning and searches at U.S. land borders and international airports. These stories come from U.S. citizens and immigrants; from men and women; from distinguished professors, human rights activists, respected religious leaders, corporate attorneys, and thriving entrepreneurs. The overwhelming majority of those who reported these experiences are Muslim or of South Asian or Middle Eastern descent. Judging by similar stories reported to community groups and civil rights organizations nationwide, the complaints brought to the Asian Law Caucus represent a small piece of a much wider pattern of profiling and discrimination at U.S. borders.

Intrusive CBP questioning and searches violate privacy, chill individuals' exercise of their rights to freedom of religion, speech, and association, and send the message that the U.S. government targets

particular beliefs or communities rather than unlawful conduct. CBP appears to have no policy constraining officers from questioning individuals on religious beliefs and political activities, and has adopted new policies that grant border officers expansive powers to search travelers' written materials and electronic devices without any suspicion of wrongdoing. The impact of overbroad questioning and searches extends beyond the individuals singled out for this treatment at the border. These practices alienate communities, make business more costly, obstruct cultural exchange, and strain U.S. diplomatic relationships around the world.

### **Profiling and the Terrorist Watchlist**

The targeting of Muslim, South Asian, and Middle Eastern citizens and residents for invasive CBP inspections is the result of two troubling policies: first, the use of invidious profiling, and second, the reliance on a bloated and mismanaged terrorist watchlist. CBP openly targets individuals, including U.S. citizens, for border inspections based on their national origin. In addition, inadequate agency policies and procedures give little confidence that CBP officers are complying with internal rules prohibiting profiling of travelers based on their race, ethnicity, or religion. Profiling stigmatizes some Americans as disloyal and wrongly brands them as outsiders. CBP's unwarranted use of profiling distracts border officers from more relevant indicators of suspicion, diminishes trust in law enforcement, discourages international commerce and tourism, and harms U.S. relationships with other nations.

The federal government's bloated and opaque terrorist watchlist also leads to the repeated detention and questioning of innocent people at America's doorstep. Far from affecting only those who are legitimately suspected of presenting a threat, the terrorist watchlist ensnares many ordinary Americans at the border. The government's own audits suggest that it has placed many innocent people on the watchlist without justification and has wrongly matched others to the watchlist based on a misiden-

tification. Despite persistent attempts to clear their names, many innocent people continue to face the indignity and stigma of being treated like criminals or terrorists every time they return home. CBP practices continue to stigmatize innocent people as a result of the government's inadequate procedures for updating, reviewing, and cleansing the list. These practices also divert law enforcement attention from those individuals who may actually present a threat.

Bad CBP policies at the border do not make us safer as a country or community. And Congress has regularly criticized the Bush administration's

Department of Homeland Security as a whole for its secrecy and mismanagement, problems that undermine CBP's mission of securing U.S. borders. The government's policies for screening travelers at our borders are urgently in need of reform. Even at the border, no one should have to surrender his or her basic rights as a condition for returning home. The Obama administration and Congress should reform CBP screening practices to ensure that the agency fulfills its critical mission of safeguarding U.S. borders while staying true to our core values.

## **KEY RECOMMENDATIONS**

### **Oversight of Customs and Border Protection**

- The Government Accountability Office and the Privacy and Civil Liberties Oversight Board should investigate the civil rights, civil liberties, and privacy concerns presented by CBP inspections.

### **Restoring Civil Liberties in Border Questioning and Searches**

- DHS should issue a rule specifying that CBP officers may inquire into travelers' religious and political beliefs and activities only where: 1) such questioning is reasonably related to resolving a legitimate issue regarding an alien's admissibility to the United States; or 2) there is a substantial nexus between the information such questioning seeks to elicit from that person and the investigation of a specific threat to national security or of a potential violation of a statute which the agency is authorized to enforce.

- Congress should enact the Travelers' Privacy Protection Act to establish standards for border searches of electronic devices, including the requirement of reasonable suspicion for such searches.

- DHS should issue a rule restoring pre-2007 limits on CBP's authority to read and copy travelers' written materials.

### **Eliminating Racial, Religious, and National Origin Profiling**

- DHS should prohibit profiling based on race, ethnicity, religion, and national origin in border inspections and eliminate the blanket exemption for national security and border investigations in the current Department of Homeland Security racial profiling guidance.

- DHS should record and publish information on the gender, race, ethnicity, religion, national origin, and nationality (as known or perceived) of travelers subjected to special security measures.

- Congress should enact the End Racial Profiling Act to prohibit law enforcement agencies from relying on race, ethnicity, national origin, or religion in border inspections and other investigatory decisions.

### **Reforming the Terrorist Watchlist**

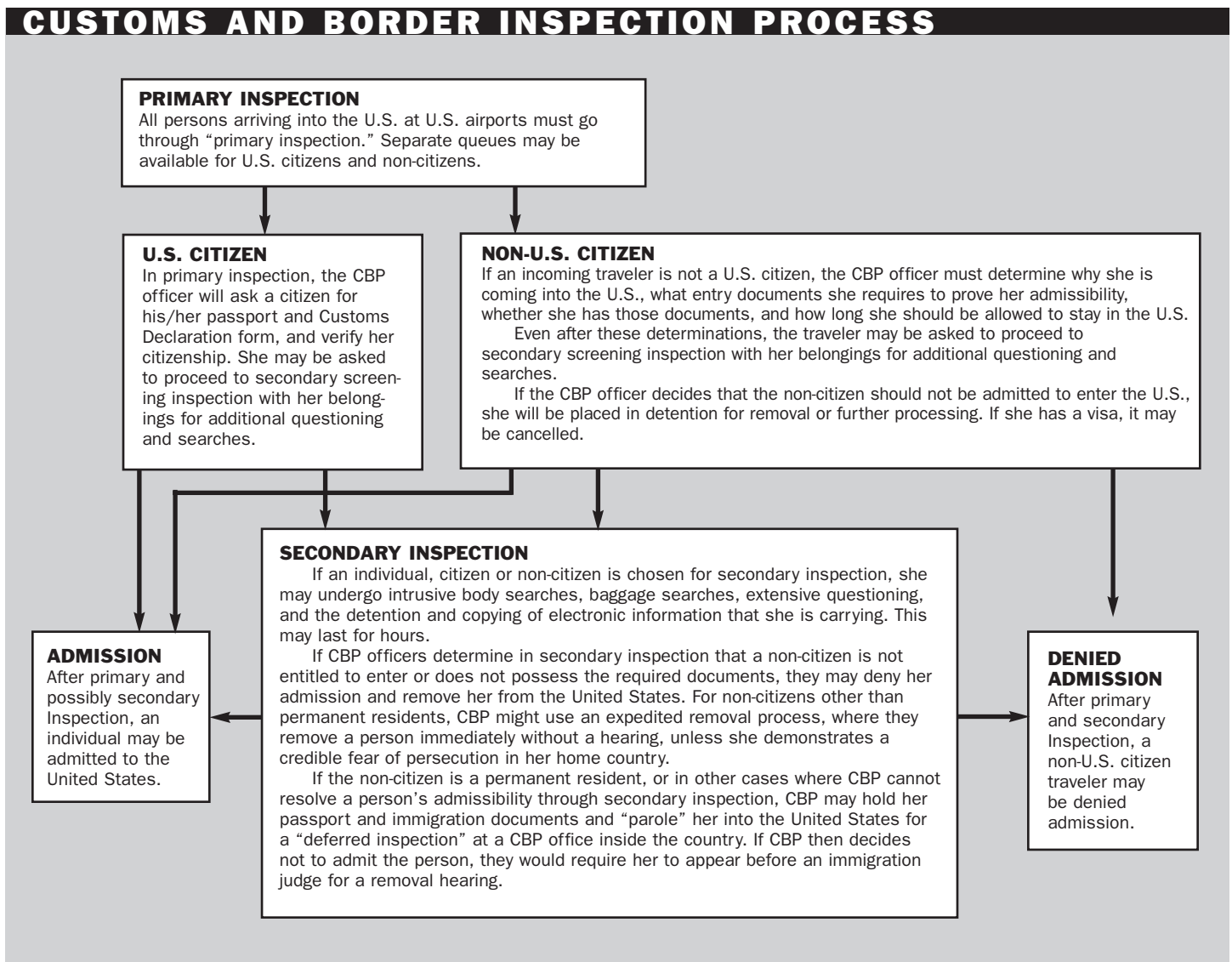
- DHS should establish stricter standards for incorporating government terrorist watchlist records into CBP's screening database.

- The Terrorist Screening Center should conduct a comprehensive review and cleansing of the records in the government's consolidated terrorist watchlist.

- DHS and other federal agencies should establish a meaningful procedure for individuals who believe they are affected by the terrorist watchlist to clear their names.

A more comprehensive and detailed list of recommendations is available at the conclusion of this report.

## CUSTOMS AND BORDER INSPECTION PROCESS



## INTRODUCTION: **NO WELCOME AT HOME**

***This is the border, and you have no rights***, a Customs and Border Protection (CBP) officer told a U.S. citizen professor and journalist at San Francisco International Airport. CBP officers questioned the innocent man at length about his travels to the Middle East, downloaded files from his laptop computer, and asked him about notes he had taken while reporting on political events abroad.

The U.S. government is ***too nice to detainees***, a CBP officer remarked while interviewing and searching Zakariya Reed, an Ohio firefighter and veteran of the National Guard, at the ***Detroit land border crossing. We should treat them like we do in the desert. We should put a bag over their heads and zip tie their hands together.*** CBP officers grilled Reed about his religious conversion and detained him at the border for several hours – the first of over a dozen times Reed has been stopped while returning home to the United States.

***It doesn't matter that you're a citizen***, a CBP agent told Anila Ali, a Pakistani-American middle school teacher, when she protested the repeated questioning and extra searches she encountered from border officers when returning home. ***What matters is where you were born.***

This report features the stories of ordinary Americans singled out by our government for intrusive and humiliating questioning and searches when they returned to the United States from travels abroad. At international airports and land border crossings nationwide, Customs and Border Protection (CBP) officers have interrogated U.S. citizens, legal permanent residents, and others who call America home about their families, religious practices, volunteer activities, political beliefs, or lawful associations. They have searched the books, laptop computers, digital cameras, cell phones, and personal papers of U.S. citizens and immigrants without first establishing any basis for suspecting these individuals of violating the law. Often, these invasive CBP inspections have lasted for hours. Many of the individuals targeted by CBP report that

border officers repeatedly subject them to these unwarranted interviews and searches each time they return home.

The individuals who came to the Asian Law Caucus with their stories were all ordinary people, traveling abroad to visit dying relatives, attend business meetings for technology firms, or spend time with friends and family overseas. They include Silicon Valley entrepreneurs, corporate attorneys at prominent law firms, middle school teachers serving low-income school districts, and therapists counseling impoverished mentally ill patients. A remarkable number of people who shared their experiences were men and women who had dedicated their lives to building bridges between the United States and the Muslim world: individuals introducing artists and performers from the Middle East and South Asia to American audiences,

distinguished professors recruited by the U.S. government to present a positive image of the United States to audiences in the Middle East, and respected religious leaders promoting tolerance and civic engagement to Muslim American communities here at home.

Since 2007, the Asian Law Caucus has received over 40 complaints about invasive CBP inspections at U.S. borders, primarily from U.S. citizens and legal permanent residents and overwhelmingly from individuals of Muslim, South Asian, or Middle Eastern origin.<sup>1</sup> These numbers represent only a small piece of a much wider national pattern of intrusive border practices nationwide, consistent with reports from other civil rights groups and community organizations around the country.<sup>2</sup>

CBP's unwarranted questioning and searches subject innocent travelers to a harm far greater than the inconvenience and economic harm of delayed travel. Invasive inspections instill anxiety, confusion, and fear, and brand ordinary Americans as perpetual outsiders in their own country. Overbroad CBP questioning and searches chill Americans' exercise of their rights to speak, worship, and associate as they choose. Frequent interrogations and searches force individuals who are required to travel for business to reconsider careers. Even U.S.-born citizens who are respected and established professionals experienced such stigma on account of invasive CBP border screenings that they felt they could not share their experiences publicly. Attorneys at prominent corporate law firms and senior professors at major universities voiced fear of retaliation from government agencies, backlash from potential employers, or social

ostracism from being wrongfully perceived as potential terrorists.<sup>3</sup>

Beyond the individuals directly affected, the questioning, searches, and detentions at the border strike at the heart of entire communities' identities and feelings of safety and belonging in America. When prominent Arab and Muslim American community leaders are targeted for discriminatory treatment at U.S. borders, despite actively working to build bridges with the U.S. government and their fellow Americans, it sends the message that the U.S. government wrongly sees these communities as a whole as suspicious and disloyal.

CBP's practices also affect U.S. businesses and cultural institutions whose employees and associates face unwarranted scrutiny at the border. The Association of Corporate Travel Executives and major U.S. companies have expressed concern that CBP searches and seizures of travelers' laptop computers jeopardize the privacy of trade secrets and confidential business information contained within. Educational and cultural institutions face barriers in bringing scholars, performers, and artists to audiences in the United States: in 2007, CBP disrupted the Arab Film Festival in San Francisco when border officers detained and grilled a Tunisian actor starring in a film with an anti-terrorism message for close to five hours on the film festival's opening night.<sup>4</sup>

News of invasive inspections at U.S. borders reverberates abroad, sending the message that America does not welcome people of other backgrounds but fears them, discouraging tourism and commerce and straining U.S. relationships with other nations. Foreign newspapers advise their citizens to brace themselves for "shakedowns"

when entering the United States, and warn that even prominent government ministers, business leaders, and journalists are not spared intrusive interviews and searches.<sup>5</sup> U.S. allies have made diplomatic protests to the U.S. State Department after CBP singled out their citizens for scrutiny based on their national origin.<sup>6</sup>

CBP plays a vital role in securing our nation's borders. But bad policies at the border waste law enforcement resources and do not make us safer as a country or community. On the contrary, as described in this report, misguided CBP practices make us less secure by diverting border officers' attention from actual threats, diminishing respect for the rule of law, alienating communities, and straining our relations with foreign nations.

Overbroad CBP practices are inconsistent with our core values, particularly our belief in a pluralistic and diverse society where freedom of religion and expression, equality under the law, and basic due process of law are protected. When border officers question and search our fellow citizens regarding their ideas and expressive activities, where they worship, and what they choose to read, they contravene our most basic notions of what America represents. The stories in this report reveal policies and practices that are fundamentally inconsistent with our Constitution, our values, and who we are as a nation.

\* \* \*

There are three troubling components to CBP's border practices: 1) overbroad CBP questioning and searches; 2) the use of racial, religious, and national origin profiling; and 3) reliance on the federal government's bloated and mismanaged

terrorist watchlist. This report describes each of these in detail. First, the report describes how CBP's intrusive questioning and searches of travelers violate privacy, chill individuals' exercise of their rights under the First Amendment, and stigmatize individuals and communities without adding to our security. The second chapter addresses the role of invidious racial, religious, and national origin profiling in CBP's border practices. Chapter three examines how CBP's use of the problematic terrorist watchlist detracts from the examination of actual national security threats while causing innocent individuals unnecessary humiliation, stigma, and anxiety. We conclude with specific recommendations to Congress, the Department of Homeland Security, and other federal agencies to exercise better oversight of Customs and Border Protection, restore civil liberties in border questioning and searches, eliminate racial, religious, and national origin profiling, and reform the terrorist watchlist.

## CHAPTER ONE: **INTRUSIVE QUESTIONING, INVASIVE SEARCHES**

**Zakariya Reed** is a firefighter in Toledo, Ohio and a 20-year veteran of the National Guard.<sup>1</sup> Since 2006, CBP agents have questioned and searched him at least 12 times while he was returning to the United States after visiting his wife's family in Ontario. In 2006, at the Windsor-Detroit crossing, five CBP officers surrounded Reed's car, frisked him, and questioned him for several hours. CBP agents damaged items inside his car, including his son's portable DVD player and a decorative Quran on the dashboard.

CBP officers grilled Reed on his religious beliefs: they asked why he had changed his name from Edward Eugene Reed Jr. to "Zakariya Muhammad Reed." When he explained that he had changed his name after a religious conversion, they asked him what religion he had converted to and why he had converted. One officer made a comment in his presence about how the U.S. government was "too nice to detainees," saying, "We should treat them like we do in the desert. We should put a bag over their heads and zip tie their hands together."

In March 2007, a CBP agent attempted to intimidate Reed by taking out his weapon and making a show of removing and restoring the clip in front of Reed. Even more disturbing, officers printed out a copy of a letter to the editor that Reed had written to the Toledo Blade criticizing the war in Iraq and the Israeli invasion of Lebanon, and asked him why he had written the letter. Reed recounts feeling terrified at the prospect that the government was targeting him on account of his faith and political opinions.

Americans generally believe that the government has no business probing into the political views, religious beliefs, or peaceful associations of individuals not suspected of violating the law. Freedom of speech, freedom of religion, and freedom of association are among our most deeply held values and most hallowed rights. Equally surely, we believe that law enforcement agents should not arbitrarily search or seize people or their possessions, especially not where such searches would reveal our most intimate secrets and private thoughts. Yet at America's doorstep, the federal government insists that these basic freedoms simply do not apply. As a Customs and Border Protection (CBP) officer in San Francisco told one innocent U.S. citizen concerned that he was being detained, questioned, and searched without reason, "This is the border, and you have no rights."<sup>2</sup>

Since 2007, the Asian Law Caucus has received more than 40 complaints from individuals across the country, primarily U.S. citizens and legal permanent residents, who report that CBP subjected them to intrusive questioning or searches at U.S. borders. In some cases, border agents asked these travelers about their political views, religious practices, and associations. In other cases, these individuals were compelled to hand over laptop computers, personal papers, cell phones, digital cameras, mp3 players, or reading materials to be searched by CBP officers, often outside their presence. Incidents reported to the Asian Law Caucus are likely the tip of the iceberg: many more Muslim, South Asian, and Middle Eastern Americans nationwide face similar treatment at the border, so much so that among these communities, harassment at

the border has become a matter of common expectation and dread.

These intrusive practices violate privacy, chill individuals' exercise of their rights to freedom of religion, speech, and association, and send the message that the U.S. government targets particular beliefs or communities rather than unlawful conduct.

The Department of Homeland Security (DHS) should adopt new policies that set reasonable standards for border questioning and searches, permitting CBP officers to detect and investigate immigration violations, the smuggling of contraband, and threats to national security, while protecting our core values. The agency must also show a greater commitment to transparency and accountability so that Congress and the public can ensure that CBP exercises its authority while facilitating lawful travel and commerce.

#### QUESTIONING TRAVELERS ON RELIGION AND POLITICS

U.S. citizens and legal immigrants returning to the United States from overseas trips have been questioned about their religious practices, political views, and other highly personal matters that impinge on the free exercise of religion, freedom of speech, and freedom of association. CBP officers have grilled professors, film makers, business leaders, human rights activists, and software engineers alike, asking such overbroad questions as:

What do you think of events in Syria and Israel?

What's your opinion of Iran's president?  
Do you hate the U.S. government?

Where do you worship?

What kinds of political activism do you engage in?  
Do you volunteer at your mosque?  
What do you think about Jews and the state of Israel?  
What do you think of Barack Obama?  
Why do you donate money to three mosques?  
What do you think about “Wahhabism”?

Questioning by CBP agents is inherently coercive, since individuals at the border cannot enter the United States without satisfying border agents. Unlike individuals inside the United States who are called in for questioning by the police, FBI, or other law enforcement officers, travelers at U.S. borders cannot simply walk out of an interview. Although U.S. citizens have the right to enter the United States and are not subject to the admissibility requirements applicable to foreign nationals,<sup>3</sup> even citizens who refuse to answer questions may be threatened with further detention, more intrusive searches, or other consequences of refusing to cooperate.<sup>4</sup> Non-citizens may be denied entry at the border altogether, and even those who decide they would rather return to their home countries rather than submit to the questioning cannot simply depart from the international arrivals terminal of an airport without approval from CBP officers.<sup>5</sup> In the no man's land of the U.S. border, CBP officers wield unique and unrivalled power over incoming travelers.

**OVERBROAD QUESTIONING:  
INEFFECTIVE AND COUNTERPRODUCTIVE**

When CBP officers question individuals about their religious and political beliefs or practices, unconnected to any apparent

investigation of an actual threat, they send the message that the U.S. government recognizes “right” and “wrong” beliefs and practices, and that those who choose the “wrong” values may be barred from entering the United States. In addition, like racial or ethnic profiling, questioning about one's religion and politics brands the targets of such questioning as unequal – particularly where, as here, that treatment appears directed at Muslims, Arabs, and other minority communities. Probing into religious practices, without a reasonable basis, also undercuts the federal government's stated aim of conveying to the Muslim world that U.S. foreign policy is directed at preventing terrorism, not undermining Islam or Muslims.<sup>6</sup>

Overbroad questioning of innocent travelers based on race or religion also distracts CBP officers from targeting investigations on actual security threats. There is no indication that the answers elicited from open-ended questions about political views or religious practices are probative of suspicious behavior.<sup>7</sup> It is hard to see how a person's view of the war in Iraq, for instance, could have a meaningful bearing on whether he or she poses a risk to the United States. Furthermore, it defies common sense to think that an intending terrorist would flag border agents' attention by providing “anti-American” answers to such questions.<sup>8</sup> Broad questioning about individuals' political views and religious beliefs is not only offensive, but counterproductive.

**CHILLING FREEDOM OF EXPRESSION**

Questioning travelers on their religious practices, political views, and lawful associa-

tions has a chilling effect on the free exercise of religion, freedom of speech, and freedom of association protected by the First Amendment. Courts have long recognized that government practices short of prohibiting speech, religious conduct, or associations can substantially burden First Amendment rights: the chilling effect doctrine recognizes that “inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government.”<sup>9</sup> The Supreme Court has recognized that the First Amendment limits the government’s attempt to inquire into a person’s beliefs or associations, since “broad and sweeping state inquiries into these protected areas... discourage citizens from exercising rights protected by the Constitution.”<sup>10</sup> During the McCarthy era, the Supreme Court prohibited state legislative commissions from inquiring into the membership of lawful organizations without showing “a substantial relation between the information sought and a subject of overriding and compelling state interest.”<sup>11</sup> The Court noted that even where the government was authorized to conduct an investigation into the broad subject matter at issue, that did not automatically validate “all individual questions” or “documentary demands” made of witnesses where these demands impinged on First Amendment rights.<sup>12</sup>

While courts have approved the questioning of travelers, including U.S. citizens, on their identity, travel, and subjects related to the detection of contraband,<sup>13</sup> no court has endorsed the broad questioning on First Amendment topics in which CBP agents are now engaged. In *Tabbaa v. Chertoff*, the Second Circuit held that detaining, fingerprinting, and interrogating returning Muslim

Americans based on their attendance at a religious conference in Canada significantly burdened these individuals’ First Amendment right to free association.<sup>14</sup> Applying strict scrutiny, the court went on to conclude that no rights were violated because the government in that case had specific intelligence information that suspected terrorists might be attending the religious conference at issue.<sup>15</sup> The decision turned on the existence of that specific intelligence, as the court concluded that CBP’s objective of intercepting potential suspects returning from the conference could not be achieved through means significantly less restrictive of the plaintiffs’ associational rights.<sup>16</sup> In the absence of such intelligence, it is doubtful that CBP’s actions, triggered by individuals’ attendance at a religious conference, could have withstood the strict scrutiny applied in *Tabbaa*.

#### THE NEED FOR CBP POLICY AND TRAINING

Overbroad and harassing questioning of Americans at U.S. borders appears to result from two agency shortcomings: first, the failure of CBP to establish a policy setting reasonable limits on the questioning of travelers regarding religious and political beliefs and activities, and second, the agency’s failure to adequately train border officers on inspecting individuals in a manner that respects basic rights.

First, despite growing complaints of inappropriate questioning, CBP appears to have no policy constraining border officers from asking questions about religious and political views and practices. In 2007, the Asian Law Caucus and the Electronic

Frontier Foundation asked DHS through a Freedom of Information Act (FOIA) request to disclose agency records including any policies or procedures related to questioning on these topics.<sup>17</sup> Despite turning over 600 pages of records, the agency provided no

relevant documents that constrained such questioning.<sup>18</sup>

In the absence of a policy limiting CBP questioning, even some high-level CBP officials appear to have disturbing notions of what type of questioning is justified. In



**Amir Khan**, a U.S. citizen IT consultant originally from Pakistan, reported being questioned for a total of almost 20 hours after five international trips, despite hearing an agent explain that his name did not match any name on the terrorist watchlist. He was asked about his religion, whether he hated the U.S. government, and whether he had visited mosques, and was even told that he should “pray more.” When Khan offered to give one agent his wife’s phone number so the agent could verify his identity, the agent asked, “Isn’t it rude in Islamic culture to give a man a woman’s phone number?”

CBP agents inspected Khan’s laptop computer, examined all the books in his luggage and recorded information on one book about the history of Islam, and prevented him from taking notes on the interview.

PHOTOGRAPHED BY AMAL MONGIA

January 2008, Richard Vigna, Director of Field Operations for the Port of San Francisco, told the Asian Law Caucus that asking a person what mosque he or she attended was a “legitimate question.”<sup>19</sup> The notion that CBP agents can routinely question U.S. citizens and other travelers about the place they choose to worship, without any indication of wrongdoing, is startling – and demonstrates the need for a policy limiting CBP agents’ inquiry into protected First Amendment activities. If top CBP officials believe that it is legitimate to question Americans on their place of worship, it begs the question what ordinary CBP line agents believe they are empowered to do.

Even former DHS officials have acknowledged the need for a clear policy on appropriate questioning. Nathan A. Sales, former DHS Deputy Assistant Secretary for Policy Development, told the Washington Post that inquiring into religious practices, though appropriate in certain circumstances, involved “playing with fire.”<sup>20</sup> Sales, now a law professor at George Mason University, stated that the agency needed to take steps to ensure that questioning on such issues as “a person’s churchgoing or charitable contributions” did not become harassment: “You need to have a clearly established policy that these sorts of questions are only asked in certain circumstances, and only when we have some indication to believe that a particular mosque or a particular charity might have some sort of terrorist tie.”<sup>21</sup>

Second, consistent with findings from Congressional investigations, CBP has failed to effectively train border officers on inspecting individuals arriving at ports of entry, a problem that may be contributing

to some of the more egregious abuses of authority that travelers have reported. A Government Accountability Office (GAO) investigation criticized CBP for having inadequate training for border officers: for example, the investigation found that while CBP states that new officers at land ports of entry should receive 12 weeks of on-the-job training, new officers at the ports visited in the GAO investigation sometimes received as little as two weeks of training.<sup>22</sup>

**To prevent CBP officers from engaging in the overbroad questioning of innocent individuals, DHS should issue a rule specifying that CBP officers may inquire into travelers’ religious and political beliefs and activities only where: 1) such questioning is reasonably related to resolving a legitimate issue regarding an alien’s admissibility to the United States; or 2) there is a substantial nexus between the information such questioning seeks to elicit from that person and the investigation of a specific threat to national security or of a potential violation of a statute which the agency is authorized to enforce. In addition, CBP should be required to train border agents on the requirements of the new rule.**

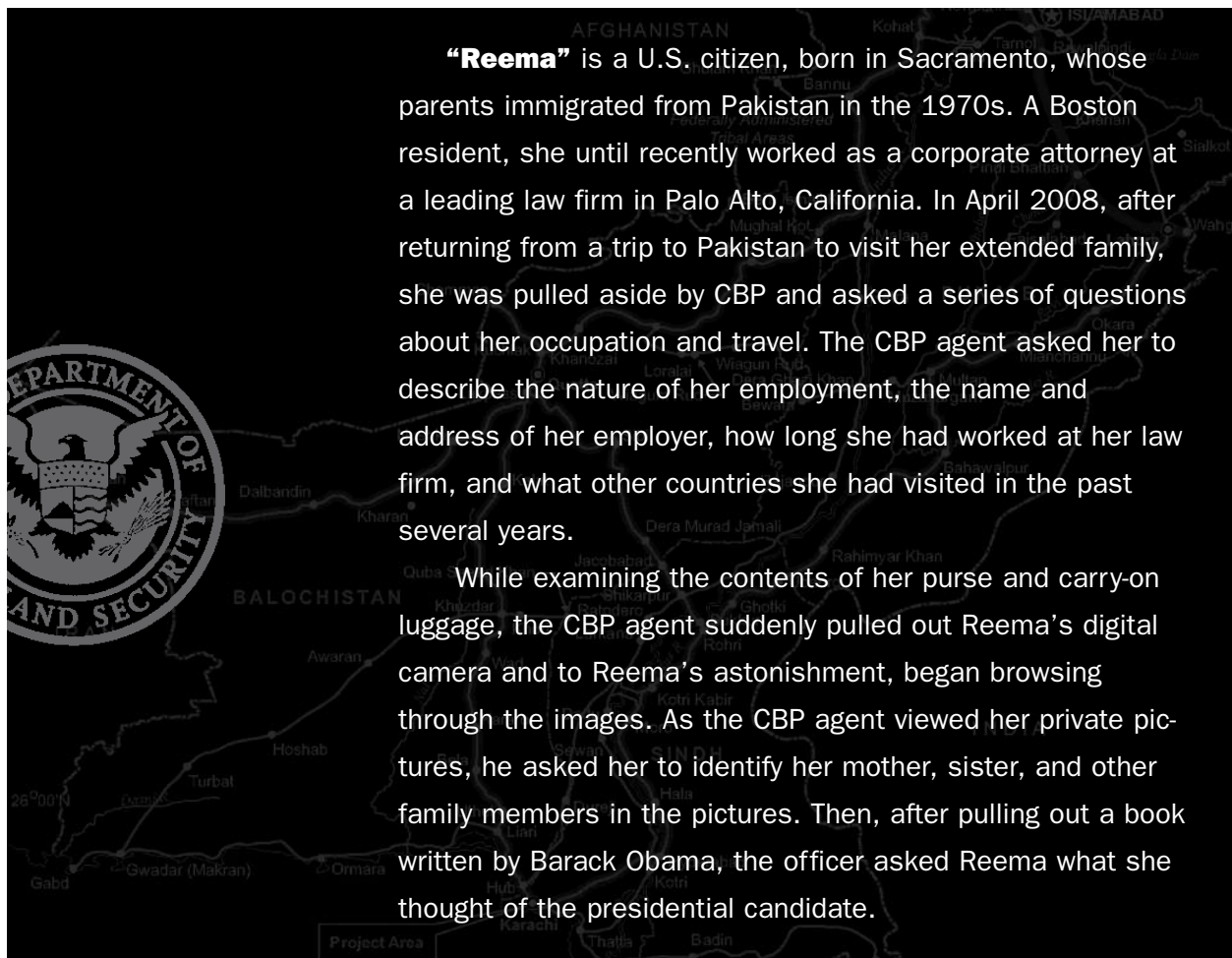
Under such a standard, CBP officers would be permitted to ask questions relevant to a person’s immigration status; for example, agents could inquire into the religious activities of a foreign national arriving in the United States on a religious worker visa. In addition, officers could ask about a person’s associations where there is a substantial nexus between the information sought from that person and an actual threat.<sup>23</sup> For example, this standard might permit CBP to ask about a person’s travels abroad on behalf of a

charity suspected of funding terrorism, but would prohibit the agency from asking a person which charitable groups she belongs to in the absence of information linking her to a suspect organization.

#### INTRUSIVE SEARCHES

In addition to experiencing intrusive questioning by CBP officials, many travelers have reported that they were compelled to hand over laptop computers, books, letters, digital cameras, confidential company documents, personal notebooks, cell phone SIM

cards, and stacks of business cards collected from colleagues abroad. As CBP officers searched these materials, sometimes for hours, they recorded the titles of books that travelers were reading, examined websites that individuals had viewed, downloaded files from laptop computers, and quizzed travelers on the content of their letters, documents, and reading materials. They frequently removed written materials from travelers and took the materials outside the travelers' sight, leading to concern that some materials may have been photocopied. These practices not only invade privacy, but also inhibit the free



**“Reema”** is a U.S. citizen, born in Sacramento, whose parents immigrated from Pakistan in the 1970s. A Boston resident, she until recently worked as a corporate attorney at a leading law firm in Palo Alto, California. In April 2008, after returning from a trip to Pakistan to visit her extended family, she was pulled aside by CBP and asked a series of questions about her occupation and travel. The CBP agent asked her to describe the nature of her employment, the name and address of her employer, how long she had worked at her law firm, and what other countries she had visited in the past several years.

While examining the contents of her purse and carry-on luggage, the CBP agent suddenly pulled out Reema’s digital camera and to Reema’s astonishment, began browsing through the images. As the CBP agent viewed her private pictures, he asked her to identify her mother, sister, and other family members in the pictures. Then, after pulling out a book written by Barack Obama, the officer asked Reema what she thought of the presidential candidate.

exchange of ideas. Mohamed Shommo, a Silicon Valley marketing representative who has been searched several times at the border, now refrains from bringing “political” books into the United States for fear of inviting greater scrutiny.<sup>24</sup> Imam Tahir Anwar, the spiritual leader of a San Jose mosque, no longer carries his laptop computer when he travels overseas, fearing that the confidential e-mail messages from congregation members he counsels will be exposed.<sup>25</sup>

#### ROLLING BACK RESTRICTIONS ON SEARCHES

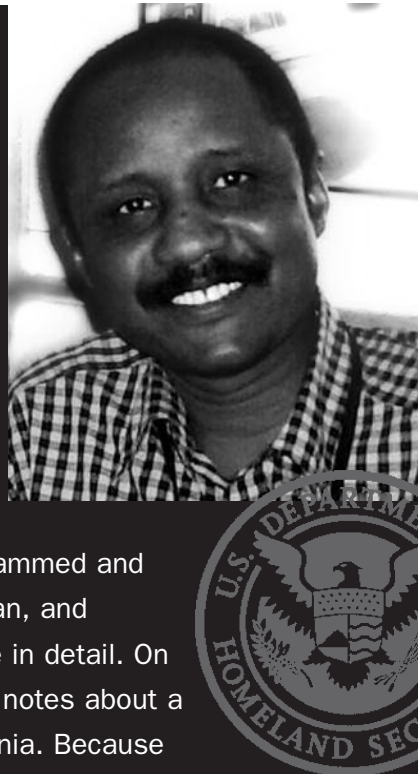
In July 2008, the Bush administration made public a new policy that gave border officers broad authority to examine travelers’ papers and electronic devices, even when agents had no reason to believe that a traveler posed a threat to national security or had violated the law.<sup>26</sup> The policy authorized border officers, without any individualized suspicion, to “review and analyze” information in individuals’ books, printed materials, laptop computers, and other electronic or digital storage devices.<sup>27</sup> Moreover, the policy permitted border officers to keep documents and electronic devices, or copies of files, for an unspecified “reasonable period of time to perform a thorough border search.”<sup>28</sup>

The 2008 CBP border search policy, which largely adopted an interim 2007 guidance,<sup>29</sup> marked a pronounced departure from previous rules governing border searches that provided broader protection for individuals’ First Amendment rights. The earlier government policy issued in 1986 and revised in 2000 set limits on the reading and copying of travelers’ documents and papers.<sup>30</sup> The older policy instructed border agents not

to read personal correspondence, as a general matter, and told agents that while they could “glance” at documents, they could read them only if they had “reasonable suspicion” that the documents were “merchandise” subject to Customs enforcement.<sup>31</sup> In addition, prior to 2007, border agents could copy materials only where they had “probable cause” to believe a law had been violated.<sup>32</sup> In 2007, however, CBP authorized officers for the first time to “review and analyze” papers without any individualized suspicion.<sup>33</sup> Furthermore, in 2007, CBP lowered the bar for copying documents to “reasonable suspicion” and in 2008, the agency altogether eliminated any requirement for individualized suspicion for copying documents.<sup>34</sup>

The government had adopted the original policy protecting First Amendment rights after U.S. citizens in the 1980s challenged the Customs Service for searching and seizing the books, personal papers, and other documents of travelers returning from Nicaragua.<sup>35</sup> U.S. professors, journalists, and other citizens subject to these searches claimed that this practice, undertaken to prevent the entry of “seditious” materials, invaded constitutional rights.<sup>36</sup> In response, the Customs Service adopted two directives limiting Customs searches, an implicit recognition that arbitrarily reading and copying the letters, diaries, and personal papers of travelers would chill Americans’ rights to free speech and free expression.<sup>37</sup> Moreover, after the adoption of these policies, a federal district court established another restriction, ruling that to protect travelers’ rights to free expression, Customs could not provide travelers’ written materials to other agencies unless the agencies agreed

In late 2006, **Hassan Ahmed Mohammed**, a mechanical engineer in Sacramento who now has U.S. citizenship, was questioned and searched by CBP officers after returning with his wife from a trip to Sudan. Border agents examined books in his luggage about Arabic literature, Sudanese politics, and Saudi Arabia. The officers focused on one book about oil and politics in Saudi Arabia, and removed the book from his sight for some time, leading him to question whether information from the book had been photocopied. This was the second time that CBP agents searched his reading materials at length; in 2003, CBP officers met Mohammed and his family at the gate after they arrived on a flight from Sudan, and escorted them to a room where they examined their luggage in detail. On that occasion, officers reviewed his journal which contained notes about a professional conference Mohammed had attended in California. Because of his problems flying, Mohammed minimizes travel, even his attendance at job-related conferences, and has avoided bringing books back with him when returning home from the Sudan.



not to retain documents found not to violate the Customs statute.<sup>38</sup> Despite these decisions recognizing that overbroad border searches chill free expression, current CBP policy authorizes agents to probe into the thoughts and lives of ordinary travelers without any suspicion at all.

The new CBP policy also raises the additional concern that travelers' files will be shared with other agencies and retained in government databases, resulting in the potential creation of dossiers on the ideas and lawful activities of ordinary Americans. The policy permits CBP to share documents with other agencies for translation assistance without any individualized suspicion, and for "subject matter assistance" where there is "reasonable suspicion" of a violation.<sup>39</sup> While

CBP must ultimately destroy documents where it does not find probable cause of a violation,<sup>40</sup> other agencies which have received copies from CBP are not bound by this restriction.<sup>41</sup> The upshot is that law enforcement agencies may now receive and retain information that they would not have been able to obtain independently, bypassing Fourth Amendment protections from unreasonable searches.<sup>42</sup>

#### SEARCHES OF LAPTOP COMPUTERS AND ELECTRONIC DEVICES

The privacy concerns resulting from CBP's broad border search powers are particularly acute in the case of laptop

computers and other electronic devices, which can contain vast amounts of information – far beyond what travelers could carry on paper – and which can reveal intimate details about individuals' personal lives and habits. Not only can computer hard drives store millions of pages of text, but they can retain information on how people think, research, and relate to others in ways that paper documents cannot.<sup>43</sup> By searching a person's laptop, CBP can determine not only what the person has written, but also his emails, contacts, and activity on the web. For instance, several travelers whose laptop computers were searched by CBP officials, including Mohamed Shommo<sup>44</sup> and Haitham Abul Haija,<sup>45</sup> reported that border agents not only looked at saved files but also opened websites that these individuals had previously visited.

Laptop searches also create privacy concerns and needless expense for companies

whose employees may be forced to disclose sensitive data at the border. Many travelers who complained to the Asian Law Caucus about laptop searches are Silicon Valley engineers and entrepreneurs who were concerned about violating the confidentiality of company data. In addition, four out of five executives who responded to an Association of Corporate Travel Executives survey believed that laptop border searches provided good reason to limit proprietary information that employees carried.<sup>46</sup> In response to searches and seizures of corporate laptop computers, some companies have recently adopted policies requiring employees to remove or encrypt data before traveling internationally.<sup>47</sup>

Other professionals who regularly carry confidential information on their computers are also affected by laptop searches at the border. Lawyers fear that privileged client communications may be revealed, journalists



**Mohamed Shommo**, a marketing representative for a Silicon Valley high-tech company and a permanent resident of Sudanese origin, has been stopped several times by CBP agents since 2006. Agents searched his laptop computer on multiple trips, on one occasion asking him about websites he had visited. CBP officers examined family pictures on Shommo's digital camera and audio files on his iPod. CBP agents have also perused the books in his luggage, questioning him on a book about women's rights in Islam. Because of these searches, Shommo now avoids purchasing political books abroad, deletes pictures from his camera, and minimizes what he carries into the United States.

PHOTOGRAPHED BY AMAL MONGIA

worry about the exposure of confidential sources, and leaders of religious congregations fear that personal information revealed in confidence by congregation members may be exposed. These fears are not unfounded. One individual who contacted the Asian Law Caucus, a U.S. citizen college professor and contributor to national magazines, was asked about the notes he had taken while reporting on political events in the Middle East and then was forced to part with his laptop computer for 45 minutes while CBP agents downloaded his files.<sup>48</sup>

#### REQUIRING REASONABLE SUSPICION FOR ELECTRONIC BORDER SEARCHES

Several members of Congress have proposed legislation to limit searches of laptop computers and other electronic storage devices at the border.<sup>49</sup> Congress should enact legislation similar to the Travelers' Privacy Protection Act, which would prohibit electronic border searches in the absence of reasonable suspicion that a person is either inadmissible, carrying contraband, or violating a law enforced by DHS.<sup>50</sup> A reasonable suspicion standard would not prevent CBP from inspecting the electronic devices of individuals whom border officers had reason to believe posed a threat, but would remove the specter of unreasonable laptop searches for the vast majority of the traveling public. A reasonable suspicion standard would also deter racial, ethnic, and religious profiling, by forcing border officers to articulate some basis for the search.<sup>51</sup>

Without waiting for Congressional action, DHS should issue a rule patterned after the

Travelers' Privacy Protection Act, requiring reasonable suspicion for electronic border searches and data collection on the race, religion, ethnicity, and national origin of individuals subject to electronic border searches. In addition, the agency should restore limits on reading and copying travelers' materials, such as those that existed until 2007, to require reasonable suspicion to read documents and probable cause for copying files.<sup>52</sup> These measures would help ensure that individuals are not forced to cede their privacy or freedom of expression at our nation's doorstep.

#### BROAD AUTHORITY, LACK OF TRANSPARENCY

While CBP claims vast powers to question and search Americans at U.S. borders, the agency has exercised this broad authority with virtually no public oversight. The specific rules governing border officers' conduct, where they exist at all, are largely delineated in internal policies, rather than in statutes passed by Congress or regulations approved after public notice and comment.<sup>53</sup> As a result, the agency has impinged on the rights of individuals crossing the border without legislative oversight, transparency, or public accountability.

DHS invokes the Homeland Security Act, which created the agency, as authority for CBP agents to engage in intrusive practices at the border, including expanded powers to search and copy travelers' written materials and to question, detain, and fingerprint U.S. citizens to probe any potential association with terrorism.<sup>54</sup> The Act gave the agency responsibility for "[p]reventing the entry of

**Imam Tahir Anwar** is the spiritual leader of a mosque in San Jose, California and an active participant in his community, serving as a human rights commissioner for the city of San Jose and a board member for several interfaith groups. In 2008, he was awarded a Santa Clara County “Unity in Diversity” award in honor of his service. Anwar has also traveled as a guest of the U.S. State Department to speak abroad about the experiences of American Muslims. Despite Anwar’s broad civic engagement and community work, CBP has pulled him aside a dozen times for questioning and extensive luggage searches.

On one occasion, when Anwar was returning from a conference in Europe to which he had been invited by the U.S. government, agents examined a stack of business cards he had collected from other conference participants and took them to another room, leading him to suspect that they photocopied the business cards. On other occasions, border agents searched his laptop computer and cell phone. As Anwar wrote in a letter to federal officials, he teaches moderation, respect, and partnership with government agencies to his congregation, but his experiences at the border make him question why law enforcement officers fail to accord him the same respect he urges community members to show the government.

PHOTOGRAPHED BY AMAL MONGIA



PHOTOGRAPHED BY AMAL MONGIA

terrorists and the instruments of terrorism into the United States.”<sup>55</sup> Beyond announcing that broad mandate, however, the statute did not establish more specific rules for border questioning and searches, especially of U.S. citizens.

CBP also relies on a range of older customs and immigration statutes and regulations for authority to inspect travelers, but these laws, like the Homeland Security Act, do not set standards for CBP practices with the specificity that would allow CBP agents or travelers to understand the scope of permissible CBP actions at the border.<sup>56</sup> Moreover, these statutes and regulations have barely been amended since the creation of DHS and CBP, despite the new emphasis on counterterrorism and border security.<sup>57</sup>

Instead, the agency has acted pursuant to internal policies on border inspections, undermining transparency and public accountability for its actions. For example, CBP officers conduct inspections according to such policies as the Inspector’s Field Manual governing immigration inspections<sup>58</sup>; a 2006 directive on preventing terrorists from entering the United States<sup>59</sup>; and the 2008 policy on border searches of documents and electronic devices described above.<sup>60</sup> CBP only released these policies after the agency rebuffed initial requests for disclosure: members of Congress had to apply persistent pressure before the agency heeded their requests for information, and members of the public had to file administrative appeals or lawsuits before the agency complied with FOIA requests.<sup>61</sup>

Even beyond these specific policies, Congressional investigations and the agency’s own reports suggest that DHS has been overly secretive. For example, the agency

has demonstrated a reluctance to disclose information about its procedures even to congressional auditors that maintain confidentiality procedures.<sup>62</sup> The Government Accountability Office has called “burdensome” the processes by which DHS determines which documents are too sensitive to be reviewed by GAO auditors, making it difficult for Congress to assess the agency’s effectiveness.<sup>63</sup> The GAO urged the agency to “become more transparent and minimize recurring delays in providing access to information on its programs and operations.”<sup>64</sup> In addition, the agency’s own report on its compliance with the FOIA concludes that DHS has repeatedly failed to respond to public records requests in a timely fashion, violating the statute and delaying public disclosure.<sup>65</sup>

**To remedy DHS’s lack of transparency about the authority under which CBP exercises its border inspection powers, the agency should publish existing policies on its website and issue new rules pursuant to processes that provide for public notice and comment. The agency should also commit to complying with requests for information from Congress and the public.** These reforms would be consistent with President Barack Obama’s instruction to federal agencies to adopt a presumption in favor of disclosure regarding FOIA requests, to respond to requests in a timely fashion, and to use technology to make information public even without specific requests for that information.<sup>66</sup> For its part, Congress should require greater transparency from DHS and exercise oversight of CBP’s border policies and practices to better hold the agency accountable.

## **Summary of Recommendations**

Overbroad CBP questioning and searches at the border not only invade privacy and undermine civil liberties, but also discourage lawful travel and commerce and divert law enforcement resources from the investigation of real threats to national security. When CBP officers broadly interrogate individuals on their religious or political beliefs and activities unconnected to actual threats, it sends the wrong – and counterproductive – message that the U.S. government targets particular ideas or religions rather than terrorism or violence. When border officers ask travelers about their views on foreign policy or other broad political topics, it diverts their attention from probing actual indicators of potential threats. Similarly, when CBP agents engage in searches of individuals' reading materials or electronic devices without any basis for suspicion, they secure no benefit to national security even as they violate individuals' privacy and impose costs on businesses.

We recommend the following measures to DHS and Congress:

1. DHS: Issue a rule specifying that CBP officers may inquire into travelers' religious and political beliefs and activities only where:
  - 1) such questioning is reasonably related to resolving a legitimate issue regarding an alien's admissibility to the United States; or
  - 2) there is a substantial nexus between the information such questioning seeks to elicit from that person and the investigation of a specific threat to national security or of a potential violation of a statute which the agency is authorized to enforce.

2. DHS: Issue a rule establishing standards for border searches of electronic

devices modeled on the Travelers' Privacy Protection Act, including the requirement of reasonable suspicion for such searches;

3. DHS: Issue a rule restoring limits on CBP's authority to read and copy travelers' written materials, such as those that existed until 2007, including a requirement of reasonable suspicion for reading documents and probable cause for copying files;

4. DHS: Increase transparency about CBP border practices and policies by complying with the requirements of the Freedom of Information Act and Congressional requests for information and by publishing on its website, to the greatest extent possible, all agency directives and authorities governing border inspections; and

5. Congress: Enact the Travelers' Privacy Protection Act to establish standards for border searches of electronic devices, including the requirement of reasonable suspicion for such searches.

## CHAPTER TWO: **RACIAL, RELIGIOUS, AND NATIONAL ORIGIN PROFILING**

The overwhelming majority of those who shared their stories of intrusive questioning and searches with the Asian Law Caucus are Muslim or of South Asian or Middle Eastern descent. Many felt that Customs and Border Protection (CBP) had targeted them on account of their ethnicity, religion, or national origin. Some noticed that when they were taken aside for further questioning, everyone detained in the room with them appeared to be of the same ethnicity or was recognizable as Muslim because of a headscarf or other religious garb. Still others were told explicitly that border agents singled them out because of their national origin.

While CBP claims not to target travelers for border inspections based on their race, ethnicity, or religion, the agency as a matter of policy uses national origin as a basis for scrutinizing individuals, including U.S. citizens. Moreover, inadequate agency policies and procedures give little confidence that CBP officers are complying with instructions not to profile travelers based on their race, ethnicity, or religion. Profiling not only stigmatizes individuals and communities, but distracts border officers from more relevant indicators of suspicion, diminishes trust in law enforcement, discourages international commerce and tourism, and harms U.S. relationships with other nations.

### THE IMPACT OF PROFILING ON INDIVIDUALS AND COMMUNITIES

CBP profiling of travelers, whether on the basis of race, religion, national origin, or nationality, sends the message to targeted individuals and communities that they do not enjoy the same rights and protection as others, impairing their sense of belonging and security in the United States. For U.S. citizens who experience profiling, the practice confers second-class status, branding these citizens as outsiders despite their membership in the polity. For immigrants and visitors, profiling sends the message that America does not welcome people from other countries but fears them, shaping a negative image of the United States abroad and discouraging tourism, cultural exchange, and commerce. Sometimes, that message has been explicit: a CBP agent at San Francisco International Airport told one permanent resident, a Somali immigrant, after an intrusive search, “You are a foreigner and you will always remain a foreigner. Even if you become a U.S. citizen, you will always be a foreigner.”<sup>1</sup>

The impact of profiling at the border extends beyond the individuals who are questioned and searched, and affects broader communities that hear about the experiences of their friends and family. When Imam Tahir Anwar, the spiritual leader of a large mosque in San Jose who teaches moderation and civic engagement to his congregation, is

**Anila Ali**, a naturalized U.S. citizen originally from Pakistan, teaches middle school in an urban school district near Los Angeles. She is an active member of her local community, serving on the boards of the Irvine Public School Foundation and of several organizations that promote the culture of Pakistan, including the Pakistan Arts Council. In December 2007, she flew back to Los Angeles International Airport after attending her mother's funeral in Pakistan. A CBP officer shouted at her to step aside, saying: "You're here from Pakistan? Go over there!" CBP officers took her aside while a police dog sniffed her belongings.

A CBP agent asked Ali about her travels and handled every item in her purse, even opening tampons. When Ali asked the agent's supervising officer why CBP had singled her out, the supervisor said that it was because of where she was born and because of



her name. This experience was the fifth time in recent years that border officers pulled Ali aside for questioning and searches. And it was not the first time they told Ali that her Pakistani origin was to blame; a year earlier, she had been returning to the United States with her teenage son from London, when CBP agents subjected her to an extra luggage search before permitting her to board her U.S.-bound flight. When Ali protested that she was a U.S. citizen, the agent told her that her citizenship did not matter: "It's where you were born."

stopped and questioned each time he returns to the United States, it conveys to Muslim Americans more generally that the U.S. government targets even the most mainstream of religious leaders for discriminatory treatment.<sup>2</sup> When Lotfi Abdelli, a Tunisian actor arriving in the United States to promote a film with an anti-terrorism message at

a San Francisco film festival, is detained and interrogated for close to five hours, that experience tells Arab communities here and abroad that the U.S. government treats all Arabs as "terrorists," even those actively working to build bridges with Americans.<sup>3</sup>

Profiling also conveys to others outside targeted communities that particular races or

ethnicities are disloyal or suspicious; as the Ninth Circuit Court of Appeals noted, “Stops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone. . . [and that they] enjoy a lesser degree of constitutional protection – that they are in effect assumed to be potential criminals first and individuals second.”<sup>4</sup> And, as Professor David Cole has argued, the government’s practice of singling out nationals of Muslim or Arab countries communicates to the public at large that Arab or Muslim identity is a central factor for suspicion of terrorism, encouraging stigmatization and discrimination by private citizens.<sup>5</sup>

#### THE IMPACT OF PROFILING ON LAW ENFORCEMENT

Beyond stigmatizing individuals and communities, racial profiling has often been shown to be ineffective at apprehending individuals who present a threat or who have violated the law. CBP should know this based on its own experience: in the late 1990s, the U.S. Customs Service faced widespread allegations that it was singling out women and minority groups for invasive body searches aimed at uncovering drugs.<sup>6</sup> The General Accounting Office (GAO) investigated, and found that among U.S. citizens, black women were nine times more likely than white women to be X-rayed after being frisked or patted down, but less than half as likely to be found carrying contraband.<sup>7</sup> As a result of lawsuits, public scrutiny, and congressional hearings, Customs changed its personal search criteria to reduce

racial, ethnic, and gender bias.<sup>8</sup> One study found that after the search criteria were changed, the overall number of searches declined but Customs’ “hit rate” – its recovery of contraband – remained the same, suggesting that race-neutral criteria actually netted better results by focusing Customs officers on more relevant indicators of narcotics smuggling.<sup>9</sup>

Similarly, several post-9/11 government security initiatives that identified people for scrutiny based primarily on demographic criteria have been widely critiqued as ineffective. For example, the NSEERS Special Registration “Call-In” program, which required non-citizens from 25 predominantly Muslim countries to report to immigration offices to be fingerprinted, photographed, and interviewed, was terminated prematurely, and many government officials agreed that it had not been an effective method of identifying lawbreakers.<sup>10</sup> Although more than 80,000 foreign nationals registered under the program, not a single person was charged with a terrorism crime.<sup>11</sup> Similarly, the Department of Justice’s post-9/11 initiative to interview 7,600 non-citizens identified because of their gender, age, nationality, and date of entry into the United States failed to net a single terrorism conviction.<sup>12</sup>

As critics of racial profiling in the drug trafficking context have long argued, racially biased law enforcement methods erode the legitimacy of the rule of law and the criminal justice system, undermining relationships between communities and law enforcement and making it more difficult to secure convictions through the courts.<sup>13</sup> There is already evidence of this trend in post-9/11 America:

**Nabila Mango**, a 65-year-old Palestinian American who came to the United States more than forty years ago, has dedicated her life to serving her community and building bridges between the United States and the Arab world. She serves as a mental health therapist in the low-income Tenderloin neighborhood of San Francisco, counseling immigrants, domestic violence survivors, and others who are coping with mental illness. Mango teaches Arabic at local community colleges, brings Arab poets, artists, and musicians to the United States to share their culture with Americans, and helps direct an Arabic choir that performs in the San Francisco Bay Area.

Now, however, for the first time in her 40 years in the United States, Mango feels that her Arab origin has earned her a second-place status, despite her U.S. citizenship. It began when she was returning from a trip to the Middle East in 2007, and CBP agents questioned her about where she had traveled, where she had slept each night, what degrees she had, and the name and occupation of her adult daughter. CBP agents rifled through Mango's Arabic music books, took away personal documents and business cards she had collected from acquaintances, and removed her cell phone from her presence. Mango noticed that although she had flown from Germany, on a flight with passengers who appeared to be largely European, no else had been stopped and taken aside for questioning as she was. For days, Nabila remained shaken by her experience and even afraid for the safety of individuals whose numbers were programmed on her cell phone.

Since that experience, CBP has stopped Mango twice more after she returned to the

United States from trips to Latin America. After her last trip to the Galapagos Islands, border officers held her more than two hours, causing her to miss her connection to California and forcing her to scramble to find a hotel for the night. No one else from her party was detained. Each of these experiences has been not just an inconvenience, but a source of anxiety, fear, and insecurity, causing Mango to question her place in the United States as an Arab and a Muslim.

PHOTOGRAPHED BY AMAL MONGIA



in 2006, a field study commissioned by the Justice Department found that Arab Americans reported significant fear and suspicion of federal law enforcement agencies as a result of government policies, and community members and law enforcement officers alike identified diminished trust as the most significant barrier to greater cooperation.<sup>14</sup>

#### INADEQUATE DHS POLICIES ON PROFILING

CBP has often stated that it does not scrutinize travelers based on their race, ethnicity, or religion, but the agency's policies fail to provide sufficient protection against profiling. Then-DHS Secretary Michael Chertoff told the Senate Judiciary Committee in April 2008 that the agency does not ethnically profile U.S. citizens.<sup>15</sup> Similarly, Leticia Romero, CBP Assistant Director of Field Operations for Border Security in San Francisco, told the Asian Law Caucus that CBP does not profile travelers for searches or questioning based on their race, religion, religious garb, or ethnicity.<sup>16</sup>

DHS policies, however, send mixed signals to border officers on the permissibility of profiling. On the one hand, the CBP Officer Basic Training handbook directs CBP officers in using their border authority "never" to use "gender, race, color, religion or ethnic background as selection criteria."<sup>17</sup> Yet the primary DHS statement purporting to prohibit racial and ethnic profiling, a 2004 statement titled the "DHS Commitment to Race Neutrality," incorporates a blanket exemption for national security and border integrity,

leaving CBP inspections outside its scope.<sup>18</sup> The 2004 statement explicitly adopts the 2003 Department of Justice (DOJ) Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, which prohibits the consideration of race or ethnicity in "routine or spontaneous law enforcement decisions," such as traffic stops, and restricts the consideration of race or ethnicity in "specific investigations."<sup>19</sup> However, the DOJ Guidance completely exempts from these restrictions law enforcement activities related to national security and border integrity, leaving CBP traveler inspections altogether outside that Guidance and the 2004 DHS statement adopting it.<sup>20</sup>

Beyond CBP's inconsistent policies on profiling, the agency's inadequate training of border agents increases the risk that Americans may be flagged for scrutiny based on their race, ethnicity, religion, or other such grounds. In fall 2007, the GAO documented weaknesses in staffing and training of CBP officers which it concluded could compromise traveler inspections and undermine U.S. security.<sup>21</sup> Untrained or poorly trained officers are more likely to base traveler selection decisions on inappropriate grounds, particularly when the agency's policies send mixed signals about the permissibility of profiling.

Moreover, CBP's expanded use of a computerized traveler risk assessment system known as the Automated Targeting System raises concern that the agency has the means to single out travelers for improper reasons even before they meet a CBP agent. DHS states that the Automated Targeting System does not single out travelers based on "any objective physical characteristic or political, religious, racial, or ethnic affiliation."<sup>22</sup> But

concerns remain that this system could incorporate information on passengers' race, religion, or ethnicity from passenger name record data, providing CBP the capability to profile travelers at a systematic level.<sup>23</sup>

**DHS ought to adopt a rule prohibiting law enforcement decisions based on race, ethnicity, religion, and national origin while eliminating the blanket exemption for national security and border investigations. Such a rule would not prevent CBP from questioning or searching travelers whom the agency determines merit further scrutiny, but would require CBP to base selection decisions on non-discriminatory grounds.**

**To allow Congress and the public to monitor compliance with this rule, DHS should require CBP officers to log the gender, race, ethnicity, religion, national origin, and nationality, as known or perceived, of each individual subjected to secondary inspections, searches of electronic devices, or other special security measures at each port of entry, and to report this information on an annual basis.** In addition, DHS should log and report comparable demographic data for a statistically significant, random sampling of all travelers at each port of entry to permit a comparison between individuals selected for special scrutiny and travelers at large.<sup>24</sup> To protect individuals' privacy and preclude the retention of information on the race, religion, or other personal characteristics of individual travelers, the data collected should be maintained in aggregate form, not in a format that permits the information to be associated with identifiable individuals. Similarly, CBP officers should be instructed not to ask travelers about their race, religion,

or other demographic factors, but to report only such factors as known or perceived.

**For its part, Congress should enact the End Racial Profiling Act (ERPA), a federal bill last introduced in 2007 that would prohibit law enforcement agencies from relying to any degree on race, ethnicity, national origin, or religion in determining who to select for routine or spontaneous law enforcement investigations or other activities, "except when there is trustworthy information, relevant to the locality and timeframe, that links a person of a particular race, ethnicity, national origin, or religion to an identified criminal incident or scheme."<sup>25</sup>** The Act specifically includes border inspections among law enforcement investigations for which profiling is prohibited.<sup>26</sup> In addition, ERPA authorizes civil actions to enforce the law and establishes training, data collection, and other requirements for federal agencies to ensure compliance.<sup>27</sup>

**"CONNECTIONS TO COUNTRIES":  
NATIONAL ORIGIN PROFILING BY  
ANOTHER NAME**

While CBP claims not to use a person's race, ethnic background, or religion in deciding whom to select for additional questioning or searches, it openly relies on what it describes as travelers' "connections" to particular countries. For instance, the DHS Commitment to Race Neutrality states: "Rather than relying on race or ethnicity, it is permissible and indeed advisable to consider an individual's connections to countries that are associated with significant terrorist activity."<sup>28</sup> CBP's practice of flagging travelers

based on their “connections to countries,” however, essentially brands as suspicious individuals of particular national origins, resulting in discrimination no less invidious than the racial, ethnic, and religious profiling that CBP has disavowed.

For example, in June 2004, CBP targeted individuals of Pakistani origin, including naturalized U.S. citizens, on the expansive justification that that “persons of Pakistani descent are increasingly being identified” with “extremist activities.”<sup>29</sup> A June 17, 2004 “Intelligence Driven Special Operation” bulletin directed CBP agents at six major ports of entry to “[i]ncrease scrutiny of passengers who are Naturalized citizens or Legal Permanent Residents of Pakistani descent” who exhibited evidence of “suspicious travel,” such as short unexplained stays or unusual bruises or burn marks that might have been acquired in terrorist training camps.<sup>30</sup> Far from affecting only those whose behavior is actually “suspicious,” this directive could target an ordinary Pakistani American who has lived in the United States since childhood who makes a short visit to Pakistan to visit extended family.

In addition to issuing such special bulletins profiling travelers of particular national origins, CBP may be routinely targeting travelers from a list of “special interest” countries. According to a McClatchy Newspapers account citing an Immigration and Customs Enforcement (ICE) intelligence memo, U.S. officials considered consolidating existing lists of “suspect nationalities” used by federal agencies to target certain individuals for added security measures.<sup>31</sup> The proposed consolidated list included over 35 countries, most with significant Muslim or Arab

populations.<sup>32</sup> In addition, the ICE memo stated that the agencies had considered creating a single definition of a “special interest alien,” who irrespective of nationality, would be subject to a “full court press” of interviews and inspections based on ethnic ties or sympathies to listed countries.<sup>33</sup> If the proposed concept of a “special interest alien” described in this memo were adopted, CBP would be authorized to perform extra searches of a fourth-generation Canadian citizen living in the United States merely because her ancestors came from Syria.

Targeting U.S. citizens and noncitizens on the basis of their national origin is similar to racial and ethnic profiling – which CBP has disavowed – in that it turns on the false premise that individuals of a particular demographic group are more likely than others to be associated with criminal or terrorist activity. Like racial and ethnic profiling, differential treatment on the basis of national origin sends the public message that discrimination against certain individuals or communities is sanctioned by the state. Furthermore, the targeting of individuals of certain nationalities risks antagonizing foreign nations whose citizens are subject to discriminatory treatment. For instance, senior U.S. government officials including FBI Director Robert Mueller told the 9/11 Commission that the NSEERS “Special Registration” program, which required men of 25 suspect nationalities to register at immigration offices for fingerprinting, photographs, and interviews, harmed U.S. relations with targeted foreign countries.<sup>34</sup> Finally, while it is sometimes argued that singling out noncitizens based on their current *nationality* is distinct from treating individuals differently based on their *origin*,

in practice, nationality profiling often bleeds into national origin profiling; for example, NSEERS “Special Registration” was applied not just to individuals with particular foreign passports but also to individuals who were born in designated countries, even if they were citizens of “non-suspect” countries.<sup>35</sup>

The targeting of individuals based on their connections to foreign countries is even more problematic when applied to U.S. citizens on account of their foreign birth. Secretary Chertoff told the Senate Judiciary Committee that CBP does not profile U.S. citizens based on national origin,<sup>36</sup> but the CBP bulletin targeting individuals of Pakistani origin demonstrates that the agency has, in fact, called for greater scrutiny of U.S. citizens based on their country of birth.<sup>37</sup> This form of national origin profiling entails discrimination against naturalized U.S. citizens, as compared to U.S.-born citizens, despite the fact that U.S. law generally does not permit the “assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born.”<sup>38</sup> Moreover, naturalized citizens have already taken an oath of allegiance to the United States and undergone security checks before being granted their citizenship – a screening process that U.S.-born citizens never undergo – making the targeting of this class of U.S. citizens even less rational or justifiable.

#### TRAVEL PATTERNS

In addition to relying explicitly on the national origin of incoming travelers, CBP’s practice of singling out travelers based on the countries they have visited during their

travels may amount, in practice, to national origin profiling justified by a more politically acceptable label. The agency’s Personal Search Handbook, applicable to pat-down, strip searches, cavity searches, and other physical searches of people, instructs officers: “A person’s country of departure, transit, or destination are permissible factors to consider.”<sup>39</sup> CBP officers have also indicated that they consider travel to high-risk destinations as a factor warranting greater scrutiny.<sup>40</sup> In theory, this basis for scrutiny looks to behavior – where people go rather than who they are – avoiding the premise that a person of a particular background has a higher propensity for criminal activity. Depending on how this factor is applied, however, use of travel histories could serve as a proxy for more invidious profiling, since most travelers to particular countries are people who have ethnic ties to those countries.

CBP has never explained publicly how it determines which countries warrant greater scrutiny or how it factors travel into selection decisions, making it impossible to determine whether CBP is using travel patterns in an appropriate fashion to identify high-risk travelers or as a proxy for wrongful profiling. For example, if CBP flags as suspicious travel to *any* country with a predominantly Muslim population, then it seems that the agency is using national origin and religion as proxies for dangerousness. This use of travel patterns might subject to intrusive questioning and searches an innocent U.S. citizen who travels outside the United States for the first time to visit an ailing grandparent in Jordan. On the other hand, if the agency flags individuals whose travel history matches numerous points on known terrorists’ international

travel routes, then use of this factor is distinguishable from profiling based on national origin, religion, or similar characteristics. **Given that an analysis of travel patterns can provide legitimate risk assessments or serve as a proxy for invidious profiling, Congress should request the GAO to investigate CBP's use of travel patterns to determine whether it is conceived and applied in a neutral and justifiable manner.**

### **Summary of Recommendations**

Profiling U.S. citizens, residents, and other travelers at the border sends the message that certain races, religions, or national origins are not entitled to the same rights and protections as others. Besides stigmatizing those who are directly affected, policies of profiling can damage U.S. national security by undermining trust in law enforcement agencies and the rule of law, by distracting law enforcement agencies from criteria that are more relevant indicators of potential threats, and by antagonizing other nations. In spite of these harms, CBP has acknowledged subjecting travelers of certain national origins to greater scrutiny at the border, and without reporting requirements and adequate training to deter profiling, some border agents may be basing selection decisions on other inappropriate grounds as well.

We recommend the following measures to DHS and Congress:

1. DHS: Issue a rule prohibiting profiling based on race, ethnicity, religion, and national origin in border inspections and

eliminating the blanket exemption for national security and border investigations in the agency's current racial profiling guidance;

2. DHS: Require CBP officers to log, in aggregate format only, the gender, race, ethnicity, religion, national origin, and nationality (as known or perceived) of each individual subjected to secondary inspections, searches of electronic devices, or other special security measures at each port of entry, and to report this information on an annual basis, along with comparable demographic data for a statistically significant, random sampling of all travelers at each port of entry;

3. Congress: Enact the End Racial Profiling Act to prohibit law enforcement agencies from relying on race, ethnicity, national origin, or religion in border inspections and other investigatory decisions; and

4. Congress: Request a GAO audit analyzing CBP's use of travel patterns in flagging individuals for questioning and searches to ensure that travel patterns are not used as a proxy for invidious profiling.

## CHAPTER THREE: THE BLOATED AND MISMATCHED TERRORIST WATCHLIST

The federal government's bloated and mismatched terrorist watchlist is responsible for the unwarranted detention, questioning, and search of many innocent Americans at U.S. borders. The list is secret, so no one knows for certain whether he or she is on the list. But a number of people who shared their stories of intrusive border questioning and searches with the Asian Law Caucus surmise that they are mistakenly associated with the watchlist because CBP officers flag them each and every time they return to the United States. In addition, border officers told several people directly that they singled them out for invasive inspections because their name appeared to match a name on the list.

Far from affecting only those who actually present a threat, the terrorist watchlist ensnares many innocent individuals at the border. Some travelers may be on the list, but should not be: for instance, they may be listed because of false allegations, outdated information, or the mistake of a law enforcement agent. Others are not on the list at all, but their names are flagged because of a misidentification. Both categories of people end up suffering from the humiliation and stigma of unjustified repeated screenings at the border. More than a mere "inconvenience," the experience of being treated like a suspect every time a person returns home to the United States impairs individuals' sense of belonging and security as Americans.

Law enforcement agencies such as CBP use the terrorist watchlist to focus their

attention on those who are likely to present the greatest threat in situations where they cannot subject all individuals to extensive security measures. Yet enduring problems with the terrorist watchlist mean that innocent people continue to be stigmatized and harassed without reason, while real threats may go undetected. DHS should reexamine its criteria for including and responding to watchlist records in the CBP border screening database. Agencies charged with maintaining the watchlist should conduct an immediate and comprehensive review of the database, adopt rigorous internal review procedures to ensure that only real suspects are designated, and create meaningful opportunities for innocent people to remove themselves from the watchlist.

### CBP'S USE OF THE TERRORIST WATCHLIST

CBP screens travelers seeking to enter the United States against the Interagency Border Inspection System (IBIS), a DHS database that includes information on criminal histories, immigration violations, and terrorist watchlist status.<sup>1</sup> The terrorist watchlist information in IBIS is drawn from the Terrorist Screening Database (TSDB), a centralized watchlist maintained by the FBI's Terrorist Screening Center. In addition to CBP, various law enforcement agencies use subsets of TSDB data to screen people: the Transportation Security Administration sends watchlist data to commercial airlines to



**Haitham Abul-Haija** is a 36-year-old marketing engineer who lives with his wife and three children in Sacramento. He first came to the United States from Jordan 14 years ago to pursue a graduate degree, stayed on to work in the high-tech industry, and became a U.S. citizen. Now, as a marketing engineer for one of the largest semiconductor companies in the country, he frequently travels internationally, mostly to Europe. But CBP agents stop, question, and search Abul-Haija nearly every time he returns home. Since 2007, CBP has targeted him for inspections seven times in a row.

On the worst of these occasions, in September 2007, Abul-Haija was returning from a business trip to London with his colleagues. He showed his passport to a CBP officer at San Francisco International Airport who then asked him to step aside. Then, for more than two hours, CBP agents questioned Abul-Haija about the names, positions, and citizenship of his traveling companions; about the details of family members in the United States and abroad; and about his views on recent political events in Syria and Israel. For half an hour, officers examined his laptop computer, visiting websites whose addresses he had saved in a “favorites” folder. CBP agents inspected his cell phone, even dialing a number on the phone, and examined everything in his wallet. When Abul-Haija asked what had led to such an invasive inspection, an officer made clear that this selection was not random – he was “in the system.”

Abul-Haija has written multiple complaints and tried the government’s “redress” process for those who are frequently selected for border inspections, but the detentions persist. When he complains to CBP agents, they sometimes agree that the system is broken – but insist they have to follow the routine regardless of how pointless the repeated questions seem. Abul-Haija wants nothing more than to clear his name, and has gone so far as to contact the FBI to ask for an opportunity to prove he is no threat. For Abul-Haija, the inability to clear his name and the repeated experience of harassment at the border have eroded his sense of belonging in America, and led him to question whether he can continue in a career that requires such frequent travel. “I feel unwelcome to my own country,” he says. “I never experienced such a feeling at any international airport in the world, including Third World countries. But I have this feeling when I come home.”

screen airline passengers before they board flights; the State Department uses the watchlist to vet foreigners applying for visas to the United States; and state and local police screen people they arrest or encounter in routine traffic stops.<sup>2</sup> The TSDB as a whole now includes over one million records pertaining to 400,000 people, including U.S. citizens and residents, and is growing at an alarming rate of some 20,000 records per month.<sup>3</sup>

CBP screens individuals against more name records from the consolidated terrorist database than any other federal agency, heightening concerns that innocent travelers are facing needless invasions of civil rights and liberties at U.S. borders.<sup>4</sup> CBP screens travelers against 98% of all records in the database,<sup>5</sup> because it maintains the loosest criteria for importing TSDB records into its own screening database.<sup>6</sup> The agency is responsible for six out of ten calls from law enforcement agencies to the Terrorist Screening Center regarding possible encounters with persons on the watchlist.<sup>7</sup>

Unlike CBP, other agencies use more limited watchlist data in part to avoid snagging innocent individuals whose names are similar to those of watchlisted persons. For instance, DHS believes that if a larger watchlist were used by commercial airlines for passenger airline screening, it would “expand the number of misidentifications to unjustifiable proportions without a measurable increase in security.”<sup>8</sup> Out of the same concern, the FBI database for state and law enforcement agencies omits terrorist watchlist records that contain incomplete identifying information.<sup>9</sup> Although CBP’s greater use of the terrorist watchlist has been explained as a function of its mission to screen all travelers at U.S. borders, including both

U.S. citizens and noncitizens,<sup>10</sup> it is not clear why this mission would differentiate it from other law enforcement agencies that also encounter both citizens and noncitizens. The fact that CBP routinely screens travelers against nearly a million terrorist watchlist records, in spite of other agencies’ concerns about misidentifications, suggests that CBP is likely subjecting many innocent individuals to unwarranted questioning and searches.

CBP subjects travelers whose names are flagged by the watchlist to intensive inspections at the border. If a traveler appears to match a watchlisted person, CBP coordinates with the Terrorist Screening Center to determine whether the traveler is indeed the person on the watchlist.<sup>11</sup> CBP does not deny admission to most individuals positively matched to the watchlist, because the government does not have “sufficient derogatory information” to deny entry, but subjects them to in-depth questioning and the inspection of their travel documents and belongings.<sup>12</sup> In September 2006, CBP issued a directive to all field offices regulating the activities of counterterrorism response teams responsible for handling encounters with watchlisted persons.<sup>13</sup> The directive calls for an “intensive secondary inspection, document review, questioning, and examination” of suspects, including a review of “electronic media.”<sup>14</sup>

This directive makes clear that association with the terrorist watchlist is one reason that some travelers may face intensive scrutiny at U.S. borders. Yet as described below, government audits suggest that many law-abiding individuals, including U.S. citizens, continue to be wrongfully snared by the watchlist: some merely share a common name as a watchlisted person, while others are included on the list without justification.



**Motsem Benothman**, a resident of Irvine, California, is a U.S. citizen of Libyan origin who works in IT sales.<sup>15</sup> He has lived in the United States since he was four years old. In July 2007, he was returning from Canada with his wife and 1 year old daughter after vacationing in Vancouver. At the Blaine, Washington border crossing, border agents scanned the family's passports, told them to park their car, and instructed them to wait inside a room for secondary screening. Agents examined all their possessions, noting down information such as phone numbers and credit card numbers from their wallets. The detention lasted close to four hours, during which time they were told only that border agents were waiting for a call from headquarters and that their experience was just a "routine random secondary screening." As a result of the detention, Benothman's family missed their flight from Seattle back to Southern California and spent a day making arrangements to get back home.

Later that year, Benothman and his wife were returning by car from Mexico through the San Diego border crossing after vacationing in Rosarito. After scanning their passports, two border agents came to the car, grabbed their arms, and led them into a nearby building. CBP agents directed Benothman and his wife to place their hands on the counter and spread their legs. Agents searched them from head to toe; a CBP employee required Benothman's wife to remove her religious headscarf, jacket, and shoes and searched her hair and head. Agents removed the couple's belongings and directed the couple to sit down without speaking to one another. Soon afterwards, agents handcuffed both Benothman and his wife and transferred them to another room, where they were again instructed to wait without communicating. After four hours, border agents fingerprinted the couple, and one agent explained that Benothman's name was similar to that of a "person of interest," requiring clearance from headquarters. Upon finally being permitted to leave, Benothman asked whether he'd face the same experience if he crossed the border again the next day. The agent said yes.

### THE MISMANAGED AND INACCURATE WATCHLIST

Recent government investigations have found significant problems with the accuracy and quality of watchlist records. According to a September 2007 Justice Department Inspector General audit, when the Terrorist Screening Center reexamined watchlist files in response to individuals' complaints about law enforcement encounters, nearly half the watchlist records required changes or removal from the list.<sup>16</sup> In addition, when the Terrorist Screening Center conducted a "special quality assurance" review of the Transportation Security Administration's "No-Fly List," the list was cut in half: thousands of persons were downgraded as threats or removed from the agency's lists altogether.<sup>17</sup> Unfortunately, this "special quality assurance" review covered only a small fraction of the TSDB – some 71,000 records of what is now over one million records – and most of the database has not been subject to this level of oversight.<sup>18</sup> Given that the Terrorist Screening Center's own reviews find such high levels of inaccuracy, one expects that if the watchlist were reviewed by an independent auditor, or if listed individuals were given an opportunity to rebut the factual allegations against them, even more people would be found to have been improperly placed on the list.

This level of inaccuracy serves neither the civil rights and civil liberties of affected individuals nor the objective of protecting national security. Given the large number of border crossings each day<sup>19</sup> and CBP officers' complaints over inadequate staffing at ports of entry,<sup>20</sup> each CBP encounter with an

improperly watchlisted person diverts precious resources from the investigation of actual threats. The additional resources that would be required up front to conduct a more comprehensive review of the TSDB would be more than justified by the reduction in law enforcement resources required to detain, search, and question improperly watchlisted individuals.

### INADEQUATE INTERNAL REVIEW PRIOR TO DESIGNATION ON THE WATCHLIST

There is little independent review of the designation of individuals to the terrorist watchlist, increasing the risk that innocent, ordinary U.S. citizens and immigrants may be added to the list. In theory, before a name is added to the watchlist, multiple agencies review the factual evidence against a person and approve his or her inclusion. In the case of an individual suspected of ties to international terrorism, procedures call for three levels of review: first, an intelligence or law enforcement agency (often the FBI, State Department, or Central Intelligence Agency) nominates the person for inclusion in the TSDB.<sup>21</sup> Second, the National Counterterrorism Center (NCTC) is charged with vetting the nomination.<sup>22</sup> And third, the Terrorist Screening Center is supposed to review the file and make the final decision to accept or reject the nomination.<sup>23</sup>

But in practice, all three agencies in this process – the source agency, the NCTC, and the Terrorist Screening Center – fail to follow important steps to ensure that the watchlist only includes those who present real threats. For example, a March 2008

Department of Justice Inspector General report concluded that the FBI's process for submitting names to the watchlist could lead to inaccurate and outdated data being included on the list.<sup>24</sup> The Inspector General found that FBI field offices were generally not reviewing nominations by individual field agents, bypassing an important internal level of review.<sup>25</sup> Worse still, the FBI often failed to remove or modify watchlist records, even after closing an investigation on a person or receiving new information about an individual, and even lacked procedures for the removal of certain classes of watchlisted individuals.<sup>26</sup> The Inspector General concluded that "the potential exists for watchlist nominations to be inappropriate, inaccurate, or outdated because watchlist records are not appropriately generated, updated or removed as required by FBI policy."<sup>27</sup> Although the FBI claimed to be improving its procedures in response to the Inspector General report,<sup>28</sup> even if it made those changes, thousands of individuals may have been added to the watchlist based on the flawed procedures previously in place.

Moreover, the NCTC and Terrorist Screening Center often defer to agencies supplying watchlist nominations rather than seriously vetting the submissions. The NCTC, which is supposed to determine whether there is "reasonable suspicion" to list a person, relies upon the originating agency's determination that the person meets that standard; the NCTC will accept the FBI's determination that a person qualifies unless it has "specific and credible" information that the designation was not appropriate.<sup>29</sup> Similarly, the Terrorist Screening Center relies primarily on nominating agencies to

determine whether or not a person meets the standard, and has rejected only one percent of nominations.<sup>30</sup> In fact, prior to March 2006, the Terrorist Screening Center did not even review the factual support for a nomination.<sup>31</sup> Whether this deference stems from bureaucratic indifference or political incentives that are always weighted in favor of overinclusion, the upshot is that names are added to the terrorist watchlist without real review.

#### LACK OF MEANINGFUL REDRESS FOR INNOCENT TRAVELERS

When the government maintains a secret terrorist watchlist that deprives innocent individuals of their rights, it must provide a meaningful way for mistakenly listed and misidentified individuals to clear their names. In February 2007, DHS established the Traveler Redress Inquiry Program (DHS TRIP), its latest mechanism for receiving travelers' complaints and reviewing files related to watchlisted persons.<sup>32</sup> DHS TRIP is supposed to enable travelers who experience repeated delays or screening at airports or borders to submit a complaint, with a copy of their passport or other identifying documents, so that their watchlist status can be investigated and possibly revised.<sup>33</sup> Yet DHS TRIP fails to provide redress for many individuals.

As an initial matter, the program is inaccessible to most travelers. Most people who reported intrusive border experiences to the Asian Law Caucus did not know of its existence. CBP agents provided generic "comment cards" or a fact sheet on the Interagency Border Inspection System to

those who complained about their experience, but did not tell these individuals that they could file a complaint through DHS TRIP regarding a possible watchlist match. CBP's website also does not provide an easily accessible route to the DHS TRIP website; its page on "How CBP Handles Traveler Complaints," for instance, does not mention or link to DHS TRIP.<sup>34</sup>

Individuals who did manage to file complaints regarding CBP inspections reported widespread frustration with the resolution. A number of people told the Asian Law Caucus that they waited for months, even up to a year, without a response. This concern finds support in the government's own audit: the fall 2007 Inspector General report found that, due in part to the absence of timeliness measures for completing redress requests, there were "excessive delays" in resolving complaints.<sup>35</sup> In addition, the same report noted that even where the Terrorist Screening Center revised its watchlist in response to complaints, agencies relying on that data, including CBP, failed to update their records in a timely fashion.<sup>36</sup> In one case, CBP did not make a change requested by the Terrorist Screening Center for more than 130 days.<sup>37</sup>

More fundamentally, the opaque nature of the redress process makes it nearly impossible for individuals to challenge their possible inclusion on the watchlist. Many people told the Asian Law Caucus that their experience with CBP inspections did not improve after filing a complaint. Because DHS does not disclose whether a person is on the watchlist or whether any changes were made to his watchlist status,<sup>38</sup> a person who files a complaint but continues to be flagged at the border has no way of knowing whether:

1) he is on the list, but the government determined that the listing was proper; 2) he is not on the list, but he is repeatedly screened for reasons unrelated to the watchlist; or 3) the redress process was simply ineffective at addressing the complaint.

Those who continue to experience intrusive questioning and searches at the border after an unsuccessful DHS TRIP complaint have no place to turn. First, CBP has not developed any administrative appeals process, meaning that innocent individuals affected by CBP's use of the watchlist cannot make use of the Terrorist Screening Center's existing appeals protocol.<sup>39</sup> The letter DHS sends to people closing a complaint about CBP inspections says nothing about how individuals can take further action.<sup>40</sup> Second, even if CBP made an appeals process available, the Terrorist Screening Center's existing appeals procedures do not give individuals the right to access the alleged derogatory information against them in order to contest the basis for their inclusion.<sup>41</sup> This places potentially watchlisted individuals in the position of establishing their innocence and proving a negative – why they should not be on a list – without any charge and in the face of secret evidence. As Justice Frankfurter noted in the context of secret evidence introduced in court, "fairness can rarely be obtained in secret, one-sided determination of facts decisive of rights."<sup>42</sup>

**Individuals who believe they may be on the watchlist without justification should have access to an administrative hearing with an independent decision-maker and an opportunity for judicial review to contest their possible inclusion on the list.**<sup>43</sup> Proposals issued by the Constitution

Project and Heritage Foundation recommend that in such hearings, the government bear the burden of proof and that arbiters apply a *de novo* evidentiary standard.<sup>44</sup> Even where access to classified information might be limited to protect national security objectives,<sup>45</sup> these proposals from politically divergent perspectives agree that watchlisted persons must have some recourse to external adjudication.

### **Summary of Recommendations**

When innocent people are ensnared by the terrorist watchlist at the nation's borders, it serves neither the civil liberties of the individuals themselves nor the interest of national security. Individuals who are wrongfully flagged by the watchlist face anxiety, humiliation, and stigma – particularly when they are handcuffed, physically searched, or otherwise treated like criminals – and sometimes bear economic costs from the delay caused by unwarranted watchlist-based inspections. Moreover, the wrongful inclusion or misidentification of innocent travelers diverts scarce law enforcement resources away from examining actual threats to U.S. security.

We recommend the following measures to DHS, the Terrorist Screening Center, and the Department of Justice Inspector General:

1. DHS: Establish stricter standards for incorporating watchlist records from the TSDB into CBP's Interagency Border Inspection System (IBIS) to prevent innocent individuals from being misidentified and ensure that when the Terrorist Screening Center removes or modifies TSDB watchlist data, such changes are made to IBIS within 14 days;

2. Terrorist Screening Center: Conduct a comprehensive review and cleansing of the records in the TSDB at least as rigorous as the Terrorist Screening Center's "special quality assurance" review of the No-Fly List, and require annual reviews of the TSDB thereafter;

3. Department of Justice Inspector General: Conduct a detailed review of watchlist records removed from the TSDB in response to individual complaints to determine which agencies, institutions, and procedures were responsible for improperly nominating and/or approving the inclusion of those individuals to the watchlist; and

4. DHS, the Terrorist Screening Center, and the Department of Justice: Establish a meaningful procedure for individuals who believe they are affected by the terrorist watchlist to clear their names:

- a. Require CBP officers at ports of entry to inform individuals with concerns about border inspections about DHS TRIP and make available a complaint procedure on-site;

- b. Require the Terrorist Screening Center to complete DHS TRIP redress inquiries within 60 days;

- c. Establish and publicize widely an appeals process for the resolution of CBP-related watchlist complaints;

- d. Require the Department of Justice, which oversees the Terrorist Screening Center, to establish a terrorist watchlist review board that acts as a neutral, independent forum to hear administrative appeals from individuals who believe they are improperly watchlisted, without limiting the opportunity for judicial review in federal court.

## CHAPTER FOUR: **CONCLUSION AND RECOMMENDATIONS**

Congress and the new administration have an opportunity to restore civil rights, civil liberties, and privacy protections to border inspections so that Customs and Border Protection can fulfill its critical mission of safeguarding U.S. borders while staying true to our core values.

The stories in this report document the profound impact that experiences of harassment and profiling have had on U.S. citizens, residents, and others who call America home. Rather than receiving a welcome as they return home, many individuals now feel that they are treated with a presumption of disloyalty and branded as perpetual outsiders, no matter how strong their ties to the United States. These experiences have led people to question their place in the United States, to reconsider careers because they cannot travel freely, and to feel anxious and fearful every time they return to the United States – a feeling of *insecurity* every bit at odds with CBP's mission of safeguarding our collective security.

The impact of intrusive and unwarranted CBP inspections extends beyond the individuals who are questioned and searched; these practices affect businesses, communities, and even U.S. relations with other nations. Businesses have had to adopt new policies to reduce the risk that border searches of employee laptop computers will reveal sensitive data. Muslim, South Asian, and Middle Eastern American communities have come to expect discriminatory treatment from their own government. And the image

of the United States has suffered abroad because of the poor treatment of foreign nationals at U.S. borders.

Many of the intrusive CBP practices described in this report do not benefit, and frequently harm, our security. When CBP officers question individuals on their political views and religious practices unconnected to an investigation of an actual threat, or search laptop computers of travelers whom they do not reasonably suspect of wrongdoing, they lose opportunities to probe activities or individuals that present real threats. Similarly, when CBP scrutinizes innocent people based on misguided racial, religious, national origin profiling or due to mistaken matches with a terrorist watchlist, these actions do not make us any safer.

Congress and the Obama administration should reform CBP and restore America's welcome to individuals returning home. We offer the following recommendations:

### **Exercising Oversight of Customs and Border Protection**

Both Congress and the White House should further investigate the civil rights, civil liberties, and privacy concerns presented by CBP inspections and reform the agency's border screening practices.

I. Congress: Request the Government Accountability Office to prepare, within the next year, a report on the civil rights, civil liberties, and privacy concerns presented by

CBP traveler inspections, with a particular focus on (a) inappropriate questioning of individuals, including questioning on religious and political views and activities; (b) intrusive searches, including searches of travelers' electronic devices and reading materials; (c) the use of race, ethnicity, religion, and national origin profiling to subject particular individuals to border inspections; and (d) CBP's use of the terrorist watchlist to flag particular individuals for scrutiny.

2. Privacy and Civil Liberties Oversight Board: Conduct, within the next year, an assessment of the civil rights, civil liberties, and privacy concerns presented by CBP traveler inspections, with a particular focus on (a) inappropriate questioning of individuals, including questioning on religious and political views and activities; (b) intrusive searches, including searches of travelers' electronic devices and reading materials; (c) the use of race, ethnicity, religion, and national origin profiling to subject particular individuals to border inspections; and (d) CBP's use of the terrorist watchlist to flag particular individuals for scrutiny.

### **Restoring Civil Liberties in Border Questioning and Searches**

Overbroad questioning into travelers' religious and political beliefs and activities and suspicionless searches of travelers' reading materials and electronic devices impinge on civil liberties and privacy without benefiting our security. We propose the following measures to remedy these abuses.

3. DHS: Issue a rule specifying that CBP officers may inquire into travelers' religious

and political beliefs and activities only where:

- a. such questioning is reasonably related to resolving a legitimate issue regarding an alien's admissibility to the United States; or
- b. there is a substantial nexus between the information such questioning seeks to elicit from that person and the investigation of a specific threat to national security or of a potential violation of a statute which the agency is authorized to enforce;

4. DHS: Issue a rule establishing standards for border searches of electronic devices modeled on the Travelers' Privacy Protection Act, including the requirement of reasonable suspicion for such searches;

5. DHS: Issue a rule restoring limits on CBP's authority to read and copy travelers' written materials, such as those that existed until 2007, including a requirement of reasonable suspicion for reading documents and probable cause for copying files;

6. DHS: Increase transparency about CBP border practices and policies by complying with the requirements of the Freedom of Information Act (FOIA) and congressional requests for information and by publishing on its website, to the greatest extent possible, all agency directives and authorities governing border inspections; and

7. Congress: Enact the Travelers' Privacy Protection Act to establish standards for border searches of electronic devices, including the requirement of reasonable suspicion for such searches.

## **Eliminating Racial, Religious, and National Origin Profiling**

Racial, religious, and national origin profiling at the border stigmatizes individuals and communities, distracts border officers from more relevant indicators of suspicion, diminishes trust in law enforcement, and harms U.S. foreign relationships and commerce. DHS and Congress should act to prohibit CBP officers from profiling travelers.

8. DHS: Issue a rule prohibiting profiling based on race, ethnicity, religion, and national origin in border inspections and eliminating the blanket exemption for national security and border investigations in the agency's current racial profiling guidance;

9. DHS: Require CBP officers to log, in aggregate format only, the gender, race, ethnicity, religion, national origin, and nationality (as known or perceived) of each individual subjected to secondary inspections, searches of electronic devices, or other special security measures at each port of entry, and to report this information on an annual basis, along with comparable demographic data for a statistically significant, random sampling of all travelers at each port of entry;

10. Congress: Enact the End Racial Profiling Act to prohibit law enforcement agencies from relying on race, ethnicity, national origin, or religion in border inspections and other investigatory decisions; and

11. Congress: Request a GAO audit analyzing CBP's use of travel patterns in flagging individuals for questioning and searches to ensure that travel patterns are not used as a proxy for invidious profiling.

## **Reforming the Terrorist Watchlist**

CBP's use of the bloated and mismanaged terrorist watchlist subjects many innocent Americans to intrusive questioning and searches at U.S. borders, serving neither the civil liberties of the individuals themselves nor the interest of national security. We recommend the following measures to DHS and other agencies responsible for maintaining the watchlist.

12. DHS: Establish stricter standards for incorporating watchlist records from the TSDB into CBP's Interagency Border Inspection System (IBIS) to prevent innocent individuals from being misidentified and ensure that when the Terrorist Screening Center removes or modifies TSDB watchlist data, such changes are made to IBIS within 14 days;

13. Terrorist Screening Center: Conduct a comprehensive review and cleansing of the records in the TSDB at least as rigorous as the Terrorist Screening Center's "special quality assurance" review of the No-Fly List, and require annual reviews of the TSDB thereafter;

14. Department of Justice Inspector General: Conduct a detailed review of a statistically significant number of watchlist records removed from the TSDB in response to individual complaints to determine which agencies, institutions, and procedures were responsible for improperly nominating and/or approving the inclusion of those individuals to the watchlist; and

15. DHS, the Terrorist Screening Center, and the Department of Justice: Establish a meaningful procedure for individuals who believe they are affected by the terrorist watchlist to clear their names:

- a. Require CBP officers at ports of entry to inform individuals with concerns about border inspections about DHS TRIP and make available a complaint procedure on-site;
- b. Require the Terrorist Screening Center to complete DHS TRIP redress inquiries within 60 days;
- c. Establish and publicize widely an appeals process for the resolution of CBP-related watchlist complaints;
- d. Require the Department of Justice, which oversees the Terrorist Screening Center, to establish a terrorist watchlist review board that acts as a neutral, independent forum to hear administrative appeals from individuals who believe they are improperly watchlisted, without limiting the opportunity for judicial review in federal court.

## APPENDIX

### **SELECTION OF LAWS ENFORCED BY U.S. CUSTOMS AND BORDER PROTECTION RELATED TO BORDER QUESTIONING AND SEARCHES**

CBP relies on the Homeland Security Act and older customs and immigration statutes and regulations for authority to inspect travelers, but these laws, like the Homeland Security Act, do not set standards for CBP practices with the specificity that would allow CBP agents or travelers to understand the scope of permissible CBP actions at the border. Many of these statutes and regulations have barely been amended since the creation of DHS and CBP, despite the new emphasis on counterterrorism and border security and the greater powers now exercised by CBP border officers.

# Returning Home: How U.S. Government Practices Undermine Civil Rights At Our Nation's Doorstep

## Appendix

US CODE SECTION	SUBJECT MATTER OF LAW	USC AMENDMENTS SINCE 2001 (OR LAST DATE OF AMENDMENT)	CODE OF FEDERAL REGULATIONS SECTION	SUBJECT MATTER OF REGULATION	CFR AMENDMENTS SINCE 2001 (OR LAST DATE OF AMENDMENT)
<b>TITLE 8 - IMMIGRATION</b>					
8 U.S.C. § 1181	Describes required travel documentation for non-U.S. nationals entering the United States, and DOJ's discretion in admitting certain persons without the required documentation	Last amended November 29, 1990	8 C.F.R. § 231.1	Requires commanders of commercial vessels to provide I-94 forms for non-U.S. citizens arriving in the U.S.	Most recently amended April 7, 2005, changing headings and eliminating the in-transit exemption for presentation of passenger manifests, as well as the provision regarding completion and submission of Form I-94
8 U.S.C. § 1182	Describes categories of aliens not allowed to enter the United States, including terrorists. Note: several bills are pending in Congress as of February 20, 2009 that would substantially change § 1182	Amended dozens of times since 2001, but without directly affecting CBP procedures for questioning or searching travelers	8 C.F.R. § 235.1	All persons entering the U.S. must provide identification to border officials, as required by law	Amended on April 4, 2008 to specify the documentation acceptable as proof of citizenship or identity (effective June 1, 2009)
8 U.S.C. § 1185(a)	Describes unlawful means of entry into the United States and gives the President the power to modify enforcement mechanisms	Last amended October 25, 1994	8 C.F.R. § 292.5(b)	Applicants for admission are not entitled to legal representation during primary or secondary inspection	Last amended in 1995
8 U.S.C. § 1221	Requires carriers to provide passenger manifests and sets out penalties for failure to do so	Amended on May 14, 2002 to broaden the passenger manifest requirements beyond aircraft and boats	19 C.F.R. § 4.50	Requires vessel operators to submit passenger and crew lists	No significant amendments to this provision since 2001
8 U.S.C. § 1225(a)(3)	Persons entering the U.S. are subject to inspection	Amended on May 8, 2008 to make technical conforming amendments, such as inserting "or the Commonwealth of the Northern Mariana Islands" to the Immigration and Nationality Act	19 C.F.R. § 162.6	All persons and baggage entering the U.S. are subject to search by CBP officers	Last amended in 1972
8 U.S.C. § 1225(d)(3)	CBP officers may inquire after "any matter which is material and relevant" to the enforcement of immigration laws	Amended on May 8, 2008 to make technical conforming amendments, such as inserting "or the Commonwealth of the Northern Mariana Islands" to the Immigration and Nationality Act	19 C.F.R. § 162.7	CBP officers may stop and search any baggage, trunks or envelopes subject to the reasonableness restrictions in 19 U.S.C. § 482(a)	Last substantively amended in 1972

**Returning Home: How U.S. Government Practices Undermine Civil Rights At Our Nation's Doorstep**

Appendix

<b>US CODE SECTION</b>	<b>SUBJECT MATTER OF LAW</b>	<b>USC AMENDMENTS SINCE 2001 (OR LAST DATE OF AMENDMENT)</b>	<b>CODE OF FEDERAL REGULATIONS SECTION</b>	<b>SUBJECT MATTER OF REGULATION</b>	<b>CFR AMENDMENTS SINCE 2001 (OR LAST DATE OF AMENDMENT)</b>
<b>TITLE 8 - IMMIGRATION</b>					
8 U.S.C. § 1325	Provides civil and criminal penalties for aliens who attempt to enter the United States illegally	Last amended September 30, 1996	19 C.F.R. § 162.21	U.S.C. § 482(a) CBP officers may seize property upon obtaining "reasonable cause" to believe any law or regulation enforced by CBP or ICE has been violated	Amended on February 19, 2008 to change authority of "Customs Service" to CBP and ICE
8 U.S.C. § 1357(c)	Immigration officers, upon obtaining "reasonable cause to suspect that grounds exist for denial of admission to the United States," may search a person and his personal effects	Amended in 2006 to remove the requirement that minors who were abused and are applying for special juvenile immigrant status contact their alleged abusers for purposes of the application	22 C.F.R. § 42.1	Sets out categories of aliens who are not required to obtain immigrant visas	No significant amendments to this provision since 2001
<b>TITLE 18 - CRIMES AND CRIMINAL PROCEDURE</b>					
18 U.S.C. § 758	Penalties for evading checkpoints in excess of the posted speed limit	Enacted September 30, 1996	22 C.F.R. § 53.1	U.S. citizens are required to enter with valid U.S. passports	Amended on November 24, 2006 to (i) specify the exemptions from the passport requirement and (ii) define the "United States" as defined in the Immigration and Nationality Act
18 U.S.C. § 911	Penalties for falsely and willfully representing oneself to be a U.S. citizen	Last amended September 30, 1994			
18 U.S.C. § 2199	Penalties for traveling as a stowaway	Amended March 9, 2006 to prescribe harsher penalties for violations, with increasing severity when the stowaway purposely causes death or serious bodily injury.			

**Returning Home: How U.S. Government Practices Undermine Civil Rights At Our Nation's Doorstep**

Appendix

<b>US CODE SECTION</b>	<b>SUBJECT MATTER OF LAW</b>	<b>USC AMENDMENTS SINCE 2001 (OR LAST DATE OF AMENDMENT)</b>	<b>CODE OF FEDERAL REGULATIONS SECTION</b>	<b>SUBJECT MATTER OF REGULATION</b>	<b>CFR AMENDMENTS SINCE 2001 (OR LAST DATE OF AMENDMENT)</b>
<b>TITLE 19 - CUSTOMS DUTIES</b>					
19 U.S.C. § 482(a)	Grants CBP the authority to (i) stop, search, and examine any person on whom they "suspect" of possessing contraband, (ii) search trunks and envelopes upon "reasonable cause" to suspect it contains contraband and (iii) seize any property upon "reasonable cause" that it is in violation of U.S. law	Amended on August 6, 2002 to eliminate liability for civil damages for officers conducting searches pursuant to this section	19 C.F.R. § 162.7	CBP officers may stop and search baggage, trunks or envelopes subject to the reasonableness restrictions in 19 U.S.C. § 482(a)	Last substantively amended in 1972
19 U.S.C. § 1433(e)	Planes and vehicles entering the U.S. are prohibited from discharging passengers and their merchandise or baggage unless in accordance with rules prescribed by the Secretary of DHS	Last amended in 1999	19 C.F.R. § 162.21	CBP officers may seize property upon obtaining "reasonable cause" to believe any law or regulation enforced by CBP or ICE has been violated	Interim DHS rule issued as of February 19, 2008 to make nomenclature changes, e.g., from "Customs Service" to CBP and ICE
19 U.S.C. § 1461	For travelers from contiguous countries, bags "shall be unladen" and may be inspected by CBP officers upon entry	Last amended in 1930	22 C.F.R. § 53.1	U.S. citizens are required to enter with valid U.S. passports	Amended on November 24, 2006 to (i) specify the exemptions from the passport requirement for citizens entering the U.S. and (ii) define the "United States" as defined in the Immigration and Nationality Act
19 U.S.C. § 1462	Failure to comply with a baggage search request shall result in the bag being retained by CBP officers and may result in forfeiture	Last amended in 1930			
19 U.S.C. § 1467	CBP officers may search persons, baggage and merchandise arriving on "vessels" (as defined in the Tariff Act of 1930)	Last amended in 1970; in 2002, transfer of functions, personnel, assets and liabilities to DHS was accomplished as set out in 6 U.S.C. § 542 (act reorganizing DHS) Last amended in 1970; in 2002, transfer of functions, personnel, assets and liabilities to DHS was accomplished as set out in 6 U.S.C. § 542 (act reorganizing DHS)			

**Returning Home: How U.S. Government Practices Undermine Civil Rights At Our Nation's Doorstep**

Appendix

US CODE SECTION	SUBJECT MATTER OF LAW	USC AMENDMENTS SINCE 2001 (OR LAST DATE OF AMENDMENT)	CODE OF FEDERAL REGULATIONS SECTION	SUBJECT MATTER OF REGULATION	CFR AMENDMENTS SINCE 2001 (OR LAST DATE OF AMENDMENT)
<b>TITLE 19 - CUSTOMS DUTIES</b>					
19 U.S.C. § 1595	Persons authorized to make searches and seizures may pass upon or through private land or buildings (but not homes) to discharge this duty	Last amended in 1970; in 2002, transfer of functions, personnel, assets and liabilities to DHS was accomplished as set out in 6 U.S.C. § 542 (act reorganizing DHS)			
<b>TITLE 46 - SHIPPING</b>					
46 U.S.C. §§ 3301-18	Gives CBP the authority to inspect incoming vessels	§ 3301 lists vessels subject to inspection; amended August 9, 2004 to include "towing vessels"			
46 U.S.C. § 3502	Requires those in charge of passenger vessels to keep a "list or count" of passengers aboard	Enacted August 26, 1983.			

## ENDNOTES

### Introduction

- <sup>1</sup> After receiving several complaints in early 2007 from individuals who believed they were profiled at the border, the Asian Law Caucus began conducting outreach in the South Asian, Muslim, Middle Eastern, and other immigrant communities about this issue, with a particular focus on Northern California. We posted “know your rights” information about CBP inspections on our website, spoke and passed out literature on this issue at community events, and invited individuals through various listservs to contact the Asian Law Caucus with their stories.
- <sup>2</sup> Citing growing concerns over the persistent targeting and detention of travelers, a coalition of advocacy groups in Michigan recently established a border complaint hotline for individuals profiled or detained at the U.S.-Canada border. Gregg Krupa, *Hotline Set Up for Reporting Suspected Profiling at the Border*, DETROIT NEWS, Dec. 11, 2008. The ACLU of Illinois brought a federal lawsuit on behalf of numerous U.S. citizens alleging unlawful detentions and harassment at the border. Rahman v. Chertoff, 530 F.3d 622 (7th Cir. 2008).
- <sup>3</sup> As a result, the stories described in this report represent only a sample of the compelling accounts of border questioning and searches the Asian Law Caucus received. The people in this report are identified by real names except where otherwise noted.
- <sup>4</sup> See, e.g., Bob Egelko, *Homeland Security Sued for Not Divulging Info*, S.F. CHRON, Feb. 8, 2008, at B4 (describing detention of Tunisian actor Lotfi Abdelli at San Francisco International Airport).
- <sup>5</sup> See, e.g., Rose Yasmin Karim, *Traveller or Threat?* THE STAR ONLINE, Feb. 28, 2009, <http://thestar.com.my/lifestyle/story.asp?file=/2009/2/28/lifetravel/3046519&sec=lifetravel> (an account in Malaysia’s leading English newspaper warning Malaysians to expect harassment when entering the United States).
- <sup>6</sup> See *supra*, at 30-31.

### Chapter One: Intrusive Questioning, Invasive Searches

- <sup>1</sup> Zakariya Reed was brought to the attention of the Asian Law Caucus by the Council on American-Islamic Relations of Ohio. Reed’s story is also recounted at Matthew Rothschild, *Muslim American Grilled at Border Over Religion, Letter to the Editor*, PROGRESSIVE.COM, May 9, 2007, [http://www.progressive.org/mag\\_mc050907](http://www.progressive.org/mag_mc050907).
- <sup>2</sup> Telephone Interview by Shirin Sinnar, Asian Law Caucus staff attorney, with John Doe 1 (Mar. 2, 2007). This individual did not want his name used in this report.
- <sup>3</sup> CBP, INSPECTOR’S FIELD MANUAL 18 (ed. Charles Miller 2008) [hereinafter INSPECTOR’S FIELD MANUAL], available at <http://www.ilw.com/immigdaily/News/2008,0513-cbp.pdf>. The Inspector’s Field Manual also instructs immigration inspectors: “Once you are satisfied the person being examined is a U.S. citizen and any required lookout query [of a database] has been completed, the examination is over.” *Id.* The manual also states that if probable cause to arrest a U.S. citizen has not been developed within a “reasonable period of time,” the person must be released. *Id.* These standards may not be current: this version of the Inspector’s Field Manual was last revised in February 2006, see *id.* at 1, and appears to pre-date the full merger of immigration and customs functions at CBP. The manual was developed under the Immigration and Naturalization Service and states that it is “gradually being updated to address CBP’s policies and practices.” *Id.* at 1.
- <sup>4</sup> See, e.g., Tabbaa v. Chertoff, 509 F.3d 89, 99-100 (2d Cir. 2007) (stating that U.S. citizens were threatened with continued detention unless they cooperated with CBP questioning, fingerprinting, and photographing measures, and finding such measures to be routine);

- Leticia Romero, Assistant Director of Field Operations for Border Security, Port of San Francisco, Remarks at the Meeting of Asian Law Caucus and other civil rights groups with CBP, in San Francisco (Jan. 8, 2008) (stating that travelers who refuse to answer questions may in some cases be subjected to a “personal” search, or a physical search of a person); Director, Field Operations, Tucson Field Office, Level 1 Determination Interview 2, (bates stamp 000552) at [http://www.eff.org/files/filenode/alc/073008\\_cbp\\_bordersearch04.pdf](http://www.eff.org/files/filenode/alc/073008_cbp_bordersearch04.pdf) (noting that individuals who refuse to answer questions are subject to a second-level, more intrusive interview under the CBP Tucson Field Office’s procedures for interviewing high-interest subjects).
- <sup>5</sup> See, e.g., *United States v. Gupta*, 183 F.3d 615, 617 (7th Cir. 1999) (noting that an arriving immigrant is not free to leave or return to his or her home country without clearing U.S. inspectors).
  - <sup>6</sup> See DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 197 (New Press 2003) (arguing that discriminatory policies contradict government’s stated aim of not presenting war on terror as a war against Islam or particular cultures); MUZAFFAR A. CHISHTI, ET. AL., *AMERICA’S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11* 8 (Migration Policy Institute 2003) (arguing that domestic immigration policy that targets Arab and Muslim communities “deepens the perception abroad that America is anti-Muslim and that its principles are hypocritical,” strengthening the voices of radicals and undermining moderates in the Arab and Muslim world).
  - <sup>7</sup> See Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 *Ariz. L. Rev.* 621, 659, n. 212-13 (2004).
  - <sup>8</sup> *Id.* at 659.
  - <sup>9</sup> *Lamont v. Postmaster General*, 381 U.S. 301, 309 (1965) (Brennan, J., concurring).
  - <sup>10</sup> *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6, 8 (1971) (holding that applicant to Arizona state bar was protected by First Amendment from being compelled to answer question regarding whether she had been a member of the Communist Party or other organization advocating overthrow of the U.S. government). Although *Baird* concerned a state’s attempt to deny a material benefit to an individual for her beliefs – exclusion from the legal profession – the Court stated specifically that even a state’s attempt to inquire into an individual’s beliefs and association must be justified by a “heavy burden” to demonstrate that “the inquiry is necessary to protect a legitimate state interest.” *Id.* at 6-7.
  - <sup>11</sup> *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 545, 557 (1963) (holding that legislative committee could not compel NAACP to produce membership records in order for chapter president to testify as to whether particular individuals were members of the association).
  - <sup>12</sup> *Id.* at 545.
  - <sup>13</sup> See, e.g., *United States v. Silva*, 715 F.2d 43, 47 (2d Cir. 1982) (deeming routine questions on length and purpose of foreign travel and acquisitions overseas); *United States v. Massie*, 65 F.3d 843, 849 (10th Cir. 1995) (finding questioning of a U.S. citizen on vehicle ownership, destination, and travel plans to be routine); *Gupta*, 183 F.3d at 617 (stating that an immigrant must describe identity, nationality, business, and claim of entitlement to enter); *Brent v. Ashley*, 247 F.3d 1294, 1299-1300 (11th Cir. 2001) (finding Customs’ agents questioning of a U.S. citizen regarding nature of her trip to be routine).
  - <sup>14</sup> *Tabbaa*, 509 F.3d at 102.
  - <sup>15</sup> *Id.* at 103, 105.

## ENDNOTES

- <sup>16</sup> *Id.* at 102. In addition, the *Tabbaa* court noted that the questions asked of the plaintiffs were not “materially different” from questions posed to other travelers about their overseas activities. *Id.* at 98–99. Thus, the court endorsed questioning individuals regarding their activities during their foreign travel – not open-ended questions into their religious beliefs or practices in general.
- <sup>17</sup> Letter from Shirin Sinnar, Asian Law Caucus, and Marcia Hofmann, Electronic Frontier Foundation, to U.S. Customs and Border Protection (Oct. 31, 2007) (on file with author), available at <http://www.eff.org/files/filenode/alc/alc-complaint.pdf> (Exhibit A).
- <sup>18</sup> DHS provided documents advising immigration inspectors on questioning non-citizens with potential asylum claims about religious or political persecution abroad and on questioning individuals seeking to enter on religious worker visas. CBP, Inspector’s Field Manual, at [http://www.eff.org/files/filenode/alc/062808\\_cbp\\_bordersearch01.pdf](http://www.eff.org/files/filenode/alc/062808_cbp_bordersearch01.pdf) (bates stamp 000003–000007, 000009–000011). DHS also provided portions of a directive on inspecting “potential terrorists” that included three redacted lines of text listing the subjects on which officers should question individuals. DIRECTIVE NO. 3340-021B, RESPONDING TO POTENTIAL TERRORISTS SEEKING ENTRY INTO THE UNITED STATES 13 (Sept. 7, 2006), at [http://www.eff.org/files/filenode/alc/062808\\_cbp\\_bordersearch02.pdf](http://www.eff.org/files/filenode/alc/062808_cbp_bordersearch02.pdf) (bates stamp 000147). Although the directive was highly redacted, it does not seem that the redacted sections provided guidance on questioning individuals on political views or religious beliefs since they were marked as “non responsive” to plaintiffs’ FOIA request rather than being justified under a statutory exemption to the FOIA’s disclosure requirements. *See id.* at 1–25 (bates stamp 000135–000159).
- <sup>19</sup> Richard Vigna, Director of Field Operations, Port of San Francisco, Remarks at the Meeting of Asian Law Caucus and other civil rights groups with CBP, in San Francisco (Jan. 8, 2008).
- <sup>20</sup> Ellen Nakashima, *Expanded Powers to Search Travelers at Border Detailed*, WASH. POST, Sept. 23, 2008, at A2.
- <sup>21</sup> *Id.*
- <sup>22</sup> GOV’T ACCOUNTABILITY OFFICE (GAO), BORDER SECURITY: DESPITE PROGRESS, WEAKNESSES IN TRAVELER INSPECTIONS EXIST AT OUR NATION’S PORTS OF ENTRY 8 (2007), available at <http://www.gao.gov/new.items/d08219.pdf>.
- <sup>23</sup> *See Gibson*, 372 U.S. at 546, 554–555 (requiring in a legislative investigation into subversive activities a “nexus” between “information sought and a subject of overriding and compelling state interest,” and finding that the evidence showed no support for a substantial relationship between the NAACP and subversive or communist activities). *Gibson* noted that “an adequate foundation for inquiry must be laid” before curtailing or inhibiting constitutionally protected activities. *Id.* at 557.
- <sup>24</sup> *See Box*, *infra* at 19.
- <sup>25</sup> *See Box*, *infra* at 21.
- <sup>26</sup> U.S. CUSTOMS AND BORDER PROTECTION, POLICY REGARDING BORDER SEARCH OF INFORMATION (July 16, 2008), available at [http://www.cbp.gov/linkhandler/cgov/travel/admissibility/search\\_authority.ctt/search\\_authority.pdf](http://www.cbp.gov/linkhandler/cgov/travel/admissibility/search_authority.ctt/search_authority.pdf) [hereinafter 2008 BORDER SEARCH POLICY]. An almost identical policy was issued the same day by Immigration and Customs Enforcement. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DIRECTIVE 7-6.0: BORDER SEARCHES OF DOCUMENTS AND ELECTRONIC MEDIA 3 (July 16, 2008), available at [http://www.cdt.org/security/20080716\\_ICE%20Search%20Policy.pdf](http://www.cdt.org/security/20080716_ICE%20Search%20Policy.pdf).
- <sup>27</sup> 2008 BORDER SEARCH POLICY, *supra* note 26, at 1.
- <sup>28</sup> *Id.* at 2.
- <sup>29</sup> *See* CBP OFFICE OF CHIEF COUNSEL AND DHS OFFICE OF GENERAL COUNSEL, INTERIM PROCEDURES FOR BORDER SEARCH/EXAMINATION OF DOCUMENTS, PAPERS, AND ELECTRONIC INFORMATION (July 2007), available at [http://www.eff.org/files/filenode/alc/073008\\_cbp\\_bordersearch05.pdf](http://www.eff.org/files/filenode/alc/073008_cbp_bordersearch05.pdf) (bates stamp 000598) [hereinafter 2007 BORDER SEARCH POLICY].
- <sup>30</sup> For a more detailed analysis of changes made in CBP policy on searches of reading materials, *see* Asian Law Caucus and Electronic Frontier Foundation, *Analysis of Excerpts from Asian Law Caucus – Electronic Frontier Foundation 2008 FOIA Release* (2008), [http://www.eff.org/files/filenode/alc/bordersearch\\_analysis.pdf](http://www.eff.org/files/filenode/alc/bordersearch_analysis.pdf).
- <sup>31</sup> CUSTOMS DIRECTIVE 3340-006A, PROCEDURES FOR EXAMINING DOCUMENTS AND PAPERS §§ 6.4.1, 6.5 (Feb. 4, 2000), available at [http://www.eff.org/files/filenode/alc/062808\\_cbp\\_bordersearch02.pdf](http://www.eff.org/files/filenode/alc/062808_cbp_bordersearch02.pdf) (bates stamp 000177). *See also* CUSTOMS DIRECTIVE 3340-006, REVIEW, COPYING AND SEIZURE OF DOCUMENTS §§ 5.a, 5.b (June 12, 1986), available at [http://www.eff.org/files/filenode/alc/062808\\_cbp\\_bordersearch02.pdf](http://www.eff.org/files/filenode/alc/062808_cbp_bordersearch02.pdf) (bates stamps 000181–000182) (earlier version of directive that permitted officers to “scan” documents and read them only if they appeared to relate to materials subject to laws enforced by Customs).
- <sup>32</sup> *See* CUSTOMS DIRECTIVE 3340-006A, PROCEDURES FOR EXAMINING DOCUMENTS AND PAPERS § 6.7 and 6.7.1 (Feb. 4, 2000), at [http://www.eff.org/files/filenode/alc/062808\\_cbp\\_bordersearch02.pdf](http://www.eff.org/files/filenode/alc/062808_cbp_bordersearch02.pdf) (bates stamp 000178); CUSTOMS DIRECTIVE 3340-006, REVIEW, COPYING AND SEIZURE OF DOCUMENTS §§ 5.d, 5.e (June 12, 1986). The 2000 policy contained an exception to the probable cause requirement for documents that needed to be translated or that needed “special expertise to determine their nature.” CUSTOMS DIRECTIVE 3340-006A, PROCEDURES FOR EXAMINING DOCUMENTS AND PAPERS § 6.II.1 and 6.II.2 (Feb. 4, 2000).
- <sup>33</sup> 2007 BORDER SEARCH POLICY, *supra* note 29; 2008 BORDER SEARCH POLICY, *supra* note 26, at 1.
- <sup>34</sup> 2007 BORDER SEARCH POLICY, *supra* note 29; 2008 BORDER SEARCH POLICY, *supra* note 26, at 1.
- <sup>35</sup> *See* Anthony Lewis, *Abroad at Home; Policing Our Thoughts*, N.Y. TIMES, Apr. 28, 1986, at A25; *Haase v. Sessions*, 835 F.2d 902, 904 (D.C. Cir. 1987); *Heidy v. U.S. Customs Serv.*, 681 F. Supp. 1445, 1447 (C.D. Cal. 1988).
- <sup>36</sup> *See, e.g., Heidy*, 681 F. Supp. at 1447.
- <sup>37</sup> *Id.* (citing Customs Directive 3340-006, REVIEW, COPYING AND SEIZURE OF DOCUMENTS (June 12, 1986), and CUSTOMS DIRECTIVE 2210-01, RESTRICTIONS ON IMPORTATION OF SEDITIOUS MATTER (Aug. 29, 1986). Both directives are available at [http://www.eff.org/files/filenode/alc/062808\\_cbp\\_bordersearch02.pdf](http://www.eff.org/files/filenode/alc/062808_cbp_bordersearch02.pdf) (bates stamp 000180, 000187)).
- <sup>38</sup> *Heidy*, 681 F. Supp. at 1453. Although this case dealt specifically with materials seized under 19 U.S.C. § 1305, a statute prohibiting the importation of treasonous materials into the United States, the court’s warning against preserving a “permanent record” of people based on the materials they read, *id.* at 1452, applies equally to searches conducted under other border search authority.
- <sup>39</sup> 2008 BORDER SEARCH POLICY, *supra* note 26, at 2.
- <sup>40</sup> *Id.* at 3.
- <sup>41</sup> *Id.* at 4.
- <sup>42</sup> This outcome is not theoretical: many law enforcement agencies that do not have CBP’s border search powers have asked CBP for

## ENDNOTES

- copies of documents that they could not obtain directly. An e-mail sent on July 11, 2007, apparently from the CBP Director of Field Operations in New York, states: "As we all know, CBP's data collection capabilities have been widely discussed in the law enforcement community and we have been asked by many various agencies to copy and transmit documentation being carried by travelers for legitimate law enforcement reasons." E-mail from the Director of Field Operations, New York Field Office, to Deputy Assistant Area Director, Customs and Border Protection (Jul. 11, 2007), at [http://www.eff.org/files/filenode/alc/073008\\_cbp\\_bordersearch05.pdf](http://www.eff.org/files/filenode/alc/073008_cbp_bordersearch05.pdf) (bates stamp 619).
- <sup>43</sup> See *Laptop Searches and Other Violations of Privacy Faced by Americans Returning from Overseas Travel: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 110th Cong. at 2, 5-6 (June 25, 2008) (statement of Lee Tien, Electronic Frontier Foundation) available at <http://www.eff.org/files/filenode/travelscreening/tien%20testimony.pdf> (citing Orin Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 541-43 (2005)).
- <sup>44</sup> See Box, *supra* at 19.
- <sup>45</sup> See Box, *supra* at 34.
- <sup>46</sup> Press Release, Ass'n of Corporate Travel Executives, Risk of Laptop Seizure by Customs or Border Patrol Officers Impacts International Corporate Privacy (Oct. 23, 2006), available at [http://www.acte.org/resources/press\\_release.php?id=91](http://www.acte.org/resources/press_release.php?id=91).
- <sup>47</sup> These companies include Radius and Blaney McMurtry, two global corporations. The law firm of Arnold and Porter has also advised a client to adopt such a policy. Ellen Nakashima, *Clarity Sought on Electronic Searches*, WASH. POST, Feb. 7, 2008, at A1, available at [http://www.washingtonpost.com/wp-dyn/content/article/2008/02/06/AR2008020604763\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2008/02/06/AR2008020604763_pf.html).
- <sup>48</sup> Telephone Interview, *supra* note 2.
- <sup>49</sup> Travelers' Privacy Protection Act, S. 3612, H.R. 7118, 110th Cong. (2008) (introduced by Sen. Russ Feingold); Electronic Device Privacy Act, H.R. 6588, 110th Cong. (2008) (introduced by Rep. Zoe Lofgren), and Securing Our Borders and Our Data Act, H.R. 6702, 110th Cong. (2008) (introduced by Rep. Eliot Engel).
- <sup>50</sup> Travelers' Privacy Protection Act, S. 3612, H.R. 7118, 110th Cong. § 4(a)(1) and (2) (2008). The bill also sets other standards for electronic searches such as requiring probable cause for seizures, defined as the retention of electronic equipment or files for more than 24 hours; requires supervisory approval for electronic searches; and authorizes civil actions for violations of the statute. *Id.* at §§ 3(11), 4(b), 5(a)(1), and § 12(a).
- <sup>51</sup> See, e.g., Yule Kim, *Border Searches of Laptops and Other Electronic Storage Devices*, Cong. Research Serv., Mar. 5, 2008, at 8, available at [http://assets.opencrs.com/rpts/RL34404\\_20080305.pdf](http://assets.opencrs.com/rpts/RL34404_20080305.pdf) (arguing that without a reasonable suspicion standard, border officers may conduct targeted searches based on unconstitutional justifications such as ethnic profiling). The Travelers' Privacy Protection Act would also explicitly prohibit electronic searches based on race, ethnicity, national origin, or religion, and require CBP to collect and publish demographic data to assess its compliance with that prohibition. Travelers' Privacy Protection Act of 2008, *supra* note 49, at § 5(a)(2) and 7.
- <sup>52</sup> Such a rule could contain an exception to the probable cause standard for copying documents in situations where CBP officers needed foreign language expertise or technical assistance to evaluate a document, in which case the lower standard of reasonable suspicion could be used.
- <sup>53</sup> Under the rulemaking process set out in the Administration Procedure Act (APA), government agencies are first required to publish a notice in the Federal Register proposing a rule by which the agency plans to abide. 5 U.S.C. § 553(b) (2008). The public then has the opportunity to submit written comments for the agency's consideration. 5 U.S.C. § 553(c) (2008). These requirements do not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice, or in situations where the agency for good cause finds that the rulemaking process should not be used. 5 U.S.C. § 553(b)(A) and (B).
- <sup>54</sup> See Ellen Nakashima, *Expanded Powers to Search Travelers at Border Detailed*, WASH. POST, Sept. 23, 2008, at A2; *Tabbaa*, 509 F.3d at 92-93.
- <sup>55</sup> *Tabbaa*, 509 F.3d at 97 (citing 6 U.S.C. § 202(i)).
- <sup>56</sup> See Appendix, *infra* at XX, for a partial listing of statutes and regulations cited by CBP for its border inspection authority, including a description of most recent amendments made to those authorities.
- <sup>57</sup> See *id.* CBP, a consolidated agency that combined the workforce and border authorities of several agencies, defines as its priority mission "preventing terrorists and terrorist weapons from entering the United States." CBP, Protecting our Borders Against Terrorism, May 14, 2008, at <http://www.cbp.gov/xp/cgov/about/mission/cbp.xml> (last visited Mar. 3, 2009). According to the agency's website, identifying and preventing the entry of individuals who posed a threat was not a focus before 9/11 but is now CBP's top priority. *Id.*
- <sup>58</sup> INSPECTOR'S FIELD MANUAL, *supra* note 3, available at [http://www.ilw.com/immigdaily/News/2008\\_0513-cbp.pdf](http://www.ilw.com/immigdaily/News/2008_0513-cbp.pdf).
- <sup>59</sup> CBP, CUSTOMS DIRECTIVE 3340-021B, RESPONDING TO POTENTIAL TERRORISTS SEEKING ENTRY INTO THE UNITED STATES (Sept. 7, 2006), available at [http://www.eff.org/files/filenode/alc/062808\\_cbp\\_bordersearch02.pdf](http://www.eff.org/files/filenode/alc/062808_cbp_bordersearch02.pdf) (bates stamp 000135). This policy was heavily redacted before it was released to the Asian Law Caucus and Electronic Frontier Foundation pursuant to a FOIA request.
- <sup>60</sup> 2008 BORDER SEARCH POLICY, *supra* note 26.
- <sup>61</sup> The Inspector's Field Manual was released after an administrative appeal of an individual's FOIA request. INSPECTOR'S FIELD MANUAL, *supra* note 3, at i-iii. A redacted version of the 2006 directive was released to the Asian Law Caucus and Electronic Frontier Foundation after a lawsuit based on the agency's failure to respond according to the statutory time limits. Plaintiffs' Complaint for Injunctive Relief for Violation of the Freedom of Information Act at 6, *Asian Law Caucus v. Dep't of Homeland Sec.*, 2008 U.S. Dist. LEXIS 98344 (N.D. Cal. 2008) (No. CV 08-0842 CW), available at <http://www.eff.org/files/filenode/alc/alc-complaint.pdf>. The 2008 Border Search Policy was released after the Senate Judiciary Committee Subcommittee on the Constitution held hearings on laptop border searches – to which CBP refused to send a witness – and after the agency resisted requests for disclosure for nearly two years. Press Release, Sen. Russ Feingold, Feingold, Cantwell, Smith Offer Bills Protecting Travelers From Suspicionless Laptop Searches (Sept. 29, 2008) available at <http://feingold.senate.gov/releases/08/09/20080925l.html> (last visited Feb. 27, 2009).
- <sup>62</sup> NORMAN RABKIN, GOV'T ACCOUNTABILITY OFFICE, PUB. NO. GAO-07-700T, TESTIMONY BEFORE THE SUBCOMM. ON MANAGEMENT, INVESTIGATIONS AND OVERSIGHT, COMMITTEE ON HOMELAND SECURITY, HOUSE OF REPRESENTATIVES 2, 4 (Apr. 25, 2007), available at <http://www.gao.gov/new.items/do7700t.pdf> (last visited Feb. 27, 2009) (stating that DHS' delays in providing information have "impede[d] GAO's ability to conduct audit work efficiently and to provide timely information to congressional clients").
- <sup>63</sup> *Id.* at 5, 7.
- <sup>64</sup> *Id.* at 7.

## ENDNOTES

- <sup>65</sup> See, e.g., DHS, ANNUAL REPORT: 2008 ANNUAL FREEDOM OF INFORMATION ACT REPORT TO THE ATTORNEY GENERAL OF THE UNITED STATES 6 (2008), available at [http://www.dhs.gov/xlibrary/assets/foia/privacy\\_rpt\\_foia\\_2008.pdf](http://www.dhs.gov/xlibrary/assets/foia/privacy_rpt_foia_2008.pdf) (indicating that the number of FOIA requests pending at the start of the fiscal year (83,819) remained steady by the end of the fiscal year (83,742)). Further, even of those FOIA requests that were deemed “simple” by DHS, the agency exceeded the 20-day response period for almost two-thirds. *Id.* at 12-13. DHS also failed to respond to the Asian Law Caucus and the Electronic Frontier Foundation’s FOIA request for records of the agency’s policies and procedures governing border searches and questioning, which prompted a lawsuit. Plaintiffs’ Complaint for Injunctive Relief for Violation of the Freedom of Information Act at 6, *Asian Law Caucus v. Dep’t of Homeland Sec.*, 2008 U.S. Dist. LEXIS 98344 (N.D. Cal. 2008) (No. CV 08-0842 CW), available at <http://www.eff.org/files/filenode/alc/alc-complaint.pdf>.
- <sup>66</sup> Barack Obama, Memorandum for the Heads of Executive Departments and Agencies, Freedom of Information Act (Jan. 21, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Freedom\\_of\\_Information\\_Act/](http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/).
- Chapter Two: Racial, Religious, and National Origin Profiling**
- <sup>1</sup> Telephone Interview by Menaka Fernando, Asian Law Caucus legal intern, with John Doe 2 (Jan. 2009). This individual did not want his name used in this report.
- <sup>2</sup> See Box, *supra* at 21.
- <sup>3</sup> See Bob Egelko, *Homeland Security Sued for Not Divulging Info*, S.F. CHRON., Feb. 8, 2008, at B4.
- <sup>4</sup> *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (holding that Hispanic appearance of defendants could not be a factor in establishing reasonable suspicion at border checkpoint, where majority of people passing through the checkpoint were Hispanic in appearance).
- <sup>5</sup> DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 51-53 (2003).
- <sup>6</sup> Lori Montgomery, *New Police Policies Aim to Discourage Racial Profiling*, WASH. POST, June 28, 2001, at A1. The controversy even attracted the attention of then-law professor Barack Obama, who included a question on racial profiling by Customs agents in a University of Chicago law exam. Barack Obama, 1999 Law Exam, Current Issues in Racism and the Law, available at <http://www.nytimes.com/2008/07/30/us/politics/30law.html>.
- <sup>7</sup> U.S. GEN. ACCOUNTING OFFICE, U.S. CUSTOMS SERVICE: BETTER TARGETING OF AIRLINE PASSENGERS FOR PERSONAL SEARCHES COULD PRODUCE BETTER RESULTS 2 (2000), available at <http://www.gao.gov/archive/2000/gg00038.pdf>.
- <sup>8</sup> *Id.* at 1, 6. Montgomery, *supra* note 6. David Johnston, *Customs Announces Changes in Its Search Policy*, N.Y. TIMES, Aug. 15, 1999, at 2. Lynn Sweet, *New Policies on Searches; Customs Looks at Alleged Airport Bias*, CHI. SUN-TIMES, Aug. 12, 1999, at 30.
- <sup>9</sup> Lamberth Consulting, *Racial Profiling Doesn't Work*, <http://www.lamberthconsulting.com/about-racial-profiling/racial-profiling-doesnt-work.asp> (last visited Jan. 23, 2009).
- <sup>10</sup> Rachel Swarns, *Program's Value in Dispute as a Tool to Fight Terrorism*, N.Y. TIMES, Dec. 21, 2004, A26.
- <sup>11</sup> *Id.*
- <sup>12</sup> David Cole & Jules Lobel, *Why We're Losing the War on Terror*, THE NATION, Sept. 24, 2007, at 11, 14, available at [http://www.thenation.com/doc/20070924/cole\\_lobel/single](http://www.thenation.com/doc/20070924/cole_lobel/single) (Last visited Jan. 22, 2009). See also GOV'T ACCOUNTABILITY OFFICE, HOMELAND SECURITY: JUSTICE DEPT'S PROJECT TO INTERVIEW ALIENS AFTER SEPTEMBER 11, 2001 9 (April 2003) (stating that data from the first phase of the interview program showed that fewer than 20 people had been arrested, primarily on immigration charges, and that none of the three individuals arrested on criminal charges appeared to have any connection to terrorism). Note that although DOJ stated that interviewees were not suspects, see *id.* at 9, the list of questions used in interviews suggests that the government was probing the interviewees' connections to terrorist activities, e.g. by asking interviewees what they knew about the events of 9/11 and whether they had participated in any armed conflicts. *Id.* at 23.
- <sup>13</sup> DAVID HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 117-28 (New Press 2002).
- <sup>14</sup> VERA INSTITUTE OF JUSTICE, LAW ENFORCEMENT AND ARAB-AMERICAN COMMUNITY RELATIONS AFTER SEPTEMBER 11, 2001: ENGAGEMENT IN A TIME OF UNCERTAINTY 13, 21(2006).
- <sup>15</sup> *Hearing on Oversight of Department of Homeland Security Before Sen. Judiciary Comm.*, 110th Cong. (Apr. 2, 2008) (statement of Michael Chertoff, Sec'y of Homeland Sec.) [hereinafter *Chertoff Statement*].
- <sup>16</sup> Leticia Romero, Assistant Dir. of Field Operations for Border Security, Port of San Francisco, Remarks at the Meeting of Asian Law Caucus and other civil rights groups.
- <sup>17</sup> CBP Office of Chief Counsel, *CBP Officer Basic Training: C2900 – Law Course Student Outline 26* (2006), available at [http://www.eff.org/files/filenode/alc/062808\\_cbp\\_bordersearch02.pdf](http://www.eff.org/files/filenode/alc/062808_cbp_bordersearch02.pdf) (bates stamp 000128). In similar vein, the Personal Search Handbook instructs officers: “Never use a person’s gender, race, color, religion, or ethnic background as a factor in determining any level of suspicion” for a pat-down, strip search, or other bodily search. CBP OFFICE OF FIELD OPERATIONS, PERSONAL SEARCH HANDBOOK (CIS HB 3300-04B) 2 (2004), available at [http://www.eff.org/files/filenode/alc/062808\\_cbp\\_bordersearch01.pdf](http://www.eff.org/files/filenode/alc/062808_cbp_bordersearch01.pdf) (bates stamp 000025).
- <sup>18</sup> Tom Ridge, *The Department of Homeland Security's Commitment to Race Neutrality in Law Enforcement Activities 1* (2004), [http://www.dhs.gov/xlibrary/assets/CRCLMemoCommitmentRaceNeutrality\\_June04.pdf](http://www.dhs.gov/xlibrary/assets/CRCLMemoCommitmentRaceNeutrality_June04.pdf) (last visited Dec. 25, 2008) [hereinafter *Commitment to Race Neutrality*].
- <sup>19</sup> U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (June 2003), available at [http://www.usdoj.gov/crt/split/documents/guidance\\_on\\_race.php](http://www.usdoj.gov/crt/split/documents/guidance_on_race.php) (last modified July. 25, 2008).
- <sup>20</sup> The Guidance provides: “In investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing laws protecting the integrity of the Nation’s borders, Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States.” *Id.* Because some courts have permitted law enforcement officers to use race or ethnicity as one factor in a decision, so long as it is not the sole factor, the constitutional standard does not ensure that individuals are not targeted at least in part because of race or ethnicity. Under this standard, for instance, an officer could flag a traveler for special searches based on the fact that he was Arab and under 30, claiming that race alone did not motivate the decision. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975) (ruling impermissible the reliance on appearance of Mexican ancestry alone as a basis for border patrol stops of cars near the U.S.-Mexican border, but noting that apparent Mexican ancestry could be a “relevant factor”). The Ninth Circuit called into ques-

## ENDNOTES

- tion whether the Supreme Court's description of Mexican ancestry as a relevant factor still applied, in view of changing demographic patterns. *United States v. Montero-Camargo*, 208 F.3d 1122, 1131-32 (9th Cir. 2000) (holding that Hispanic appearance of defendants could not be a factor in establishing reasonable suspicion at border checkpoint, where majority of people passing through the checkpoint were Hispanic in appearance).
- <sup>21</sup> GOV'T ACCOUNTABILITY OFFICE (GAO), BORDER SECURITY: DESPITE PROGRESS, WEAKNESSES IN TRAVELER INSPECTIONS EXIST AT OUR NATION'S PORTS OF ENTRY 5-9 (2007), available at <http://www.gao.gov/new.items/d08219.pdf>.
- <sup>22</sup> Discussion of Public Comments Received on the Automated Targeting System: System of Records Notice published Nov. 2, 2006 (71 FR 64543) 3, available at [http://www.dhs.gov/xlibrary/assets/privacy/privacy\\_publicmnts\\_cbp\\_atsupdate.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_publicmnts_cbp_atsupdate.pdf) (Last visited Jan. 23, 2009).
- <sup>23</sup> According to DHS, "Passenger Name Record" (PNR) data included in the Automated Targeting System "does not routinely include" information on passengers' racial or ethnic origin, religious beliefs, political opinions, or sex life, but "[t]o the extent PNR does include terms that reveal such personal matters," DHS would filter out those terms and only use this information in "exceptional circumstances." This statement leaves open the possibility that such information could be present in ATS and could be used, at least in certain circumstances. Notice of Privacy Act System of Records, 72 Fed. Reg. 43650, 43653 (Aug. 6, 2007), available at <http://edocket.access.gpo.gov/2007/E7-15197.htm>.
- <sup>24</sup> See the similar requirement in the Travelers' Privacy Protection Act of 2008, S. 3612, 110<sup>th</sup> Cong. (2008) § 7(d).
- <sup>25</sup> End Racial Profiling Act of 2007, H.R. 4611, 110<sup>th</sup> Cong. § 3(6) and 101 (2007).
- <sup>26</sup> *Id.* at § 3(7)(F) (including among law enforcement activities for which profiling is prohibited "[i]nspections and interviews of entrants into the United States that are more extensive than those customarily carried out.")
- <sup>27</sup> *Id.* at § 201(b)(2) - (4).
- <sup>28</sup> *Commitment to Race Neutrality*, *supra* note 18, at 1 (italics omitted).
- <sup>29</sup> CBP OFFICE OF FIELD OPERATIONS, INTELLIGENCE DRIVEN SPECIAL OPERATION (June 17, 2004), at <http://sperryfiles.com/images/2-1.jpg> and <http://sperryfiles.com/images/2-2.jpg>. This document appears on the website of conservative author Paul Sperry, described on the website as "a Washington-based investigative journalist and Hoover Institution media fellow." The bulletin was also covered by national and international media. See, e.g., *Airports on Alert for Pakistanis with Rope Burns*, WASH. TIMES, June 30, 2004, available at <http://www.washingtontimes.com/news/2004/jun/30/20040630-11106-2135r/>; Josh Meyer, *U.S. Steps Up Airport Focus on Pakistan*, L.A. TIMES, July 1, 2004, at A13, available at <http://articles.latimes.com/2004/jul/01/nation/na-pakwarn1>.
- <sup>30</sup> INTELLIGENCE DRIVEN SPECIAL OPERATION, *supra* note 29.
- <sup>31</sup> Marisa Taylor, *Law Enforcement Officials Secretly Profiling Immigrants*, MCCLATCHY NEWSPAPERS, Mar. 4, 2008, at <http://www.mcclatchydc.com/227/story/29282.html>. In addition, a February 2004 CBP memo stated that 35 countries and the Palestinian territories, almost all of which had significant Muslim populations, had been designated as "special interest countries." Gus De La Vina, Chief, U.S. Border Patrol, Memorandum to All Sector Chief Patrol Agents (Feb. 24, 2004), available at <http://www.sperryfiles.com/images/10-1.jpg>. The memo required border agents to notify a CBP intelligence unit whenever they apprehended aliens from listed countries. *Id.*
- <sup>32</sup> *Id.*
- <sup>33</sup> *Id.* (emphasis added).
- <sup>34</sup> THOMAS R. ELDRIDGE ET AL, NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., 9/11 AND TERRORIST TRAVEL: STAFF REPORT OF THE NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S. 159, 169 n.77 (Aug. 21, 2004), available at [http://govinfo.library.unt.edu/911/staff\\_statements/911\\_TerrTrav\\_Monograph.pdf](http://govinfo.library.unt.edu/911/staff_statements/911_TerrTrav_Monograph.pdf) (citing interviews in which Former INS Commissioner James Ziglar and FBI Director Robert Mueller acknowledged that the NSEERS program came at a cost to U.S. relations with foreign countries. See also Meyer, *supra* note 29 (indicating that Pakistan protested the targeting of Pakistani nationals for scrutiny at U.S. borders).
- <sup>35</sup> See, e.g., MIGRATION POLICY INSTITUTE, AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTIES, AND NATIONAL UNITY AFTER SEPTEMBER 11 42 and n. 29(2003) (noting that based on the Department of Justice's expansive view of the definition of "nationals," some citizens of European countries were subject to registration requirements on the grounds that they were born in a targeted country, including thousands of Iranians who had fled Iran and obtained political asylum and citizenship in Europe).
- <sup>36</sup> See *Chertoff Statement*, *supra* note 15.
- <sup>37</sup> See *supra* at 34.
- <sup>38</sup> *Schneider v. Rusk*, 377 U.S. 163, 168 (1964) (striking down statute providing for denaturalization of foreign-born citizens residing three years in country of their birth as violative of due process). The Court stated that, except for eligibility for the presidency, "the rights of citizenship of the native born and of the naturalized person are of the same dignity and are co-extensive." *Id.* at 165.
- <sup>39</sup> PERSONAL SEARCH HANDBOOK, *supra* note 17, at 1 (bates stamp 000024).
- <sup>40</sup> *Romero*, *supra* note 16.

### Chapter Three: The Bloated and Mismanaged Terrorist Watchlist

- <sup>1</sup> GOV'T ACCOUNTABILITY OFFICE (GAO), TERRORIST WATCH LIST SCREENING: OPPORTUNITIES EXIST TO ENHANCE MANAGEMENT OVERSIGHT, REDUCE VULNERABILITIES IN AGENCY SCREENING PROCESSES, AND EXPAND USE OF THE LIST 32 (Oct. 2007) [hereinafter GAO OPPORTUNITIES], available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=gao&docid=f:d08110.pdf>. IBIS "resides on" the Treasury Enforcement Communications System (TECS), and CBP is sometimes described as performing terrorist watchlist checks through TECS. See, e.g., DEP'T OF HOMELAND SEC., OFFICE OF THE INSPECTOR GENERAL, THE DHS NOMINATION PROCESS FOR NOMINATING INDIVIDUALS TO THE CONSOLIDATED TERRORIST WATCHLIST 4-5 (Feb. 2008) [hereinafter DHS NOMINATION PROCESS], available at [http://www.dhs.gov/xoig/assets/mgmttrpts/OIG\\_08-29\\_Feb08.pdf](http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_08-29_Feb08.pdf).
- <sup>2</sup> GAO OPPORTUNITIES, *supra* note 1, at 14-15.
- <sup>3</sup> In fall 2007, the GAO reported that the Terrorist Screening Database, the centralized terrorist watchlist, had swollen from 150,000 records in June 2004 to 755,000 records in May 2007 - representing an increase of 20,000 records per month. GAO OPPORTUNITIES, *supra* note 1, at 7-8 In September 2008, Rick Kopel, principal deputy director of the Terrorist Screening Center, told a congressional committee that the TSDB included 400,000 distinct individuals and approximately one million "records," or names; the number of records is higher than the number of distinct persons because many individuals are listed according to aliases or alternate spellings. TERRORIST SCREENING CTR., STATEMENT OF RICK

## ENDNOTES

- KOPEL, PRINCIPAL DEPUTY DIRECTOR, TERRORIST SCREENING CENTER, BEFORE THE HOUSE OF REPRESENTATIVES COMMITTEE ON HOMELAND SECURITY AND INFRASTRUCTURE PROTECTION, 09 SEPTEMBER 2008 4 (2008), available at <http://homeland.house.gov/SiteDocuments/20080909154423-03376.pdf>. From the perspective of an individual screened against the list, the number of records may be the more relevant number because each additional listing in the database is another opportunity for a person to be mistakenly matched to someone on the list, merely by virtue of having a similar name.
- <sup>4</sup> See GAO OPPORTUNITIES, *supra* note 1, at 9.
- <sup>5</sup> TERRORIST SCREENING CTR., STATEMENT OF LEONARD BOYLE, DIRECTOR, TERRORIST SCREENING CENTER, BEFORE THE HOUSE OF REPRESENTATIVES COMM. ON HOMELAND SECURITY, 08 NOVEMBER 2007 5 (2007), available at <http://homeland.house.gov/SiteDocuments/20071108115249-02650.pdf>.
- <sup>6</sup> GAO OPPORTUNITIES, *supra* note 1, at 9.
- <sup>7</sup> U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GENERAL (OIG), FOLLOW-UP AUDIT OF THE TERRORIST SCREENING CENTER 7 (Sept. 2007) [hereinafter 2007 FOLLOW-UP AUDIT], available at <http://www.usdoj.gov/oig/reports/FBI/a0741/final.pdf>.
- <sup>8</sup> GAO OPPORTUNITIES, *supra* note 1, at 9. Under the new Secure Flight program, through which TSA will take over from commercial airlines the responsibility for checking the watchlist, the agency will continue to use the existing limited "no-fly" and "selectee" lists to screen passengers, but is authorized to check passengers against the entire TSDB in unique security circumstances. 73 Fed. Reg. 64018, 64019 (Oct. 28, 2008).
- <sup>9</sup> GAO OPPORTUNITIES, *supra* note 1, at 9.
- <sup>10</sup> *Id.*
- <sup>11</sup> DHS NOMINATION PROCESS, *supra* note 1, at 5; 72 Fed. Reg. 43650, 43654 (Aug. 6, 2007).
- <sup>12</sup> *Id.*
- <sup>13</sup> DHS NOMINATION PROCESS, *supra* note 1, at 5. Although this directive has not been made public, the Asian Law Caucus and Electronic Frontier Foundation obtained a redacted copy of what appears to be the same document through a Freedom of Information Act request and lawsuit. See CBP DIRECTIVE NO. 3340-021B, RESPONDING TO POTENTIAL TERRORISTS SEEKING ENTRY INTO THE UNITED STATES (Sept. 7, 2006), available at [http://www.eff.org/files/filenode/alc/062808\\_cbp\\_bordersearch02.pdf](http://www.eff.org/files/filenode/alc/062808_cbp_bordersearch02.pdf) (bates stamp 000135).
- <sup>14</sup> CBP DIRECTIVE NO. 3340-021B, RESPONDING TO POTENTIAL TERRORISTS SEEKING ENTRY INTO THE UNITED STATES (Sept. 7, 2006), *supra* note 13, at 13, 15 (bates stamp 000147, 000149).
- <sup>15</sup> Benothman is a putative plaintiff in *Rahman v. Chertoff*, the ACLU's lawsuit against the Department of Homeland Security based on border detentions, and was brought to the Asian Law Caucus' attention through the ACLU of Southern California. *Rahman v. Chertoff*, 530 F.3d 622 (7th Cir. 2008).
- <sup>16</sup> 2007 FOLLOW-UP AUDIT, *supra* note 7, at xxii.
- <sup>17</sup> *Id.* at 31-33; Letter from Willie T. Hulon, Executive Assistant Director, National Security Branch, Federal Bureau of Investigation to Glenn A. Fine, Office of the Inspector General, Aug. 28, 2007, in Appendix V, 2007 FOLLOW-UP AUDIT, *supra* note 7, at 71.
- <sup>18</sup> 2007 FOLLOW-UP AUDIT, *supra* note 7, at xiii, xvi-xviii.
- <sup>19</sup> On a typical day, CBP processes nearly 1.2 million people through its land, air, and seaports. CBP, SECURING AMERICA'S BORDERS 1 (2006), available at [http://www.cbp.gov/linkhandler/cgov/newsroom/publications/mission/cbp\\_securing\\_borders.ctt/cbp\\_securing\\_borders.pdf](http://www.cbp.gov/linkhandler/cgov/newsroom/publications/mission/cbp_securing_borders.ctt/cbp_securing_borders.pdf).
- <sup>20</sup> See, e.g., GOV'T ACCOUNTABILITY OFFICE, BORDER SECURITY: DESPITE PROGRESS, WEAKNESSES IN TRAVELER INSPECTIONS EXIST AT OUR NATION'S PORTS OF ENTRY 7 (2007), available at <http://www.gao.gov/new.items/d08219.pdf>.
- <sup>21</sup> GAO OPPORTUNITIES, *supra* note 1, at 19.
- <sup>22</sup> GAO OPPORTUNITIES, *supra* note 1, at 19-20. Individuals with ties to international terrorism, whether in the United States or abroad, constitute the vast majority of names on the watchlist. GAO Opportunities at 2-3. The much smaller proportion of individuals suspected of ties to domestic terrorism alone do not go through the NCTC but are submitted to the Terrorist Screening Center by the FBI directly. *Id.* at 3.
- <sup>23</sup> GAO OPPORTUNITIES, *supra* note 1, at 22.
- <sup>24</sup> U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., AUDIT REPORT 08-16, AUDIT OF THE U.S. DEP'T OF JUSTICE TERRORIST WATCHLIST NOMINATION PROCESS [hereinafter DOJ NOMINATION PROCESS] 10 (March 2008), available at <http://www.usdoj.gov/oig/reports/plus/a0816/final.pdf>.
- <sup>25</sup> *Id.* at 14.
- <sup>26</sup> *Id.* at 2, 9-10.
- <sup>27</sup> *Id.* at 10.
- <sup>28</sup> Press Release, FBI, FBI Response to OIG Audit of Terrorist Watchlist Nomination Processes (Mar. 17, 2008), available at <http://www.fbi.gov/pressrel/pressrel08/watchlist031708.htm>.
- <sup>29</sup> GAO OPPORTUNITIES, *supra* note 1, at 20.
- <sup>30</sup> *Id.* at 22. The audit does not state whether these rejections were based on a determination of inadequate factual support or on incomplete identifying information or other data.
- <sup>31</sup> GAO OPPORTUNITIES, *supra* note 1, at 22, n.35.
- <sup>32</sup> 2007 FOLLOW-UP AUDIT, *supra* note 7, at 47. CBP has also implemented Primary Lookout Override (PLOR), a process that automatically overrides a potential match where CBP has previously determined that the match was a false positive, so that on subsequent visits, a cleared traveler should no longer be flagged. PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, TERRORIST WATCH LIST REDRESS ACTIVITIES 7 (Sept. 10, 2007). No public investigation has examined whether the program is effective, however, and PLOR offers no help to people who are actually on the watchlist but who believe their listing is unjustified.
- <sup>33</sup> See DHS Traveler Redress Inquiry Program (TRIP), [www.dhs.gov/trip](http://www.dhs.gov/trip) (last visited Feb. 6, 2009).
- <sup>34</sup> *How CBP Handles Traveler Complaints* (Apr. 14, 2008), available at [http://www.cbp.gov/xp/cgov/travel/customerservice/handle\\_complaints.xml](http://www.cbp.gov/xp/cgov/travel/customerservice/handle_complaints.xml) (last visited Feb. 3, 2009).
- <sup>35</sup> 2007 FOLLOW-UP AUDIT, *supra* note 7, at iv, xix-xx, 45. As of late February 2007, 38% of redress requests at the TSC had been open for more than 60 days. *Id.* at 54. Responding to the 2007 Audit, the Terrorist Screening Center agreed to develop timeliness measures for resolving watchlist redress requests, Letter from Willie T. Hulon, Executive Assistant Director, National Security Branch, FBI, to Glenn A. Fine, Inspector General (Aug. 28, 2007), *id.* at 75, but as of February 2009, we found no published statement regarding whether any such measures had in fact been adopted.
- <sup>36</sup> 2007 FOLLOW-UP AUDIT, *supra* note 7, at xx.
- <sup>37</sup> *Id.* at 55.
- <sup>38</sup> See 2007 FOLLOW-UP AUDIT, *supra* note 7, at 55 (stating that

## ENDNOTES

Terrorist Screening Center policy prohibits the disclosure of a person's watchlist status). The letter a person receives at the conclusion of the watchlist redress review states: "Although we can neither confirm nor deny that DHS has records or information that prompted these inspections, if DHS has determined based on your inquiry that there is a need to make changes or corrections to any such record or information, should it exist, we can assure you such changes or corrections have been made." Letter from Jim Kennedy, DHS TRIP, to Amir Khan at 2 (Feb. 25, 2008) (on file with Asian Law Caucus).

<sup>39</sup> See 2007 FOLLOW-UP AUDIT, *supra* note 7, at 57 (stating that while the Terrorist Screening Center has created procedures for appeals, complainants can file an appeal only where the screening agency has made such a process available, and that only the Transportation Security Administration has established an appeals process).

<sup>40</sup> See Letter from Jim Kennedy, DHS TRIP, *supra* note 38, at 1-2.

<sup>41</sup> In response to an appeal, the Terrorist Screening Center is to coordinate between the National Counterterrorism Center and nominating agencies to determine "what material may be releasable to the individual during appeal (if applicable)," leaving the decision to release any such information completely at the discretion of the agencies. Dep't of Justice, et. al, Memorandum of Understanding on Terrorist Watchlist Redress Procedures at § C.vii. *executed* Sept. 19, 2007, *available at* [http://www.fbi.gov/terrorinfo/counterterrorism/redress\\_mou.htm](http://www.fbi.gov/terrorinfo/counterterrorism/redress_mou.htm).

<sup>42</sup> Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring).

<sup>43</sup> See Paul Rosenzweig & Jeff Jonas, *Correcting False Positives: Redress and the Watch List Conundrum*, 17 Heritage Found. Legal Memorandum 9-10, 13 (2005) *available at* [http://www.heritage.org/Research/Homelandsecurity/upload/79671\\_1.pdf](http://www.heritage.org/Research/Homelandsecurity/upload/79671_1.pdf); THE CONSTITUTION PROJECT, PROMOTING ACCURACY AND FAIRNESS IN THE USE OF GOVERNMENT WATCH LISTS 37-38 (2007), *available at* [http://www.constitutionproject.org/pdf/Promoting\\_Accuracy\\_and\\_Fairness\\_in\\_the\\_Use\\_of\\_Government\\_Watch\\_Lists.pdf](http://www.constitutionproject.org/pdf/Promoting_Accuracy_and_Fairness_in_the_Use_of_Government_Watch_Lists.pdf).

<sup>44</sup> Rosenzweig & Jonas, *supra* note 43, at 10; THE CONSTITUTION PROJECT, *supra* note 43, at 37.

<sup>45</sup> Rosenzweig & Jonas, *supra* note 43, at 9; THE CONSTITUTION PROJECT, *supra* note 43, at 37.

### Appendix

<sup>1</sup> The following sections of the U.S. Code and enforced by CBP have not been included in this chart, as none of the statutes thereunder govern relevant subject matter: Title 7 (Agriculture), Title 12 (Banks and Banking), Title 13 (Census), Title 15 (Commerce and Trade; Code of Federal Regulations), Title 16 (Conservation), Title 17 (Copyrights), Title 21 (Food and Drugs), Title 22 (Foreign Relations; Code of Federal Regulations), Title 26 (Internal Revenue Code), Title 27 (Intoxicating Liquors), Title 31 (Money and Finance; Code of Federal Regulations), Title 33 (Navigation and Navigable Waters), Title 35 (Patents), Title 39 (Postal Service), Title 40 (Public Buildings, Property and Works), Title 42 (Public Health and Welfare), Title 43 (Public Lands), Title 47 (Telegraphs, Telephones and Radiotelegraphs), Title 48 (Territories and Insular Possessions), Title 49 (Transportation) and Title 50 (War and National Defense).

# Asian Law Caucus

An Asian Law Caucus Report

Jointly Prepared by  
Asian Law Caucus Staff and  
the Stanford Law School  
Immigrants' Rights Clinic

April 2009

## THE ASIAN LAW CAUCUS

Asian Law Caucus  
55 Columbus Avenue  
San Francisco, CA 94111  
Phone: (415) 896-1701  
Fax: (415) 896-1702  
[www.asianlawcaucus.org](http://www.asianlawcaucus.org)

## THE STANFORD LAW SCHOOL IMMIGRANTS' RIGHTS CLINIC

Immigrants' Rights Clinic  
Administration Building — Law Clinic  
Crown Quadrangle  
559 Nathan Abbott Way  
Stanford, CA 94305-8610  
Phone: (650) 724-9068  
[immigrants.rights@law.stanford.edu](mailto:immigrants.rights@law.stanford.edu)

# RETURNING HOME:



**How U.S. Government Practices  
Undermine Civil Rights  
At Our Nation's Doorstep**

