

Exhibit A

~~— Filed Under Seal —~~

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*, on
behalf of themselves and others similarly
situated,

Plaintiffs,

v.

DONALD TRUMP, President of
the United States, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

EXPERT DECLARATION OF NERMEEN ARASTU

I, Nermeen Arastu, hereby declare and state the following:

Qualifications

1. During the last twelve years teaching and practicing law, I have represented immigrants before administrative adjudicators, the Department of Justice’s immigration and appeals courts, and federal courts in the course of deportation defense and applications for affirmative relief, including naturalization and adjustment petitions. As a professor I have taught about the intricacies of immigration law practice and as a legal scholar have studied discriminatory denials of citizenship and the impacts of overbroad “security” measures on American Muslim communities. Many of my clients have aspired to ultimately become citizens of the United States and applied for this status.

2. I graduated from UNC-Chapel Hill in 2005 with a B.A. in Political Science. I then received a J.D. from the University of Pennsylvania in 2008. Since receiving my J.D., I have been practicing immigration law in a variety of settings through my *pro bono* practice at Simpson Thacher and Bartlett, LLP, leading the Immigrant Rights Program at the Asian American Legal Defense and Education Fund (AALDEF) and most recently co-directing the Immigrant and Non-Citizen Rights Clinic as faculty at the CUNY School of Law. My academic

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and professional experience is set forth more fully in my Curriculum Vitae (attached as **Exhibit A**).

3. I began my career at Simpson Thacher & Bartlett, LLP where I received awards in 2009 and 2010 for completing over 100 hours of *pro bono* work representing immigrant clients before the Department of Justice’s immigration courts and Board of Immigration Appeals. At Simpson Thacher & Bartlett, LLP, I was awarded a full-year Public Service Fellowship to lead the Immigrant Rights Program at AALDEF.

4. At AALDEF, I continued the work of their Immigrant Rights Project in combination with their Post-9/11 Civil Liberties Project. There, I represented individuals through deportation and bond proceedings, suppression hearings, citizenship and adjustment applications, asylum, T-Visa, U-Visa and various other immigration postures. Most of my clients during this period came from Muslim-majority nations, in response to AALDEF’s focus on providing support to Asian communities disproportionately impacted by overbroad post-9/11 “security” policies.

5. My work at AALDEF led me into various American Muslim communities across New York. For example, in Jackson Heights, Queens, I oversaw monthly immigration clinics in conjunction with community-based organizations. Working in community spaces provided me with a sweeping view of immigration issues that were impacting American Muslim and/or South Asian communities, including delays and denials in immigration applications and concerns about law enforcement surveillance.

6. It was during my time at AALDEF that revelations of New York City Police Department (NYPD) spying on Muslim communities were uncovered by the Associated Press. In response to these revelations, I led AALDEF’s advocacy against law enforcement surveillance of American Muslim communities with a special focus on immigrants’ rights and vulnerabilities. I led a Freedom of Information Act/Law community initiative in pursuit of greater transparency of law enforcement and immigration enforcement practices.

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7. Embarking on a comprehensive interview-based study of New York’s Muslim communities, I co-researched and co-authored a report on behalf of the Muslim American Civil Liberties Coalition (MACLC) with the Creating Law Enforcement Accountability and Reform (CLEAR) Project at the CUNY School of Law titled, “*Mapping Muslims: NYPD Spying and its Impact on American Muslims.*” We found that due to targeted law enforcement surveillance and profiling, American Muslim were curtailing religious practice, censoring their speech, and curbing political organizing.

8. In 2013, I joined the CUNY School of Law’s faculty, first as a Clinical Professor and now as an Associate Professor of Law. I have spent the last seven (7) years co-teaching in the Immigrant & Non-Citizen Rights Clinic (INRC) which I have co-directed since 2017. The Immigrant and Non-Citizen Rights Clinic is a 16-credit, year-long clinic, which seeks to close the growing divide between citizens and non-citizens of the United States through direct representation, community education, and policy advocacy.

9. As a faculty member in INRC, I supervise third-year law students in their representation of indigent clients before immigration courts, the Board of Immigration Appeals, and the United States Citizenship and Immigration Services (USCIS) through all aspects of avoiding deportation and gaining stability and permanence in the United States. This representation includes, but is not limited to, advocacy related to asylum, trafficking, gender-based violence, deportation defense, criminal immigration, unaccompanied minors, special immigrant juvenile status, suppression motions, and various forms of cancellation of removal. For many of our clients, the future prospect of adjustment to permanent residence and eventual naturalization looms ahead—a status I have the privilege of helping many of my clients apply for and attain.

10. I estimate that I have directly represented approximately 100 clients in immigration or immigration-related proceedings. In addition, I have informally worked with many times that number of people who seek immigration advice from me in community clinics, hotline work, consultations, referrals, and other similar capacities.

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11. Along with case work where I represent clients from all parts of the globe, I have designed and implemented advocacy projects with multiple community-based organizations serving a diverse array of New York's immigrant communities. For example, my students have engaged in immigration clinics at the Arab American Association of New York and provided support for detained immigrants at Families for Freedom as part of their clinical experience.

12. Most recently, INRC undertook a multi-year advocacy and community education focus on Central American immigrants facing overbroad gang allegations in the immigration context. Inspired by my work with Muslim communities where individuals were often racially profiled by law enforcement and then discriminated against and criminalized by the immigration system, I co-authored a report: "*Swept Up in the Sweep: The Impact of Gang Allegations on Immigrant New Yorkers*," with the New York Immigration Coalition and my colleagues at the CUNY School of Law. I also co-authored a supplementary toolkit for immigration practitioners and pro se litigants who are defending against such allegations in immigration court and before USCIS, titled "*Toolkit to Challenge Gang Allegations against Immigrant New Yorkers*." The report and toolkit documented discrimination within the immigration system against Central American immigrants and offered practice tips for those targeted as such to defend themselves in immigration court and against denials of naturalization and adjustment. This work further illuminated how the immigration system can disproportionately target certain aspiring Americans by weaponizing the wide latitude that exists within immigration law and policies and the lessened evidentiary protections of the immigration system.

13. While at CUNY, I also co-taught the Immigration & Citizenship Law Seminar course, where I developed and implemented an experiential opportunity for law students to grapple with the technical nature of naturalization petitions. In co-designing the Immigration and Citizenship Law Seminar course, I developed a partnership with CUNY Citizenship Now! Through this partnership, my colleagues and I trained and supervised CUNY law students on all aspects of naturalization law to enable them to volunteer at CUNY Citizenship NOW! Citizenship drives. During these drives, student volunteers were tasked with meeting multiple

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individuals and guiding them through the citizenship process. For many clients, an entire citizenship application could be completed and submitted in one sitting.

14. At CUNY, I have also served as a faculty member of and am now *of counsel* to the Creating Law Enforcement Accountability and Responsibility (CLEAR) Project. CLEAR is a cross-clinical community lawyering initiative which provides legal services, education and organizing support in Muslim, Arab, South Asian, and other communities impacted by overbroad security policies. These policies include law enforcement surveillance and questioning, watchlisting, and delays and denials in the course of obtaining immigration relief, adjustment and naturalization.

15. Together with my CLEAR students and colleagues, I represent individuals approached by FBI, NYPD, or Department of Homeland Security (DHS) for interviews or recruitment, and those targeted by surveillance and/or placed on watch lists. Additionally, I interface with various Muslim community groups, student organizations and houses of worship to provide “know your rights” trainings and advice. In this role and while researching for the *Mapping Muslims* report, I was well positioned to hear from a broad array of impacted community members while also representing individuals in their immigration cases.

16. During the course of my work with INRC & the CLEAR Project, I have strategized and participated in efforts to strengthen local, state and federal laws regarding discriminatory surveillance and racial and religious profiling by directly interfacing with the New York City Mayor’s Office, Police Commissioner’s Office, Comptroller and Public Advocate’s Office. I was also appointed a member of then-Public Advocate Letitia James’s transition team to advise her team on issues of immigration and civil rights.

17. Throughout my tenure representing immigrants it has been apparent to me that some populations, *i.e.*, those from Muslim-majority nations characterized as “national security risks” and Central Americans characterized as “gang affiliates,” are held to a higher standard when pursuing naturalization, adjustment, other affirmative applications and when defending against deportation. Immigrants who are not from these populations more easily and successfully

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apply for citizenship while applicants from Muslim-majority countries can spend countless hours on their applications only to be met with inordinate delays in the application process or repeated follow-up requests from USCIS. Often, I observed the immigration system being used to deny relief to or deport immigrants of color targeted as “terror risks” or “gang associates” who were otherwise eligible for status where law enforcement had no evidence worthy of criminal charges.

Basis of Opinion

18. In providing my opinions on this matter, I rely on my scholarship regarding naturalization and discriminatory law enforcement and immigration policies, my direct representation of clients applying for naturalization and adjustment in various settings from direct services offered at my law school clinic to partnerships with CUNY Citizenship NOW!, my extensive experience with a diversity of immigrant communities including those from Muslim-majority nations whom the U.S. targets with “security-related” policies, and my experiences working in partnership with immigrant advocacy groups and providing community education in mosques, schools and other community spaces in American Muslim communities and beyond. I base the contents and opinions in this report on my academic research and professional experiences, as well as my review of certain documents disclosed to Plaintiffs by USCIS in this case. The list of the documents I reviewed is attached as **Exhibit B**.

Scholarship Specific to Naturalization

19. Through my above work, I observed significant disparities in my clients’ experiences when applying for naturalization and adjustment. While at AALDEF, I began noticing a pattern where USCIS would deny naturalization based on a minor application irregularity, usually an inconsistency between the application or applicant’s interview statement and open source internet materials about the applicant. This only seemed to happen where the applicant was from a Muslim-majority nation, and not when the applicant was from other countries. I heard similar stories from other practitioners serving Muslim community members and while engaging with American Muslim communities and community organizations.

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20. These observations, reports and client experiences were the impetus for my recent legal study of naturalization denials appealed to district courts documented in my article, *Aspiring Americans Thrown Out in the Cold: The Discriminatory Use of False Testimony to Deny Naturalization*. This article was published in the UCLA Law Review in 2019, and is attached in its entirety as **Exhibit C**.

21. *Aspiring Americans* looks closely at the good moral character clause, INA § 101(f), 8 U.S.C. § 1101(f), and its potential to enable individual and systemic bias by allowing USCIS to deny a naturalization petition on the basis that the applicant has offered “false testimony” and therefore lacks the requisite “good moral character” required to prove citizenship eligibility. 8 U.S.C. § 1101(f)(6) (2012).

22. In certain cases, when an adjudicator finds such inconsistencies, they allege that the applicant provided false testimony and deny citizenship based on a lack of “good moral character.” Reviewing a twenty-page naturalization application and a subsequent naturalization interview, USCIS adjudicators may delve into every detail of an applicant’s life—from associations and charitable giving to employment and travel. Inadvertent irregularities, mistakes, and omissions are common. USCIS officers can likely insert some doubt into every case no matter how careful or transparent the applicant. In fact, this is precisely what USCIS trains its officers to do when adjudicating a case in the Controlled Application Adjudication and Review Program (CARRP). *See, e.g.*, DEF-00063686 (“Are we normally going to deny for failure to notify of a change of address, returning to one’s country of claimed persecution, or lack of attachment? [¶] Not normally – but in CARRP, we don’t take anything off the table[.]”).

23. In an effort to understand adjudicator and systemic bias in the naturalization process, the study in *Aspiring Americans* examines 158 naturalization cases in which a federal court reviewed a naturalization denial that was based, at least in part, on the alleged provision of false testimony. Critically, this represents only the subset of cases that actually make it before a federal court. In my experience, the vast majority of immigration cases do not progress past administrative agency adjudication. Initiating an appeal in federal court is expensive, time-

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consuming, and may be intimidating. Some choose to cure the allegations and re-apply, while others may abandon hopes to naturalize altogether. Often, I observed USCIS would offer to settle and approve a naturalization application when faced with the prospect of federal court review. Nevertheless, I believe the cases in my study provide a representative sampling of cases that demonstrate the kinds of delays, denials, and pretextual reasoning that is characteristic of cases in CARRP processing.

24. My mapping and review of these cases suggest that adjudicators have disproportionately held misstatements and omissions—alleged as false testimony—against applicants from the countries and religions the U.S. government had deemed suspect or undesirable, most recently those from Muslim-majority nations. The discovery documents I have reviewed from this litigation provide one likely explanation for how and why this has occurred .

25. Until September 11, 2001, only twenty-eight available judicial opinions discuss citizenship denial on false testimony grounds. In these opinions, courts noticeably focus on those who sold alcohol in violation of local liquor laws and later those accused of having ties to Communism, the Mafia, and labor organizing. In the approximately eighteen years after September 11, 2001, the number of cases involving false testimony allegations that were appealed to district courts more than quadrupled to 130.

26. Analyzing this data, it appears that the U.S. government has used false testimony allegations to deny naturalization applications exponentially more in the years after September 11, 2001. Eighty-two percent of available appeals cases involving false testimony denials of naturalization were published after September 11, 2001.

27. USCIS has also used this denial tool disproportionately against those from Muslim-majority nations. Though applicants from Muslim-majority nations constitute only around 12 percent of all naturalization applicants since 9/11, they make up nearly 46 percent of the applicants in appealed cases in which USCIS relied upon false testimony allegations as a

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basis for the naturalization denial.¹ As set forth below, these data in context with revelations about CARRP strongly suggests that USCIS has sought to use the false testimony provision to pretextually deny naturalization to those from Muslim-majority nations.

28. My research further shows that federal courts upheld the agency's denial 63 percent of the time (99 of the 158 cases) and overturned denials only 20 percent of the time (32 of the 158 cases). The remaining cases are: pending; or have sealed, out-of-court agreements or settlements; or were remanded back to the administrative adjudicator or scheduled for fact-finding hearings with unknown results. Finally, in a few instances, courts dismissed cases as moot or due to lack of jurisdiction, including where USCIS adjudicates applications while pending, or where administrative remedies had not been exhausted. These statistics suggest that to the extent Plaintiffs are correct that CARRP is discriminatory and wrongly deprives immigrants of immigration benefits for which they are fully eligible, judicial review of agency denials is an inadequate remedy.

29. As discussed below, the statutory and procedural scheme governing naturalization has changed considerably from a decentralized process adjudicated by state and local courts (from our nation's founding until 1906) to a centralized approach with the then-Bureau of Immigration Services making recommendations to courts which made the final naturalization determinations (1906–1990) and finally to the present scheme, which gives the administrative agency primary adjudicative authority with limited judicial oversight.

30. From 1990—when the current scheme was enacted—until September 2001, only 9 published cases involve judicial review of false-testimony-based naturalization denials, or an average of approximately 0.75 such cases per year. After September 2001 to the April 2008 implementation of the CARRP program, this number rises to 37, or an average of approximately

¹ These averages were formulated employing data from a Center for Immigration Studies article and the author's additional calculations relying on DHS records. See Dan Cadman, *Is There Bias Against Muslims Who Apply for Naturalization?* Ctr. for Immigr. Stud. (June 22, 2016), <https://cis.org/There-Bias-Against-Muslims-Who-Apply-Naturalization#3> [<https://perma.cc/WBK4-E9BR>]; U.S. Department of Homeland Security, Yearbook of Immigration Statistics, Fiscal Year 2017, Table 21.

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4.35 such cases per year. From the advent of CARRP to October 2018 (the limits of my study), 93 cases appear, an average of 8 cases annually.

31. This growth may be caused by an increase in discriminatory denials based on false-testimony-related allegations, a higher rate of appeals or a mixture of both. The largest jump in false testimony-based denials corresponds with the period from April 2008 to the present. This time period correlates with CARRP's creation and implementation. *See* CAR000001 (establishing CARRP on April 11, 2008); CAR000005 (instructing CARRP adjudicators to deny applications using "any legally sufficient grounds").

32. The number of naturalized immigrants and legal permanent residents has risen steadily since 1970, more than doubling by 2015. Ana Gonzalez-Barrera, *Recent Trends in Naturalization: 1995–2015*, Pew Research Center (June 29, 2017). Though this may partially account for increases in denials more generally, it cannot account for the appearance of false testimony allegations appearing disproportionately in cases involving those from Muslim-majority nations.

33. To complete this study, I performed a search on a Westlaw using the search terms "naturalization" and "good moral character" with the search parameter set to "all federal." Within those search results, I narrowed cases further based on the search terms "false testimony." As of October 2019, the search yielded 533 cases. Only those cases that were based, in whole or in part, on a naturalization application denial were counted within the search results of my study. Other similar searches were run in Westlaw, Bloomberg and Pacer to ensure the study captured all available published cases in this area.

34. Because no single legal research platform contains all United States case law, and all commercial legal research platforms are somewhat selective in which cases they choose to publish, the 158 cases I identified do not represent the complete universe of all naturalization denials since the founding of this country. Furthermore, the vast majority of immigration proceedings do not exhaust all administrative proceedings and make the leap to federal court. Of

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those that do, only a portion of those are reported in legal databases. Nevertheless, the dataset offers a comprehensive and representative sample of published federal cases.

The Path to Naturalization in the United States and Good Moral Character

35. If an immigrant has reached naturalization’s doorstep, she has already undergone multiple series of inquiries, interviews, health screenings, security checks, and other reviews by multiple U.S. government agencies.

36. Those who do not enter the United States as permanent residents (through a separate process called consular processing) must go through a lengthy and extensive process to obtain lawful permanent residence (commonly called a green card) by applying for an immigrant visa. Some acquire their immigrant visas through marriage to a U.S. citizen or Lawful Permanent Resident, asylum or other humanitarian relief, extraordinary abilities, or employer sponsorship. Each of these paths come with specific eligibility requirements.

37. After a statutorily mandated period, those who have received an immigrant visa may apply for Lawful Permanent Resident status if they have maintained lawful status and or fulfilled other criteria (or applied for a waiver, where needed). There are various paths to lawful permanent residence. Some secure their green cards by affirmatively petitioning USCIS for status, while others apply for adjustment or an immigrant visa before an immigration judge to avoid deportation. Those who have non-immigrant visas or are undocumented will not have a path to adjustment and citizenship unless their circumstances change.

38. Obtaining permanent resident status involves the same extensive screening as that required to secure an underlying visa or status and lawful entry, known as the process of “admission.” For example, when an asylee applies to adjust status USCIS may scrutinize the validity of an asylee’s underlying asylum grant and will extensively renew health, security, biometric, and criminal history checks before granting an asylee permanent residence. In addition, USCIS will again conduct a comprehensive admissibility screening, and depending on the immigrant’s underlying status, reconsider factors such as whether the immigrant may become dependent on public welfare programs, criminal records and activity, and how long the applicant

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has maintained physical presence and residency in the United States. Only after all of these steps can one become a Lawful Permanent Resident. At some point after obtaining a green card, a Lawful Permanent Resident may choose to apply for naturalization.

39. The modern-day process governing naturalization is provided by section 316 of the Immigration and Nationality Act (INA) and codified at 8 U.S.C. § 1427. With some specific exceptions, an immigrant must fulfill the following eligibility requirements to naturalize: be a green card holder of at least 5 years; be 18 years or older at the time of filing; have been lawfully admitted as a permanent resident of the United States; have resided continuously in the United States (as defined under 8 C.F.R. § 316.5) for a period of at least five years after having been lawfully admitted for permanent residence; have been physically present in the United States for at least 30 months of the five years preceding the date of filing the application; be a resident of the area over which the relevant field office has jurisdiction; continuously reside within the United States from the date of application of naturalization up to time of admission to citizenship; and be a person of good moral character, attached to the principles of the United States, and favorably disposed toward the good order and happiness of the United States.

40. To apply for naturalization, one must file Form N-400, Application for Naturalization, a twenty-page document that asks over 70 questions about everything from identity information, employment, and travel history to criminal records and organizational affiliation. The filing fee, currently \$725.00, is a significant deterrent for many non-affluent noncitizens who otherwise wish to apply for naturalization.

41. After filing the form, the applicant must pass a biometrics test and complete a detailed in-person interview. Additionally, those who are not eligible for age-based or medical waivers must also pass a civics and English language test.

42. Naturalization applications are one of the few applications subject to CARRP where an individual may seek judicial review of a delay or denial. A person whose application for naturalization is denied following the interview may seek a hearing before an immigration officer pursuant to 8 U.S.C. § 1447(a). If their application is denied at this administrative

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hearing, they may seek judicial review before a district court judge pursuant to 8 U.S.C. § 1421(c). A person whose application has not been adjudicated after 120 days following the interview may seek relief before a United States district court pursuant to 8 U.S.C. § 1447(b). Another possible avenue for relief is a writ of mandamus. CARRP guidance recognizes the possibility of judicial review and instructs adjudicators to “request assistance from headquarters” in cases where USCIS has “only one opportunity to develop information . . . such as naturalization proceedings when the applicant is subject to court review.” DEF-00065590.

43. Most naturalization criteria are objective, like physical presence, jurisdiction and residency. These determinations are straightforward and require no discretionary analysis.

44. “Good moral character” is a major exception in this regard. Even if an applicant is statutorily eligible for naturalization, which is a non-discretionary benefit, the USCIS adjudicator may nevertheless find a basis for denial using the good moral character ground, relying on vague and catch-all categories allowing denials for “unlawful acts” or “false testimony.”

45. For the first 150 years after the enactment of the United States’ naturalization laws, Congress did not define good moral character. Early cases judged good moral character against the standards of the average citizen. *See In Re Spenser*, 1 N.J.L.J. 248, 22 F. Cas. 921, 921–22 (C.C.Or. 1878); *In re Hopp*, 179 Fed. 561, 562–63 (E.D. Wis. 1910). This standard eventually was accepted nationally and is now reflected in the USCIS Adjudicator Manual which calls for adjudicators to judge good moral character on a “case-by-case basis” against “the standards of average citizens of the community in which the applicant resides.” *USCIS Policy Manual Volume 12, Part F: Good Moral Character*, U.S. Citizenship & Immigration Servs., available at <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-1>.

46. However, it is clear that USCIS trains CARRP adjudicators to hold applicants to a much higher standard, and specifically instructs adjudicators to capitalize upon immaterial mistakes and omissions to deny applications on pretextual grounds, such as good moral character. *See, e.g.*, DEF-00063663 (instructing officers to use vetting “towards the specific end of not approving an NS concern”); DEF-00063686 (USCIS will “[n]ot normally” deny an

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application “for failure to notify of a change of address, returning to one’s country of claimed persecution, or lack of attachment,” but “in CARRP, we don’t take anything off the table”); DEF-00065765–DEF-00065766 (instructing officers that “[f]alse testimony under oath for the purpose of obtaining an immigration benefit constitutes a bar to a finding of good moral character,” and training officers on using this as a basis to deny applications in CARRP).

47. Minor misstatements, omissions, and mistakes are virtually impossible to avoid while navigating a complex immigration system. In a naturalization denial appeal involving false testimony, a USCIS officer testified in a deposition, “It is common for an applicant to make ‘a lot’ of mistakes when filing out a Form N-400.” *Maina v. Lynch*, No. 1:15-cv-00113-RLY-DML, 2016 WL 3476365, at *2 (S.D. Ind. June 27, 2016). The officer added, “[T]en changes is not ‘a lot,’ but is actually ‘about average.’” *Id.* This demonstrates how effective the false testimony provision can be as a catch-all mechanism to deny applications from certain naturalization applicants.

48. An applicant must have offered false testimony during the five-year period preceding the naturalization application for false testimony to be a basis for denial. But adjudicators are not limited to this five-year period and may look to actions before the statutory five-year period to determine whether an applicant has met their burden of establishing good moral character. 8 U.S.C. § 1427(a)(1)–(3); *id.* at § 1427(e); DEF-00065765 (“The Service is **not** limited to reviewing the applicant’s conduct during the five years immediately preceding the filing of the application.”).

49. The Supreme Court in *Kungys v. United States* held that “false testimony” need not relate to a material fact to preclude a finding of good moral character: “[E]ven the most immaterial of lies with the subjective intent of obtaining immigration or naturalization benefits” can prevent a good moral character finding. 485 U.S. 759, 779–80 (1988). *Kungys* provides USCIS officers with enormous latitude to deny applications on this ground. Even if petitioners meet every other element required for naturalization, *Kungys* permits adjudicators to rely on any contradictory evidence, however minor, as a basis for denial on false testimony grounds. All the

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officer has to do is find one plausible reason that the applicant could have believed that “even the most immaterial” of contradictions or omissions might have enhanced his or her chances at obtaining the benefit sought. 485 U.S. at 780.

50. USCIS trains its officers to apply *Kungys* by, for instance, scouring an applicant’s past to search for any misrepresentations at the time he or she was admitted into the United States. *See, e.g.*, DEF-00128893 (“At time of naturalization, review all prior petitions or applications to determine if the applicant was truthful at the time they obtained the benefit . . . A finding of lack of [good moral character] does not require that the testimony be material . . .”). While this instruction applies to all officers, USCIS expects CARRP-trained officers to apply such vetting techniques with particular intensity.

The CARRP Adjudicator employs all of the ‘best practices’ noted above when adjudicating an NS [National Security] Case. The CARRP Adjudicator calls in all related files to conduct a thorough review of the immigration history of the subject and any immediate relatives. The adjudicator looks at how the NS concern could affect eligibility for the benefit being sought. CARRP adjudicators determine if the NS concerns would justify the use of national security grounds in a denial of benefits, and if not, what other grounds would support a denial of the benefit due to the NS concern.

DEF-000128893.

51. It is clear that USCIS expects officers to devote an unusual amount of time and effort into vetting CARRP cases. An instructor guide explains, “In most respects, the adjudication process completed by a CARRP adjudicator is very similar to that completed by any other Adjudications Officer. CARRP adjudicators, however, have resources that are not commonly available to most adjudicators in the field; two of which are time and enhanced access to information. *CARRP Adjudicators may spend hours or days tracking down information from public sources and law enforcement agencies.* They validate this information and, in some cases, obtain permission to disclose third agency or law enforcement sensitive information.” DEF-00128896 (emphasis added).

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52. In light of the substantial time and resources USCIS officers spend investigating CARRP cases, those officers will be particularly equipped to craft a denial of a CARRP case using false testimony and/or good moral character grounds. Any minor inconsistency—whether about the details of an association with a group or club, a single minor omission in the applicant’s travel history, or anything else—can be used to justify a denial of a naturalization or green card application. Indeed, this is precisely what USCIS trains its officers to do. In a training slide titled “N-400,” USCIS provides various “[f]orm-specific” examples of reasons to deny the application on false testimony grounds. CAR001173. Among these are “[f]ailure to provide true and complete information during his N-400 interview with regard to trips abroad and “[f]ailure to disclose all addresses where the applicant resided during this N-400 interview.” *Id.*; *see also* DEF-00065590 ([REDACTED]

[REDACTED]). I believe that such denials manipulate naturalization’s testimonial requirements to powerfully exclusionary ends.

53. In many of the cases I studied, the applicants’ false testimony did not prove them to be dangerous, nor did the alleged false testimony prevent USCIS from learning about the applicant’s relevant qualities. Similarly, CARRP guidance does not direct adjudicators to deny applications based on supposed dangerousness or a sincere belief that the applicants’ character is not worthy. Rather, denials are encouraged as a time-saving measure to avoid the lengthy process of external vetting. *See, e.g.*, CAR000004–CAR000005 (instructing officers to use internal vetting—including interviews—“to determine if the individual is eligible for the benefit sought,” the purpose of which “is to ensure that valuable time and resources are not unnecessarily expended externally vetting a case when the individual is otherwise ineligible for the benefit sought”).

The Controlled Application Review & Resolution Program (CARRP)

A. How CARRP Works: Creating a Distinct Naturalization Process to Deny

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54. In June 2010, the ACLU of Southern California (ACLU SoCal) filed a Freedom of Information Act (FOIA) request after practitioners noticed that USCIS subjected applicants from Arab and Muslim-majority countries to heightened scrutiny and discriminatory delays and denials in their naturalization and adjustment applications. The FOIA letter expressed the ACLU SoCal’s “concern[] that USCIS appears to have a pattern and practice of denying naturalization to applicants from [these] nations for reasons unsupported by naturalization law or fact,” such as pretextual claims of false statements about organizational associations and charitable giving.² In response to its request, ACLU SoCal uncovered information about CARRP to the public for the first time.

55. CARRP was created by an internal USCIS policy memo. CARRP was neither enacted by either Congress nor promulgated through the Administrative Procedure Act’s notice and comment process required for legislative rules.

56. CARRP is a process “for vetting and adjudicating cases with national security concerns.” CAR000008. As a USCIS training slide explains, “It’s a way of slowing ourselves down, taking some extra time to think about eligibility, think about derogatory information.” CAR000609.

57. USCIS defines a national security (NS) concern as: “[W]hen an individual or organization has been determined to have an articulable link to prior, current, or planned involvement in, or association with, an activity, individual, or organization described in sections 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B) of the Immigration and Nationality Act.” CAR000001. “Indicators”—that is, evidence—of NS concerns include “proficiency in particular technical skills gained through formal education, training, employment, or military service, including foreign language or linguistic expertise, as well as knowledge of radio, cryptography,

² Freedom of Information Act Request (FOIA) Letter from ACLU of S. Cal. to U.S. Citizenship & Immigration Servs. (June 16, 2010), <https://www.aclusocal.org/sites/default/files/wpcontent/uploads/2013/01/First-FOIA-Request-June-16-2010.pdf> [<https://perma.cc/JY27-8YWD>].

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weapons, nuclear physics, chemistry, biology, pharmaceuticals, and computer systems,” among other wide-ranging factors. CAR000086.

58. CARRP categorizes cases with NS concerns into two groups: Known or Suspected Terrorist (KST) and Non-Known or Suspected Terrorist (Non-KST). A KST is a person who is on the Terrorist Screening Database, the Terrorist Watch List, and have a “specially-coded lookout posted” in certain databases. Non-KSTs are all other cases with national security concerns. CAR000001.

59. USCIS officers check certain government databases to confirm whether a KST NS concern exists. CAR000004.

60. The process for confirming a non-KST NS concern is much more complicated. It requires an analysis of “the [NS] indicator in conjunction with the facts of the case, considering the totality of the circumstances,” to “determine whether an articulable link exists between the individual and an activity, individual, or organization described in sections 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B) of the [INA].” CAR000004.

61. If an officer identifies a “clear link” between the applicant and an NS ground (from INA §§ 212(a)(3)(A), (B), or (F), or 237(a)(4)(A) or (B)), this “confirms” the NS concern. CAR000622. But if there is no such “clear link,” then the NS concern is “NS Not Confirmed.” CAR000624. USCIS instructs its officers that mere “INDICATIONS or SUSPICIONS” of a link are sufficient to place a case in CARRP. CAR000624. USCIS can then “use the CARRP process to build our articulable link,” to take it from “a kind of hazy articulable link” to “the perfectly clear link that would lead us to an NS confirmed determination.” CAR000624.

62. After an NS concern is identified, the case proceeds to the next stage of CARRP processing: internal vetting and external vetting. Internal vetting consists of “DHS, open source, or other systems checks; file review; interviews;” and other related research. CAR000004. During this stage, officers search for reasons the applicant may be ineligible for the benefit sought. CAR000004–CAR000005. External vetting consists of working with other agencies,

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including law enforcement and the intelligence community, to “obtain[] additional information regarding the nature of the NS concern and its relevance to the individual.” CAR000005.

63. Finally, if after vetting the NS concern remains, the officer must evaluate the evidence and determine whether to approve the application, deny the application, or “obtain any additional relevant information (e.g., via a request for evidence, an interview, and/or an administrative site visit).” CAR000006. An officer can decide to deny the application on his or her own. However, “[o]fficers are not authorized to approve applications with confirmed KST NS concerns,” and “[o]fficers are not authorized to approve applications with confirmed Non-KST NS concerns without supervisory approval and concurrence from a senior-level official. CAR000006–CAR000007. Accordingly, CARRP’s program design makes it much more difficult to approve than to deny a case in CARRP processing.

64. In addition to the various ways CARRP’s design creates systematic pressure to deny cases, the way CARRP identifies NS concerns is systematically discriminatory against Muslims in America.

65. For instance, USCIS instructs officers to identify NS indicators and vet concerns through various government databases, including FBI Name Checks, FBI Fingerprint Checks, or NCIC Criminal History Checks. CAR000087–CAR000088.

66. In my experience, whether a person is placed in a government list, database, or in an open FBI file is inextricably tied to the overpolicing and surveillance of American Muslim communities and those who look like them, especially after 9/11. For example, DHS and FBI databases include the names of many individuals who provided voluntary interviews to the FBI or shared names of persons of interest with the FBI but were never subject to a national security investigation. Amna Akbar, *Policing Radicalization*, 3 U.C. Irvine L. Rev. 809 (2013) (describing the account of a young Pakistani man who was placed on the No- Fly List after refusing to act as an FBI informant in his community). Relying on overbroad and faulty methods which disproportionately target immigrants from Muslim-majority nations to identify “NS

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concerns” is deeply problematic. Constructively denying eligible immigrants green cards and citizenship in reliance on this discriminatory system only compounds the harms of CARRP.

67. According to USCIS’s data produced in this lawsuit, 15,078 N-400 applications have been processed under CARRP between FY 2013 and FY 2019. The countries whose citizens’ N-400 applications were subjected to CARRP in the highest numbers during that period were [REDACTED]

[REDACTED].
2020-06_Wagafe_Internal_Data_FY2013-

2019_(Confidential_Pursuant_to_Protective_Order).xlsx (“Approval & Denial Rates” tab). [REDACTED]

[REDACTED]. *The World Factbook 2020*. Washington D.C: Central Intelligence Agency, 2020, <https://www.cia.gov/library/publications/the-world-factbook/fields/401.html>. [REDACTED]

[REDACTED]. *Id.*, Jeff Diamant, *The Countries with the 10 Largest Christian Populations and 10 Largest Muslim Populations*, PewResearch.org, April 1, 2019, <https://pewrsr.ch/2V7dMSU>. The fact that all of the nations that top this list are majority-Muslim or home to large Muslim populations suggests that in practice, NS concerns often serve as a thinly veiled metonym for Muslim, and that CARRP joins the “corpus of immigration law and law enforcement policy that by design or effect applies almost exclusively to Arabs, Muslims, and South Asians.” Muneer I. Ahmad, *A Rage Shared by Law: Post September 11 Racial Violence as Crimes of Passion*, 92 Cal. L. Rev. 1259, 1262 (2004).

B. How CARRP Works: Pretextual Denials

68. Where an applicant is classified as a national security concern through the process summarized above, training manuals instruct USCIS officers to conduct a “thorough review of the record” and deny the application “on any legally sufficient ground.” CAR000004.

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69. To prepare for their interviews with applicants, training materials instruct field officers to “[p]ick a date and time when you can dedicate yourself to the case” and “[b]e ready to explore answers and prepare for resistance.” DEF-00027670. They further instruct field officers to [REDACTED] DEF-00027670.

70. During the interview, USCIS officers must “look for any information that may not be on the N-400 application.” DEF-00128892. Officers are trained to utilize interviews as a critical source of vetting existing and uncovering new ties to national security issues. *See* DEF-00063688 (instructing officers when conducting interviews to “still [be] on the lookout” “for NS [national security] information,” even if “the [NS] concern was resolved, or if we’re approving anyway even though it’s unresolved”); DEF-00063720 (describing “multiple interviews” as one of the “internal vetting tools” for CARRP adjudicators).

71. During the vetting process, adjudicators pay close attention to “inconsistencies,” focusing on aliases and various name spellings, institutions and degrees, school records, roommates, group membership, and travel companions. CAR001175. CARRP adjudicators are guided to “review everything in front of you,” [REDACTED] review the questions and answers and ask, “Can you use any of that to deny the application in front of you?” DEF-00027670, Slide 67 (speaker notes); *see also* DEF-00065590 (“Look through each application with a fine-toothed comb!”); *id.* (“Review all documents/materials to determine whether you have enough information to deny application based on credibility/inconsistencies.”).

72. In contrast to CARRP, general USCIS adjudication guidelines provide simple, straightforward instructions for reviewing naturalization applications. For example, the Adjudicator’s Field Manual reminds adjudicators to check that the form is completed and signed, supporting documents are unaltered, and ensure “basic statutory eligibility” for the benefit sought. U.S. Citizenship & Immigration Servs., Chapter 10.3: An Overview of the Adjudication Process, in Adjudicator’s Field Manual—Redacted Public Version, available at

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<https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/0-0-0-1166.html#0-0-0-276>. (last updated June 18, 2007).

73. In non-CARRP adjudications, USCIS’s denial of an application or petition is routinely preceded by a Notice of Intent to Deny explaining the nature of the adverse findings and providing the applicant an opportunity to respond or inspect the proceeding record. *Id.* at Chapter 10.3(f).

74. In contrast, in CARRP adjudications, USCIS does the opposite. If at the conclusion of CARRP processing a USCIS officer believes an NS concern may remain but cannot resolve it conclusively, officers are trained to apply “lead vetting”—*i.e.*, “the act of building a separate evidentiary basis for a decision . . . to build a new path from the starting point (our person) to the ending point (we need to deny them)” which avoids disclosing to the applicant the national security related grounds for the denial. CAR001291. Officers must “find a way to deny . . . using only facts that we can disclose / leverage in a decision.” *Id.* This process deprives the applicant of the ability to know about the derogatory allegations or circumstances that triggered the NS concern, much less defend against it. Instead, applicants only receive notice of the pretextual reasons for the denial.

75. In sum, CARRP denies immigration benefits to individuals who may be loosely linked to a set of overbroad security markers for reasons unrelated to the applicant’s statutory eligibility for the benefit sought. Indeed, in the naturalization context, the INA sections with which CARRP is concerned—sections 212 (grounds of inadmissibility) and 237 (grounds of deportability)—are completely irrelevant to eligibility. Still, a naturalization application in which an officer identifies an NS concern can be placed in CARRP processing precisely because, as a training slide states, “What we are talking about right now *is not* eligibility related.” CAR000611.

76. Historically, false testimony-based denials may have resulted from individual adjudicator bias against suspect populations. But CARRP takes this a step further—it institutionalizes discriminatory denials by creating an explicit framework through which USCIS

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uses false testimony, good moral character, and related grounds to pretextually deny citizenship to immigrants who are Muslim or come from Muslim-majority countries.

C. Researching Naturalization Denial Cases

77. In 1992, Professor Louis DeSipio asked a question which may still resonate today: “What administrative reviews should be instituted to allow oversight of individual abuse that apparently continues to occur . . . ?” Louis DeSipio, *Making Americans: Administrative Discretion and Americanization*, 12 *Chicano-Latino L. Rev.* 52, 66 (1992). His analysis demonstrated grave geographic and racial disparities in naturalization adjudication, highlighting differential rejection rates for immigrants from different regions of the world. *See id.*

78. The research presented in *Aspiring Americans* takes a close look at the 158 cases in which adjudicators used false testimony allegations as at least one basis to deny naturalization. These numbers tell only a small part of the story, as many applicants are unlikely to appeal naturalization denials to the federal courts. Appeals are expensive, time consuming, and, since most may reapply for naturalization five years after the event that rendered them ineligible (for instance, the provision of false testimony), many choose to wait it out and apply again. Others may abandon hopes of naturalization altogether. Further, many who do pursue judicial review may settle out of court when USCIS offers naturalization in response to litigation.

79. But even with the limitations inherent to this dataset, the judicial opinions I reviewed tell a compelling story about systemic biases that appear to exist in the adjudication of naturalization applications, and complements the information contained in the discovery documents from this litigation provided for my review.

80. After the current statutory scheme was enacted in 1990, there were only 9 naturalization appeals cases between 1990 and September 11, 2001 that involve false testimony. In the almost 9 years between September 11, 2001 and April 2008, the number rose exponentially to 37. In the decade since CARRP’s implantation in April 2008, courts have

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considered another 93 such cases. These numbers demonstrate a marked increase in the use of false testimony to deny citizenship in the years after 9/11 and CARRP's implementation.

81. In the federal case law reviewing naturalization denials, two clearly different adjudication standards emerge. First, the vast majority of applicants who appeal their naturalization denials are alleged to have misstated or omitted past arrests, convictions, or a fact that implicated the underlying immigration status that opened the path to naturalization. In these cases, the penalized misstatement or omission may have a direct relation to specific statutory requirements or bars to naturalization.

82. But in a second, curious set of cases, adjudicators denied naturalization applications based at least in part on misstatements or omissions relating to aliases, organizational associations, extramarital affairs, travel and employment history, taxes, land ownership, and other information not directly related to specific statutory requirements or bars to naturalization. The vast majority of recent applicants denied citizenship in this manner are either from Muslim-majority nations or have names that indicate they may have Muslim origins.

83. The discovery documents I reviewed reinforce my findings and observations. In my opinion, it is remarkable that the training materials specifically instruct adjudicators to deny applications based on "credibility" and "inconsistencies," as neither of these are statutory bars to naturalization.

84. In light of the various ways CARRP is designed to push officers toward denying immigration benefit applications, it is not surprising that my study found that applicants from Muslim-majority nations—*i.e.*, those most likely to be subjected to CARRP—were more likely than other applicants to receive naturalization denials based on minor misstatements about aliases, organizational associations, extramarital affairs, travel and employment history, taxes, land ownership, and other information unrelated to statutory eligibility for naturalization. *Cf.* DEF-00065838 (CARRP training materials directing officers adjudicating naturalization applications "to take a particularly hard look at these areas for national security cases: Travel, Criminal History, [REDACTED] and Affiliations.")

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85. CARRP sheds light on cases like *Lajevardi v. Department of Homeland Security*, No. SACV 14-1249-AG (ANx), 2015 WL 10990359 (C.D. Cal. Oct. 16, 2015). When Mr. Lajevardi applied to become a citizen, he offered an array of evidence to prove the continuous physical presence required to naturalize. Mr. Lajevardi offered compelling and thorough evidence through his business records, passport, taxes, and corroborating declarations. DHS discounted each piece of evidence, alleging that the affidavits were “self-serving” and “he might have managed those businesses outside of the United States.” *Lajevardi*, 2015 WL 10990359, at *2–*3. DHS argued the passport-related evidence, too, was insufficient because “it does not show exit dates from the United States.” *Id.* at *3.

86. When the court questioned DHS about how the applicant could account for weekends where he did not have time sheets, DHS responded that the applicant had the burden of accounting for time between work weeks. The court held that such a “detailed showing that essentially presumes international travel on weekends” could not reasonably be required of the applicant and found no genuine issue of material fact concerning Mr. Lajevardi’s continuous presence. *Lajevardi*, 2015 WL 10990359, at *2–*3.

87. DHS further contended that Mr. Lajevardi did not establish good moral character because he had provided false testimony about how many days he spent in Mexico on vacation. The court rejected this argument, stating,

Plaintiff mentions that, for “the first time out of this long process, Defendants now claim that Plaintiffs lacks [good moral character] because he stated in the interview at the airport that he was out in 2012 for one (1) week on a trip to Mexico and then stated he was out for twenty (20) days during the same trip on his N-400 application.” . . . Indeed, it does not appear that this good moral character issue was raised earlier. The Court is not convinced that it can consider issues not raised during the earlier proceedings, even applying de novo review. But even if the Court did consider the good moral character issue, it would grant summary judgment in Plaintiff’s favor.

Lajevardi, 2015 WL 10990359, at *2–*3.

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88. Granting Mr. Lejavardi’s motion for summary judgment, the court commented: “During the hearing on the motions, the Court asked counsel for both sides whether there was a lingering equal protection issue concerning the United States being generous on immigration issues with one group of people, while throwing this application out in the cold. This result also resolved any looming equal protection issues.” *Lajevardi*, 2015 WL 10990359, at *5.

89. I do not have access to information that could confirm whether Mr. Lajevardi’s application was subject to CARRP, although I observe that it was adjudicated after CARRP was implemented. At the very least, USCIS’s treatment of his application strongly reflects the CARRP policy where USCIS explicitly directs adjudicators to require an impossibly high standard of detail and accuracy about topics like travel history, organizational membership, charitable giving, and taxes in searching for reasons to deny an application.

90. My research demonstrates that allegations of false testimony based on lies or misstatements about organizational associations appear in my dataset *only* in cases in which the applicant was from a Muslim-majority country, had a name which indicated a Muslim heritage, or where USCIS was concerned about the applicant’s ties to Communism. See **Exhibit C**.

91. According to my research and experience, many American Muslims are denied naturalization on false testimony grounds after extensive delays. When USCIS refuses to schedule a naturalization interview or adjudicate the application, it prevents the applicant from availing him or herself of the review provisions of 8 U.S.C. § 1447(a)-(b) and §1421(c). When the adjudication of an application is indefinitely delayed, it prevents the applicant from reapplying to cure any defect. USCIS explicitly instructs CARRP adjudicators to take advantage of these facts. See CAR000027 (“[W]here the individual is deemed ineligible for the benefit and the denial grounds can be overcome with a subsequent filing, the most prudent course of action is to continue with external vetting rather than denying on the initial ground of ineligibility.”); CAR000053 (“If USCIS does not issue a decision within 120 days of the naturalization interview, the naturalization applicant can file suit in federal court seeking to obtain a decision on naturalization. See INA § 336(b). Therefore, it is important for the officer to have as much

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information as possible about the individual and the NS concern before the naturalization interview occurs to ensure that the naturalization interview explores all statutory and regulatory grounds of eligibility along with potential grounds of ineligibility. The Field is strongly encouraged to identify all potential grounds of ineligibility prior to scheduling an N-400 interview.”) In these ways, CARRP traps naturalization applicants in limbo, denying them the ability either to reapply to overcome any ineligibility grounds or to seek review of a denial from a neutral adjudicator.

Impact of CARRP on Muslim Immigrant Communities

92. As an immigration practitioner who has worked across diverse communities, including with Muslim immigrant communities, I have seen firsthand the harmful impacts of citizenship denials and delays on my clients and their families. Though there is no way for me to confirm that these individual clients were subject to CARRP, the pretextual delays and denials they faced follow the CARRP rubric I reviewed in discovery documents. Since their experiences paralleled those faced by applicants subject to CARRP, the resultant impacts of delays and denials on these clients are illustrative of how CARRP likely impacts individuals and communities.

93. I have observed how difficult it is for many of my Muslim clients to successfully receive citizenship approvals. I have seen requests for evidence and denials of applications on the basis of minor misstatements and omissions about aliases, stage names, political beliefs and organizational associations. For example, one client was initially denied naturalization because he failed to reveal an alias he used in his creative pursuits. Another was delayed for more than a decade for using the term “comrade” in a blog post about labor organizing. I discuss both these cases in greater detail below. In contrast, my clients from non-Muslim majority nations generally do not face these difficulties when naturalizing or adjusting status.

94. For Muslim naturalization applicants who have walked the long road to citizenship, a denial at the end of the process based on innocuous misstatements or unintentional

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omissions is often devastating to them and their families emotionally, psychologically and financially.

95. Facing long citizenship and adjustment delays or pretextual denials, many impacted Muslim clients and community members I know have described shock and surprise that the American government is delaying or denying their applications when they have strived to follow every rule. They describe feeling unwanted and rejected from their adopted country. For many who have lived in the United States since a young age, this is the only country they have ever known, and they have been fully participating in American civic life for many years already.

96. There are destructive tangible consequences, too. One client from Bangladesh, a young college student, experienced indefinite delays in his I-589 (application for fear-based relief) and then again during his I-485 (application for a permanent residency). These delays led to lost job opportunities, missed travel to visit sick family members and a lack of ability to plan his future during his transformative post-college years when his peers were thinking about future career paths. This client in particular was also hesitant to pursue a courtship with a woman he loved—ultimately, he did not—because he was unsure about his future status in the United States. DHS only approved his adjustment application when we sought to initiate a mandamus suit in federal court.

97. I also had a client from Sudan, an artist, whose citizenship was denied on false testimony grounds based on an omission of a stage name. When asked to list any aliases on the official N-400 Form, he didn't share a casual stage name he used for performances. He later swore the contents of the form were correct during his naturalization interview. Using internet search engines, USCIS uncovered that he performed under a nickname and alleged he had provided false testimony for omitting the use of this name. This fact pattern matches CARRP directives to mine open sources of information to search for inconsistencies and omissions, however immaterial. *See* DEF-00027670, Slide 67 (speaker notes).

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98. This client, a community leader and artist who had spent his entirely adult life in the U.S., felt betrayed by the United States. His family members, many of whom had more easily naturalized decades before, also felt a sense of betrayal and confusion about USCIS's clear efforts to deny citizenship to their son. Even after citizenship was eventually granted under threat of litigation against USCIS, those feelings of denial and undesirability have lingered.

99. Another client from Bangladesh, a taxi driver and labor organizer, faced an almost decade-long delay of his naturalization petition. For over nine years his application languished without reason or response. After 9 years of waiting, he eventually retained AALDEF as counsel. We reached out to the DHS Ombudsman and local congressional representatives. In response, he was contacted by USCIS about his use of the term "comrade" in a blog post, and asked questions about his organizational affiliations with communist groups. He was also asked repeatedly to swear his commitment to the United States. My client was earnestly baffled by these questions and loyalty requests. My client justifiably believed that this minor matter was a pretextual justification for this decade-long wait, and felt that the United States was simply looking for reasons to keep him out. He described the stigma he faced from friends and colleagues as their applications were quickly adjudicated and his continued to be held in limbo. He recounted that his employer asked him if there was any legitimate reason the U.S. was not approving his application and if he was hiding a criminal or suspicious background. As an immigration practitioner, it was difficult to explain to him why the U.S. government might be seeking to indefinitely exclude him from a status he had waited for so long and was clearly eligible for.

100. This client's application had been held indefinitely without any notification for the reason for the delay, consistent with CARRP's instructions to USCIS officers. *See* DEF-00027670. When he did receive a reason—the use of the word "comrade" on a blog post about union organizing—there was no mention of any national security related ground nor any explanation for why an investigation into this matter spanned a decade. My client reflected upon this wait when he finally took his oath of naturalization, describing how a weight had been lifted and how he felt he could finally live his life as a "real" member of the United States.

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101. In addition to these specific accounts from my clients and community members I have engaged with during legal clinics, community events and intake calls have described similar inexplicable delays and denials, accompanied by similar feelings of frustration, bewilderment, betrayal, and pain during what should have been an exciting and proud time in their lives.

102. Though my clients are able to avail themselves of the *pro bono* services of the Asian American Legal Defense Fund and the Immigrant and Non-Citizen Rights Clinic, *pro bono* services are hard to find and secure even in relatively resource-rich New York City. Many are instead forced to pay expensive and endless legal costs that impose a very heavy financial burden. People who apply for affirmative benefits without paying for legal counsel and are subject to delays and pretextual denials may be forced to secure attorney help. This is yet another cost that those processed in CARRP bear.

103. Before learning about CARRP, my clients and I were baffled at why delays were happening in their cases and were forced to embark on lengthy investigations of their circumstances. In many cases, we opened service requests, ombudsman complaints, and sought assistance through congressional inquiries but to little avail. My review of CARRP training manuals confirms the hypothesis I have developed over years of experience that USCIS officers deliberately conceal from applicants that they have been, or are, subject to CARRP, and that officers also deliberately avoid relying on national security related grounds in explaining a denial or delay wherever possible. *See* DEF-00027670.

104. When representing clients who may be subject to CARRP, I and other attorneys may need to spend years pursuing and litigating FOIA requests trying to understand why cases are being delayed or denied, responding to multiple Requests For Evidence (RFEs), and appearing at multiple interviews, all while investigating a client's entire background online and offline.

105. Notably, in the accounts I share above, my clients eventually received the benefits they sought only after threatening USCIS with litigation. For some in this position, the prospect of litigating against the United States to gain citizenship was difficult to accept. I recall one

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client asking why he needed to sue when he had fulfilled all the criteria so clearly. For others, suing the government felt like opening the door to further retaliation against themselves and their families. They wondered if suing for citizenship might lead down a dangerous road of deportation, and how it might impact other family members also seeking to naturalize.

106. Those who do seek judicial review may become subject to lengthy and intrusive discovery, questioning, and depositions, exposing themselves to even greater scrutiny than during the administrative application process. In my experience, this is not just financially costly but emotionally stressful for clients. Therefore, some individuals decide not to pursue a case to obtain the benefit to which they are entitled, for these and similar reasons.

107. Even after the expensive and stressful initiation of litigation, there is still no guarantee that these cases will be adjudicated, much less granted. In some cases, it is simply easier for the applicant to wait for the relevant statutory period to pass before reapplying, rather than seek costly and time-consuming judicial review.

108. Of course, clients who wait and reapply for naturalization after the statutory period affecting their denial has elapsed also bear costs. They may have to pay steep naturalization fees and possible attorney costs for a second time.

109. Crucially, during these lengthy waiting periods of delayed adjudications, RFEs, denials, appeals and reapplications, those subject to CARRP lack the right to participate fully in American civic life as citizens, including by voting or serving on juries. They are denied the safety and security of citizenship and remain subject to deportation policies that often already target communities of color to which they belong. My Bangladeshi client, the young college student who faced abnormal delays through his I-589 adjudication and again during adjustment, constantly wondered whether he should prepare for the potential initiation of removal proceedings. He believed that if DHS was targeting his applications for permanent residency then it might very well seek to deport him, too. Citizenship applicants, too, have asked if CARRP-like delays and denials could lead to removal proceedings, highlighting the destabilizing consequences of policies like CARRP in the lives of people they affect.

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110. Citizenship is an expensive proposition, and when communities learn of possible denials and delays—particularly when such denials and delays are based on unconvincing or pretextual reasons—it is my experience that some immigrants may be deterred from ever applying at all. When immigrant communities are chilled in this manner, the harms are immeasurable.

111. The implications of naturalization policies that target and denigrate particular classes of individuals go beyond the mere denial of a citizenship or adjustment application. As demonstrated in my clients' accounts above, discriminatory naturalization denials further marginalize minorities. Many impacted individuals who shared their experiences described feeling removed and excluded from civic society. They shared how, while they waited for their applications to be adjudicated, they downplayed their religious identities and practices and avoided organizational associations with mosques and religious organizations. In this manner, discriminatory adjudications chill constitutionally protected activity. While courts have made clear that “we do not require perfection in our new citizens,” DHS has, in targeting Muslim applicants for minor misstatements, created an unreasonable standard for what constitutes the moral character to be an American—a standard unmoored from any statute. *Klig v. United States*, 296 F.2d 343, 346 (2d Cir. 1961).

112. Other community members who have faced delays and denials have echoed feelings of stigma they feel among colleagues, friends and family members when DHS delays or rejects their applications for immigration benefits for which they are eligible. In communities already impacted by surveillance and informant recruitment, some felt that when the government denied or delayed their applications they were perceived as dangerous by their own community members and judged with an air of suspicion in their workplaces.

113. My clients who experienced pretextual delays and denials also felt as if their lives were under surveillance by the U.S. Government. They felt violated and wondered why the U.S. government had searched so hard for minor discrepancies or omissions to claim that their applications were untruthful or lacked credibility. For example, my Bangladeshi client felt

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shaken upon realizing that USCIS was reading his old blog posts and googling his union organizing work. This led him to wonder if he was being followed, if his phone lines were tapped, or if his colleagues were being questioned about him. Given what I have reviewed about the investigatory resources and multi-agency efforts that CARRP adjudicators are allowed to use in their efforts to deny an application, I believe my client's fears were justified. CAR-000004–000006, DEF-00128896.

114. The harms extend beyond the applicants alone. As I explain below, when community members hear that online activity, organizing, and associational affiliations are used against neighbors and friends seeking immigration benefits, they are chilled from participating in constitutionally protected activities, like joining mosque boards, participating in community events, sharing their political views online, and traveling to sacred Islamic sites. My client from Sudan realized that DHS was tracking his artistic performances when they accused him of lying about his stage name. Similarly, my client from Bangladesh knew his blog posts were being read in an effort to look for evidence of communist activity. In turn, both of these clients questioned whether they should continue to participate in these activities.

115. I have studied how overbroad security policies, like widespread law enforcement surveillance, impacts American Muslim communities. CARRP—like overbroad law enforcement surveillance, law enforcement fishing expeditions in Muslim communities, informant recruitment in Muslim mosques and unreliable watchlisting of American Muslims—essentially penalizes Muslims on account of their race and/or religion and has similar pernicious effects as the laundry list of overbroad policies it joins.

116. In *Mapping Muslims*, my co-authors and I interviewed American Muslims who had been subject to widespread NYPD surveillance in their mosques, neighborhoods, schools and community spaces. I have found the stories that community members shared with me during this research to echo the experiences of my immigrant Muslim clients facing delays and denials due to CARRP. *Mapping Muslims* is attached to this expert report at **Exhibit D**.

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117. *Mapping Muslims* shows that when people in Muslim communities feel unfairly targeted on account of their religion, often the first response is to suppress their religious practices. In *Mapping Muslims*, impacted community members described changing the way they dressed, avoiding religious spaces and mistrusting fellow congregants and community members.

118. For immigrants subjected to online scrutiny manifested through CARRP or CARRP-like denials and delays, I observed parallel impacts. Though CARRP was a secret program until it was uncovered by the ACLU's FOIA litigation, I observed concerns about immigration delays and denials within Muslim communities long before the public was aware of CARRP. Individuals realized that their applications took longer to adjudicate, received more follow-up requests for interviews and RFEs, and were subject to pretextual denials in a way that wasn't apparent in non-Muslim communities. At intake clinics in Queens, individuals from Pakistan and Bangladesh would comment on how their non-Muslim friends had received their naturalizations or green cards quickly and easily, and wondered why they were stuck waiting for so long. Because CARRP was initiated in the shadow of NSEERS (a post 9/11 registry and surveillance program used to track those non-immigrant visa holders from mostly Muslim nations), the NYPD's program of suspicionless surveillance of Muslims and other post-9/11 discriminatory policies carried out in the name of national security, impacted community members quickly surmised that these delays, too, were likely on account of their religion. For many, the natural reaction was to mute their religious practices. My clients asked whether it was okay for them to visit religious websites or listen to online religious lectures by well-known American religious leaders. Others said they avoided leadership positions at community spaces because they wondered if listing a mosque affiliation on their eventual N-400 would be harmful. Still others avoided travel to sacred religious sites in Saudi Arabia, Iran and Iraq because they wondered if that travel would subject them to increased scrutiny.

119. In sum, many aspiring Americans talked about "laying low" when it came to practicing their religion for fear it would delay, or result in a denial of, their citizenship applications. When I was in community spaces providing know-your-rights trainings for CLEAR

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or community clinics for AALDEF, I recall some community members joking that they would go on the Hajj pilgrimage, one of the most important tenets of Islamic faith, only *after* they became U.S. citizens. Others in these spaces expressed their desire that their children avoid joining Muslim Students Associations, organize politically or take on leadership on mosques until after all the family members had adjusted or naturalized. Having reviewed CARRP training materials that instruct USCIS officers to focus explicitly on organizational associations, travel and taxes of those subject to CARRP for reasons to deny applications, I know my clients' fears and their experiences are valid. DEF-00065838.

120. Clients with social media accounts have described muting their online presence or erasing it completely, shutting themselves out of online learning, activism and community spaces. As I found in my research in communities impacted by law enforcement surveillance, I observed American Muslim immigrants at the cusp of citizenship and adjustment questioning whether they should participate in political discussions online. I heard clients recounting how they declined to speak in public forums on political topics for fear that conference schedule or event materials might be posted online and later used against them by DHS. In Muslim immigrant communities with which I have worked and among clients I represent, there was a shared general sense that applicants should mute political posts and comments on social media. Again, these concerns—that online activities are subject to enhanced scrutiny—are confirmed by specific directions in CARRP training manuals to mine open source information, like internet search engines, for information about those in CARRP. DEF-00027670, Slide 67 (speaker notes).

Opinions & Conclusions

121. Like many post-9/11 national security initiatives from NSEERS to NYPD surveillance, CARRP's labeling, delaying and denying of "national security concerns" has a disproportionate impact on American Muslim communities. This program not only delays or denies immigration benefits to those who need and have earned them, but also chills daily American Muslim life, associations, religious practice and organizing.

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122. Congress has already created a thorough statutory scheme of eligibility criteria, vetting, and testing for immigrants applying for immigration benefits. CARRP creates additional layers of scrutiny that have no basis in statute and which are not part of the ordinary eligibility criteria for immigration benefits, including adjustment of status and naturalization. This raises due process concerns for affected immigrants, as well as separation of powers concerns.

123. Discovery documents confirm that individuals impacted by CARRP are disproportionately from Muslim-majority nations or nations with large Muslim populations. *See* 2020-06_Wagafe_Internal_Data_FY2013-2019_(Confidential_Pursuant_to_Protective_Order).xlsx (“Approval & Denial Rates” tab). The confirmation that this extra-statutory process targets Muslims furthers discriminatory and harmful narratives that Muslims are a national security threat.

124. In my opinion, it is highly concerning that CARRP uses database hits and other vague “indicators” to target individuals as “national security concerns.” DHS automatically marks those on the Terrorist Watch List as a KST. But as Judge Trenga of the United States District Court for the Eastern District of Virginia has found, the Terrorist Watch List, which as of June 2017 contained 1.16 million people, “lack[s] any ascertainable standard of exclusion or inclusion.” In determining that watchlisting violated the due process rights of 23 U.S. citizen plaintiffs, the court noted that the inclusion standard “makes it easy to imagine ‘completely innocent conduct serving as the starting point for a string of subjective, speculative inferences that result in a person’s inclusion.’” *Elhady v. Kable*, 391 F.Supp. 3d. 562, 581 (E.D.Va. 2019), quoting *Mohamed v. Holder*, 995 F.Supp. 2d. 520, 532 (E.D.Va. 2019). Though *Elhady* discusses the Watch List in the context of U.S. citizens, the defective watchlisting process it describes is relevant to CARRP to the extent that CARRP relies on this and other overbroad and unreliable watch lists to deny immigrants immigration benefits for which they are eligible.

125. Accountability and redress for pretextual denials and delays are inadequate. The discriminatory application of eligibility criteria for immigration benefits has gone unchecked because of, among other things, wide adjudicator discretion, broad language governing good

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moral character, the limited utilization of judicial review, and the judiciary's general deference to the executive's plenary powers in immigration law.

126. CARRP creates in unjustified and non-transparent delays in adjudicating immigration benefits for which applicants may be clearly statutorily eligible. I believe the ways in which USCIS has implemented CARRP has resulted in a dangerously overbroad system that can be manipulated to the detriment of less-favored groups, such as Muslims.

Compensation

127. I am being compensated at an hourly rate for actual time devoted, at the rate of \$200.00 per hour. My compensation does not depend on the outcome of this litigation, the opinions I express, or the testimony I provide.

Publications

128. A list of my publications in the last 10 years is included in the attached Curriculum Vitae (attached as **Exhibit A**).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 1, 2020 in Greenville, North Carolina.



NERMEEN ARASTU
N.Y. State Bar. No. 4731204

Exhibit A

NERMEEN SABA ARASTU

Nermeen.Arastu@law.cuny.edu | 2 Court Square, Long Island City NY 1101

ACADEMIC EMPLOYMENT:

THE CITY UNIVERSITY OF NEW YORK (CUNY) SCHOOL OF LAW

Long Island City, NY

Associate Professor of Law, 2018—

Clinical Law Instructor & Supervising Attorney, 2013—2018

Immigrant & Non-Citizen Rights Clinic

June 2013 – present

- Co-direct a 16-credit, year-long clinic devoted to immigrant and non-citizen rights where all classes, case work and project work emphasize litigation and advocacy skills, social justice and professional ethics.
- Supervise third-year law students in their representation of indigent clients in immigration court, before the Board of Immigration Appeals and through USCIS processes relating to asylum, trafficking, gender-based violence, deportation defense, criminal immigration, unaccompanied minors, suppression and various forms of cancellation of removal.
- Designed community education campaigns for diverse immigrant communities and created and trained a *pro bono* attorney network.
- Piloting collaboration between law students in the Immigrant & Non-Citizen Rights Clinic and medical students at the CUNY School of Medicine to provide holistic defense and counseling to immigrant clients

Immigration & Citizenship Law Seminar

Spring 2016

- Developed and implemented experiential learning opportunity for second year students in the Immigration and Citizenship Law seminar to partake in naturalization screenings in collaboration with CUNY Citizenship NOW for credit in their doctrinal course

The CLEAR Project

Fall 2013 - Spring 2015

- Co-supervised students and co-taught weekly seminars in the CLEAR Project, a cross-clinical community lawyering initiative to provide legal services, education and organizing support in Muslim, Arab, South Asian and other communities impacted by overbroad security policies/practices.
- Represented individuals approached by the FBI/NYPD for interviews/recruitment, those targeted for surveillance and/or placed on watch lists. Additionally, strategized and co-lead advocacy efforts for strengthened local, state and federal laws regarding discriminatory surveillance and racial and religious profiling by directly interfacing with Mayor, Police Commissioner, Comptroller and Public Advocate's Office.

PUBLICATIONS & WORKS-IN-PROGRESS:

"Thrown Out in the Cold: The Use and Abuse of False Testimony Allegations to Deny Citizenship
66 UCLA L. Rev. 1078 (2019)

Expanding the Scope of Medical-Legal Collaborations: The Utility of Forensic Medical Evaluations in Preventing Deportation (In Progress -- Bellow Scholar Project)

EDUCATION:

UNIVERSITY OF NORTH CAROLINA -- CHAPEL HILL, B.A. Political Science, 2005
Chapel Hill, North Carolina

UNIVERSITY OF PENNSYLVANIA SCHOOL OF LAW, J.D., 2008
Philadelphia, Pennsylvania

Honors: Penn Law International Human Rights Fellow, Morgan, Lewis and Brockius Book Scholar

SELECTED MEDIA ARTICLES:

Why Forced DNA Collection of Migrants Should Concern Us All
(with Cristina Velez and Razeen Zaman)
New York Daily News, November 13, 2019

Trump's Public Charge Rule is a Cover-Up for Racism – With Disturbing Historical Origins
Newsweek.com, August 21, 2019

What Jeff Sessions' Efforts to Deny Asylum to Domestic Violence Victims Look Like on the Ground
(with Janet Calvo & Julie Goldscheid)
Slate.com, July 16, 2018

Stop spying on American Muslims who dare to express their opinions (with Diala Shamas)
The Washington Post, August 4, 2014

Mapping: Surveillance and its Impact on American Muslims (with Diala Shamas)
Al Jazeera, March 14, 2013.

Showing anti-Muslim documentary to cops is unacceptable
The Progressive, February 8, 2012.

SELECTED ADVOCACY:

Toolkit to Challenge Gang Allegations Against Immigrant New Yorkers [co-authored with Maya Lesczczynski & Talia Peleg] [The Immigrant and Non-Citizen Rights Clinic, CUNY School of Law], 2019.

Swept Up in the Sweep: The Impact of Gang Allegations on Immigrant New Yorkers [co-authored with Anu Joshi, Maya Lesczczynski, Camille Mackler, Talia Peleg & Kim Sykes] [The Immigrant and Non-Citizen Rights Clinic, CUNY School of Law, The New York Immigration Coalition], 2018.

Mapping Muslims: NYPD Spying and its Impact on American Muslims [co-authored with Diala Shamas] (Creating Law Enforcement Accountability & Responsibility Project, CUNY School of Law (CUNY CLEAR), The Asian American Legal Defense and Education Fund (AALDEF) and the Muslim American Civil Liberties Coalition (MACLC), 2013.

SELECTED PRESENTATIONS:

MINORITY LAW PROFESSORS: QUESTIONS AND REFLECTIONS ON DIVERSE FACULTIES IN A TIME OF POLARIZATION

Panelist, AALS Conference on Clinical Legal Education

(co-panelists: Babe Howell, Fared Nassor, Nicole Smith Futrell) (San Francisco) (May 2019)

CHALLENGES AND OPPORTUNITIES IN TODAY'S IMMIGRATION LANDSCAPE: THE ROLE OF LAW SCHOOLS IN ENSURING ACCESS TO COUNSEL FOR IMMIGRANT COMMUNITIES

Panelists, 8th Annual Law School Access to Justice Conference

(co-panelists: Dora Galacatos, Dr. Laura Gonzáles-Murphy, Thro Liebmann, Michele R. Pistone, Carmen Maria Rey) (San Francisco) (May 2019)

MOTIONS: INTERSECTION BETWEEN IMMIGRATION LAW, TRAUMA AND OPPRESSION

Panelist, Curatorial Residency Ludlow 38 (co-panelists: Adelita Husni-Bey, Christian Diaz, Raoul Anchondo) (December 2018)

SELECTED PRESENTATIONS CONT'D

IMMIGRANT PATIENTS & LEGAL COLLABORATIONS

Keynote Presenter, Mt. Sinai School of Medicine Infocus Lecture Series
(New York) (October 2018)

CHALLENGING POLICE COLLABORATIONS

Panelist, New York Immigration Coalition's I-Arc Conference: Mobilize, Organize, Resis: Immigrant Justice Lawyering in New York (co-panelists: David Brotherton & Paige Austin) (New York) (October 2018)

IMMIGRATION RIGHTS ADVOCACY IN THE AGE OF TRUMP: CENTERING COMMUNITY ORGANIZATIONS IN THE CLINICAL SETTING

Panelist, AALS Conference on Clinical Legal Education
(co-panelists: Peter Markowitz, Talia Peleg & Jessica Rofé) (Chicago) (May 2018)

IMMIGRATION ENFORCEMENT UNLEASHED: STRATEGIES FOR LITIGATING GANG ALLEGATIONS AND GANG-BASED PERSECUTION IN THE AGE OF TRUMP

Presenter, CLE Program, Hofstra University School of Law (April 2018)

THE RETURN OF SANCTUARY CITIES: THE MUSLIM BAN, HURRICANE MARIA & EVERYTHING IN BETWEEN
Symposium Presenter, University of Detroit Mercy School of Law (March 2018)

BUILDING CRITICAL APPROACHES TO LAW AND SECURITY STUDIES

Paper Presentation: Law and Society Annual Meeting (Mexico City) (June 2017)

TRANSFORMING THE ROLE OF DIRECT SERVICE PROVIDERS

Moderator, CUNY Law Review Symposium (Long Island City) (April 2017)

REFLECTIONS ON INSERTING EXPERIENTIAL LEARNING INTO LAW SCHOOL SEMINARS

Presenter, 2016 SALT Teaching Conference: From the Classroom to the Community: Teaching and Advancing Social Justice (co-panelist: Sofia Yakren) (Chicago) (September 2016)

POST-ELECTION STRATEGY AND SOLUTIONS

Panelist, National Association for Muslim Lawyers Annual Meeting (New York City) (co-panelists: Manar Waheed, Raheemah Abdulaleem, Madihha Ahusain) (January 2017)

PEDAGOGY PROMOTING PRACTICE-READY LAW STUDENTS: LESSONS LEARNED FROM RECENT PRACTICE

Panelist, Section on Balance in Legal Education, AALS Annual Meeting: Legal Education at the Crossroads (co-panelists: Emily Chiang, Nicole Iannarone, Jarrod Reich) (moderator: Jennifer Brobst) (Washington, DC) (January 2015)

THE MANY FORMS AND IMPACT OF POLICE PROFILING ON VULNERABLE COMMUNITIES

Panelist, Northeast Regional People of Color Legal Scholarship Conference (co-panelists: Ann Cammett, Babe Howell, Nicole Smith Futrell) (moderator: Diala Shamas) (New York City) (November 2014)

APA INCLUSION IN THE LEGAL PROFESSION AND BEYOND

Panelist, University of Pennsylvania APALSA Conference: Asian Redefined, New Voices in a New Era (co-panelists: Bruce Yamashita, Phil Yu, and Sandra Yamate) (Philadelphia) (February 2014)

ROUNDS AS A TOOL FOR BECOMING A BETTER CLINICIAN AND PROMOTING COMMUNITY

Panelist, AALS Conference on Clinical Legal Education: Becoming a Better Clinician (co-panelists: Degna Levister and Cynthia Soohoo) (Chicago) (April 2014)

SERVICE & MEMBERSHIPS:

THE NEW YORK CITY BAR ASSOCIATION Member, Committee on Immigration and Nationality	New York, NY <i>Sept 2017-Present</i>
THE TRANSITION TEAM OF THE PUBLIC ADVOCATE OF NEW YORK	New York, NY <i>2014</i>
AMERICAN MUSLIM CIVIC LEADERSHIP INSTITUTE <i>Fellow</i>	New York, NY <i>2012-2013</i>
MUSLIM BAR ASSOCIATION OF NEW YORK <i>Director & Vice President</i>	New York, NY <i>2010-2014</i>

PRACTICAL EXPERIENCE:

SIMPSON THACHER & BARTLETT <i>Summer Associate, Litigation Associate</i>	New York, NY <i>Summer 2007; 2008 –2011; 2012–2013</i>
<ul style="list-style-type: none">Engaged in a broad-based litigation practice in white collar, antitrust and securities matters on the state and federal level. Prepared key deponents for depositions and interviews by state regulators and the S.E.C. Drafted direct testimony affidavits, answers, motions to dismiss, discovery motions, deposition outlines, client memoranda in securities, white collar, antitrust and <i>pro bono</i> matters. Prepared for and participated in settlement negotiations.Received awards in both 2009 and 2010 for completing over 100 hours of <i>pro bono</i> work. Represented <i>pro bono</i> clients in an array of immigration matters in immigration court and before the Board of Immigration Appeals. Developed and led advocacy initiatives for DREAMers.	
THE ASIAN AMERICAN LEGAL DEFENSE & EDUCATION FUND (AALDEF) <i>Staff Attorney (Simpson Thacher Public Interest Fellow)</i>	New York, NY <i>2011 –2012</i>
<ul style="list-style-type: none">Led and designed AALDEF’s Immigrant Rights and Post 9/11 Civil Liberties project.Represented individuals through deportation hearings, suppression hearings, citizenship and green card interviews, asylum hearings, T-visa, U-visa and various other immigration processes. Provided direct representation to clients subjected to racial and religious profiling in the immigration system.Oversaw monthly immigration clinics in conjunction with various community-based organizations. Led various other community empowerment initiatives, including Deferred Action education within American Muslim communities. Worked in conjunction with immigrant and civil rights groups and coalitions to advance immigrant justice across racial lines.Engaged in federal impact litigation defending mosques under the Religious Land Use and Institutionalized Persons Act.Advocated against law enforcement surveillance practices in American Muslim communities with a special focus on immigrants’ rights and vulnerabilities. Led Freedom of Information Act/Law litigation in pursuit of greater transparency of law enforcement surveillance, particularly on college campuses.	
THE LEGAL ASSISTANCE CENTRE OF NAMIBIA <i>Penn Law International Human Rights Fellow</i>	Windhoek, Namibia <i>Summer 2006</i>
LEGAL MOMENTUM (formerly NOW Legal Defense Fund) <i>Intern, Immigrant Women Program</i>	Washington, DC <i>2004 –2005</i>

AWARDS:

2018-2020 Bellow Scholar

University of Pennsylvania School of Law’s “Rising Star Award,” accepted at the Penn Law Women’s Summit in March 2016

Exhibit B

List of Documents Reviewed

1. DEF-00000018
2. DEF-00027670
3. DEF-00038284
4. DEF-00063649
5. DEF-00065567
6. DEF-00065590
7. DEF-00123589
8. DEF-00128848
9. DEF-00148812
10. DEF-00403674
11. DEF-00037134
12. DEF-00226977
13. DEF-00018743
14. DEF-00027201
15. DEF-00018710
16. DEF-00175271
17. DEF-00177683
18. DEF-00023086
19. DEF-00149391
20. DEF-00149431
21. DEF-00216658
22. DEF-00035567
23. DEF-00180171
24. DEF-00034013
25. DEF-00034013
26. DEF-00034027

27. CAR000001

28. CAR000008

29. CAR000010

30. CAR000058

31. CAR000075

32. CAR000084

33. CAR000095

34. CAR000104

35. CAR000342

36. CAR000349

37. CAR000366

38. CAR000595

39. CAR000751

40. CAR001140

41. 2020-06_Wagafe_Internal_Data_FY2013-

2019_(Confidential_Pursuant_to_Protective_Order).xlsx

Exhibit C

U.C.L.A. Law Review

Aspiring Americans Thrown Out in the Cold: The Discriminatory Use of False Testimony Allegations to Deny Naturalization

Nermeen Saba Arastu

ABSTRACT

From their earliest enactment, U.S. naturalization laws have reflected who the nation accepts as American and have always required, among other things, a showing of “good moral character.” From there, legislators and adjudicating agencies have carefully crafted changing naturalization laws and policies to welcome some into the fold and exclude others. The laws have evolved along with ideas about who can and should be American and have reflected the economic, political, and social dynamics of the time.

This Article looks closely at the good moral character clause and its potential to enable individual and institutional bias through a subsection that allows United States Citizenship and Immigration Service (USCIS) to deny a naturalization petition when USCIS finds that the applicant offers “false testimony” and thus lacks requisite “good moral character.”

In recent years, immigration attorneys have noticed a pattern in which USCIS denies naturalization based on an application irregularity, usually an inconsistency between the application or applicant’s interview statement and other open source internet materials about the applicant. In certain cases, when an adjudicator finds such inconsistencies, they deny the application on good moral character grounds, alleging that the applicant provided false testimony. Because the naturalization application is twenty pages and delves into every detail of an applicant’s life—from associations and donations to employment and travel—irregularities, mistakes, and omissions are common. The government can likely insert some doubt into every case no matter how careful or transparent the applicant. In some cases, the government may uncover an allegation about communist association, in others it can cast doubt about other aspects of citizenship eligibility like continuous residence in the U.S., the underlying immigration status, or other political and criminal history. Finally, in cases, when all else fails, adjudicators can use any misstatement or omission to justify a naturalization denial.

But, of course, the government approves many naturalization applications. From 1907 to 1997, the government only denied about 5.6 percent of naturalization applications. So, in what cases does the government go on a fishing expedition to find contradictions in a naturalization application? Who does the government put under the metaphoric wringer? This Article analyzes an unprecedented study of the 158 cases in which courts reviewed naturalization denials based on false testimony. With these cases mapped out, it is clear that adjudicators have disproportionately held these



errors against applicants from the countries and religions the U.S. government had deemed suspect or undesirable.

Be they so-called drunkards, security threats, adulterers, or Communists, a historical survey of naturalization denials appealed to (or adjudicated by) courts gives us a window into the sizable grey zone in citizenship adjudication that has been manipulated to discriminatorily adjudicate citizenship from our nation's earliest days. Until September 11, 2001, only twenty-eight judicial opinions discuss citizenship denial on false testimony grounds. In these opinions, courts noticeably focus on those who sold alcohol in violation of local liquor laws and later those accused of having ties to Communism, the Mafia, and labor organizing. In the eighteen years after September 11, 2001, this number of cases being appealed to district courts quadrupled to 130.

Not only did the government use false testimony allegations exponentially more in the years after September 11, 2001 to deny naturalization applications, an examination of federal courts reviewing administrative naturalization adjudications in this context indicates the government used this denial tool disproportionately against those from Muslim-majority nations. Though constituting only around 12 percent of all naturalization applicants since 9/11, those from Muslim-majority nations make up nearly 46 percent of the applicants in appealed cases which included false testimony allegations as a basis for their denial. This data in context with revelations about clandestine USCIS adjudication policies that have targeted those from Muslim-majority nations confirms that the government has sought to use the false testimony provision to pretextually reject those it sought to keep out.

In the studied set, district and appeals courts upheld the agency's denial 63 percent of the time (99 of the 158 cases) and overturned denials only 20 percent of the time (32 of the 158 cases). The remaining cases are pending, have sealed, out-of-court agreements or settlements, were remanded back to the administrative adjudicator or scheduled for factfinding hearings with unknown results. Finally, in a few instances, courts dismiss cases as moot or due to lack of jurisdiction, where USCIS adjudicates applications while pending, or administrative remedies had not been exhausted.

Some of these cases reveal legal mechanisms and tests that scale back bias, implicit or intentional, at the administrative level. In overturning USCIS denials, courts usually focused on the intent requirement of the false testimony provision. When USCIS clearly expended investigatory resources to pretextually deny the application, courts sometimes questioned why some applications were thrown "out in the cold" and whether naturalization laws really "require perfection in our new citizens." Even in these cases, though, courts only allude to the fact that certain subsets of applicants are subject to discriminatory enforcement of naturalization laws in isolated dicta, giving USCIS free reign to continue these practices and expand them against the vilified immigrant group *du jour*.

AUTHOR

Nermeen Saba Arastu is an Associate Professor at the City University of New York (CUNY) School of Law where she codirects the Immigrant and Non-Citizen Rights Clinic.

U.C.L.A. Law Review

ACKNOWLEDGMENTS

This work is inspired by and dedicated to the former and current clients of the Immigrant and Non-Citizen Rights Clinic and the CLEAR Project at the CUNY School of Law. This Article would not be possible without the thorough, creative and relentless work of my research assistant, Myriah J. Heddens. This piece has benefitted immeasurably from the care and attention of the intrepid editors of the *UCLA Law Review*, especially Erin Delman, Kelly Miller, and Liz Purvis. I am indebted to Naz Ahmad, Babe Howell, Ramzi Kassem, and Nicole Smith-Futrell for their unremitting encouragement, editing and brainstorming and to Douglas Cox and Yasmin Sokkar Harker for their generous research support. I thank Sue Bryant, Janet Calvo, Asad Husain, Zainab Husain, Tarek Ismail, Andrea McArdle, Talia Peleg, Ruthann Robson, Diala Shamas and Manar Waheed for the many thoughtful conversations that contributed to this work. All errors and omissions are my own.

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INTRODUCTION

To take away a man's citizenship deprives him of a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others.¹

From their earliest enactment, U.S. naturalization laws have reflected who the nation accepts as American and have always required, among other things, a showing of “good moral character.” From there, legislators have carefully crafted changing naturalization laws to welcome some into the fold and exclude others. The laws have evolved along with ideas about who can and should be American. Some attempts to exclude classes of aspiring Americans have been explicit, shown through, for example, race- and nationality-based exclusions, and literacy, civics, and financial tests. Other methods of exclusion, like family-based immigration rubrics, which favored those with family already present in the United States, have been facially neutral, but have borne disproportionate impacts.² Often, naturalization laws have reflected the economic, political, and social dynamics of the time.

This Article looks closely at the good moral character clause and its potential to enable individual and institutional bias through a subsection that allows United States Citizenship and Immigration Service (USCIS) to deny a naturalization petition when USCIS finds that the applicant offered “false testimony.”³ This Article analyzes an unprecedented study of the 158 cases in which courts reviewed naturalization denials (or adjudicated naturalization cases at the first instance under the pre-1990 statutory scheme) based, at least in some part, on the alleged provision of false testimony. With these cases mapped out, it is clear that the false testimony provision has allowed adjudicator and systemic bias to permeate the naturalization process. Throughout United States history, the government has used this provision disproportionately against applicants of certain nations and religions to pretextually deny their citizenship applications.

-
1. Klapprott v. United States, 335 U.S. 601, 616 (1949).
 2. Arguing for the dismantling of the quota system in favor of the present-date family-based immigration rubric, Rep. Emmanuel Celler argued before Congress, “[S]ince the peoples of Africa and Asia have very few relatives here, comparatively few could immigrate from those countries.” See *THE IMMIGRATION AND NATIONALITY ACT OF 1965: LEGISLATING A NEW AMERICA* 47 (Gabriel J. Chin & Rose Cuison Villazor eds., 2015).
 3. 8 U.S.C. § 1101(f) (2012) (defining good moral character); 8 U.S.C. § 1101(f)(6) (2012) (enumerating false testimony as a basis for finding a lack of good moral character).

Until September 11, 2001, only twenty-eight judicial opinions discuss citizenship denial on false testimony grounds.⁴ In these opinions, the courts noticeably focus on those who sold alcohol in violation of prevailing local liquor laws and later those accused of having ties to Communism, the Mafia, and labor organizing. In the eighteen years after September 11, 2001, this number quadrupled to 130. Not only did the government use false testimony allegations exponentially more in the years after September 11, 2001 to deny naturalization applications, an analysis of district court cases reviewing naturalization denials in this context indicates the government used it disproportionately on certain populations. Since September 11, 2001 around 12% of all approved naturalization applicants came from Muslim-majority nations, while those from Muslim-majority nations make up 46 percent of those denied naturalization on false testimony in the dataset.⁵ This data in context with revelations about clandestine

-
4. As discussed in subsequent sections, the statutory scheme governing naturalization has changed considerably from a decentralized process adjudicated by state and local courts (founding–1906) to a centralized approach with then-Bureau of Immigration Services making recommendations to courts who made the final naturalization awards (1906–1990) to the present scheme, which gives the administrative agency primary adjudicative authority with limited powers of judicial review. Given variable access to federal courts during these three disparate periods, as well as inconsistencies in their publication by Westlaw and/or Pacer, the presence of federal court decisions relating to denials based on false testimony and good moral character likely varies depending on the period in which the case was decided. Until 1946, cases that appear in the dataset relating to false testimony involve civil and criminal prosecutions in the context of naturalization revocations. The 19 cases involving false testimony in the naturalization denial between 1946–1990 include both denials at the district court level upon recommendation by the naturalization examiner, i.e. *Petition of Ledo*, 67 F.Supp. 917 (D. R.I. 1946), and appeals of District Court denials to Appeals Courts and the U.S. Supreme Court, i.e. *In re Berenyi*, 239 F. Supp. 725, 727 (1965), indicating that denials were being published before the advent of the current statutory scheme.

Even focusing on the post-1990 period alone (when the current scheme was enacted), only 9 cases involve judicial review of a false-testimony based naturalization denial. After September 2001, this number rises to 130. This growth may correlate with an increase in discriminatory denials based on false-testimony related allegations, a higher rate of appeals or a mixture of both.

Note, too, that naturalization rates have risen exponentially since 1970, more than doubling by 2015. Ana Gonzalez-Barrera, *Recent Trends in Naturalization: 1995–2015*, Pew Research Center (June 29, 2017), Though this may account for increases in the appearance of denials more generally, it does not account for the appearance of false testimony allegations appearing repeatedly against those from Muslim-majority nations and historically, others the U.S. has sought to exclude.

5. In an effort to measure adjudicator and systemic bias in the naturalization process, this study examines 158 naturalization cases in which the district court reviewed a naturalization denial that was based, at least in part, on the alleged provision of false testimony.

The initial case search was done on WestLaw using the search terms “naturalization” and “good moral character” with the search parameter set to “all federal.” Within those search results, cases were narrowed further based on the search terms “false testimony.” As of October 2019, the search yielded 533 cases. Those cases were all reviewed and only those that were based, in whole or in part, on a naturalization application denial were counted within the search results of this

USCIS policies indicates that the government has sought to use the false testimony provision pretextually to reject those it deemed unworthy or “too dangerous” to become American.

Part I focuses on how implicit and explicit bias has reared its head through the good moral character requirement and how, until recently, the requirement disproportionately appeared to impact certain subsets of applicants—early European immigrants considered to have lesser morals, and those suspected of bringing Communist ideology to American shores.

Part II describes the modern-day evolution of the good moral character clause and the addition of the false testimony provision. In recent years, immigration attorneys have noticed a pattern in which USCIS denies

study. All denials were then reviewed for country of citizenship and other indicators such as name and content of testimony to determine whether the naturalization applicant came from a Muslim-majority country or could be perceived to be Muslim.

The author then compared the 533 cases against a broader WestLaw search based on the terms “naturalization and false testimony” to ensure that relevant cases were not overlooked based on WestLaw’s algorithms. As of March 1, 2019, that search yielded 437 cases. Those 437 cases were reviewed for overlap with the narrower search parameter noted above, and to determine which cases came before the court because of a naturalization application denial.

In total the WestLaw search results yielded 155 cases relevant to naturalization application denials based on false testimony.

Because no single legal research platform contains all United States case law, and all commercial legal research platforms are somewhat selective in which cases they choose to publish, those 158 cases do not represent the complete universe of all naturalization denials since the founding of this country. Yet, the dataset offers a comprehensive and representative sample of the published cases. Nonetheless, this author chose to compare the cases yielded through the West Law search with cases published through the Public Access to Court Electronic Records (PACER) and accessed via the Bloomberg Law dockets.

This author searched “naturalization and “false testimony” and “good moral character” using the Bloomberg Law docket search. As of March 1, 2019, that search yielded 194 federal cases. Three of those cases were not published on West Law and relevant to the search parameters of this study. Those three cases, combined with the West Law results, total the 158 cases examined in this study. Of the Bloomberg PACER cases, 57 of the 194 overlapped with the cases found via WestLaw. The remaining cases found through PACER were not relevant to the narrow search for this Article.

There are limitations to using cases published via PACER and Bloomberg Law. The cases on Bloomberg go back to 1989, a much smaller data set than WestLaw. Furthermore, the PACER documents available on Bloomberg are searchable either by the docket sheet submitted by counsel or the underlying documents to the case, such as a complaint. The underlying documents are not always available on Bloomberg, which is largely dependent on whether someone else has requested the document and the document is electronically available. Bloomberg also proactively pulls dockets from some courts, but not all, creating a limitation on what is available. Finally, the docket sheet may not contain complete information about a case or may lack the terms relevant to a particular search.

The author is confident that the methodology employed to identify the 158 cases for this study—cases that address citizenship denial based on false testimony—provides a comprehensive and accurate representation of citizenship denials appealed to district courts.

naturalization based on an application irregularity, usually an inconsistency between the application or applicant’s interview statement and other open source internet materials about the applicant. In certain cases, when an adjudicator finds such inconsistencies, they deny the application on good moral character grounds, alleging that the applicant provided false testimony. Because the naturalization application is twenty pages and delves into every detail of an applicant’s life—from associations and donations to employment and travel⁶—irregularities, mistakes, and omissions are common. But adjudicators have disproportionately held these errors against applicants from the countries and religions the U.S. government had deemed suspect or undesirable. Currently, this includes those from Muslim-majority nations whom the government indiscriminately labels as national security concerns.

Part III grapples with courts’ response (or lack thereof) to these denials. This study reveals that courts continue to give broad deference to administrative agencies regulating immigration, but sometimes turn to intent requirement within the false testimony provision to overturn wrongful naturalization denials.

I. THE GENESIS & EVOLUTION OF EXCLUSIONARY NATURALIZATION LAWS

Throughout U.S. history, lawmakers have revisited a debate that began with the founding fathers. As they have narrowed and widened the gates to citizenship in response to the political, racial, and economic climate of the time, lawmakers have asked: Who will we allow into the sacred fold? Throughout this history, however, certain foundational principles have remained constant: The American-to-be must have been present in the nation for a certain number of years and prove good character to merit citizenship

On the road to Independence, as colonists were being recast as immigrants setting citizenship’s terms in their new nation, President Washington approved the Naturalization Act of 1790.⁷ This law stated that “any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years,” could apply for citizenship before a

6. See U.S. CITIZENSHIP & IMMIGRATION SERVS., FORM N-400, APPLICATION FOR NATURALIZATION (Oct. 29, 2018), <https://www.uscis.gov/n-400> [<https://perma.cc/47EB-W7R5>].

7. Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790) (repealed 1795); see also ARISTIDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA 51 (2006); Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571 (2012) (“As historian James Kettner succinctly put it, ‘The status of ‘American citizen’ was the creation of the [American] Revolution.’ The colonials quickly went to work defining citizenship in the new nation and setting the terms for access to it. Yet it was not immediately clear whether the Revolution had created one political community or a collection of many.”).

common law court of record where the person had resided for the previous year.⁸ Among other conditions, the applicant would have to “[prove] to the satisfaction of such court that he is a person of good character.”⁹ In the thirty years following the Act’s passage, some 75,000 Irish and Scotch Irish entered the United States, putting the brand new naturalization laws to the test.¹⁰

The Federalist Party, under President John Adams, feared immigrant votes for the Republican Party would upend it.¹¹ Massachusetts Congressman Harrison Gray Otis wrote to his wife: “If some means are not adopted to prevent the indiscriminate admission of wild Irishmen & others to the right of suffrage, there will soon be an end to liberty and property.”¹² The U.S. Congress incorporated the sentiment into legislation, and five years after the nation’s first naturalization laws, enacted The Naturalization Act of 1795.¹³ It extended residency requirements from two to five years and required aspiring Americans to declare their intent to naturalize three years before applying.¹⁴ The term “good character” changed to “good moral character” as it has remained since.¹⁵

At the brink of war with France in 1798, Congress passed the Alien and Sedition Acts, which, along with many measures suppressing immigrant rights, spiked the minimum residency requirement from five to fourteen years.¹⁶ With

8. Naturalization Act of 1790, ch. 3, 1 Stat. 103.

9. *Id.* For a more extensive history of moral character’s introduction into the naturalization rubric, see Jennifer Chin and Zeenat Hassan, *As Respected as a Citizen of Old Rome: Assessing Good Moral Character in the Age of National Security*, 56 U.C. IRVINE L. REV. 945, 949–54 (2015) (explaining that Jackson, concerned with the respectability and character of the American name, hoped this requirement would allow the title of a “citizen of America” to become as “highly venerated and respected as was that of a citizen of old Rome” and that Congress adopted his proposal to require good moral character).

10. *Immigration Timeline*, ELLIS ISLAND FOUND., INC., <https://www.libertyellisfoundation.org/immigration-timeline#1790> [<https://perma.cc/H8UG-5GAE>].

11. Edward C. Carter II, *A “Wild Irishman” Under Every Federalist’s Bed: Naturalization in Philadelphia, 1789–1806*, 133 PROC. AM. PHIL. SOC’Y 178, 180 (1989) (describing how for the Federalists the fear of the Irish urban vote in the presidential election of 1796 motivated the passage of a legislative device as “needed to check the influx of foreigners”).

12. SAMUEL ELIOT MORISON, HARRISON GRAY OTIS, 1765–1848: THE URBANE FEDERALIST 107 (1969); see also Robert J. Steinfeld, *Subjectship, Citizenship, and the Long History of Immigration Regulation*, 19 LAW AND HIST. REV. 645 (2001) (discussing the young nation’s “double-sided view of immigrants,” where the “right sort of immigrant” was desired “as a critical source of future prosperity” and the undesired—such as the Irish—a drain on the nation’s economy and threat to American culture).

13. Naturalization Act of Jan. 29, 1795, ch. 20, 1 Stat. 414 (1795).

14. *Id.*

15. *Id.*

16. The Alien and Sedition Acts typically refer to only An Act Concerning Aliens (ch. 58, 1 Stat. 570 (1798)) and An Act for the Punishment of Certain Crimes Against the United States (Sedition Act) (ch. 74., 1 Stat. 596 (1798)), though they technically comprise four bills passed in 1798, including the Naturalization Act of 1798 (ch. 54, 1 Stat. 566 (repealed 1802)) and An Act

the rise of nativism and anti-Catholic sentiment in the 1850s, the Know-Nothing Party gained popularity for supporting a twenty-one-year naturalization period.¹⁷ After the Republican Party took control, Congress enacted the Naturalization Act of 1802, which kept intact the provisions from 1790 and 1798, but brought the minimum residency requirements back down to five years.¹⁸

Through the early twentieth century, the United States added an evolving set of English proficiency tests to the naturalization regime, earning the country the name “The Original Tester” and credit for “inventing” the idea of administering formal civics and language tests to aspiring citizens.¹⁹ Amitai Etzioni notes that the introduction of citizenship tests “followed the rise of anti-immigrant feeling” and were originally devised “as a means of discouraging often illiterate southern and eastern Europeans from immigrating.” He adds, “[c]ombined with national quotas, the literacy test, followed by the civics test, served for over thirty years as a tool to limit immigration.”²⁰ Citizenship laws at this time served to convert northern and western Europeans into Americans and exclude all others.

Respecting Alien Enemies (Alien Enemies Act) (ch. 66, 1 Stat. 577 (1798)). The Alien and Sedition Acts, in addition to tightening citizenship requirements, increased the president’s power to imprison and deport noncitizens judged “dangerous to the peace and safety” of the United States. The Alien Enemies Act allowed the president broad discretion to imprison and deport any noncitizen male older than fourteen who came from any foreign nation at war with or threatening the United States.

17. See Elliott J. Gorn, “Good-Bye Boys, I Die a True American”: *Homicide, Nativism, and Working-Class Culture in Antebellum New York City*, 74 J. AM. HIST. 388, 394 (1987).
18. Naturalization Act of 1802, ch. 28, 2 Stat. 153.
19. Stella Burch Elias, *Testing Citizenship*, 96 B.U. L. REV. 2093, 2111 (2016). In 1887, the economist Edward Bemis invented the first U.S. citizenship test in response to Southern and Eastern European immigration. *Id.* at 2111. Support for the test grew because many felt “requiring any would-be citizens to demonstrate their knowledge of civics and the English language would protect the national interest.” *Id.* The literacy test has been in use in the United States ever since. The Immigration and Nationality Act of 1952 formalized the civics and literacy tests, drawing on “sociological theories of the time relating to cultural assimilation.” *Id.*, citing JOYCE C. VIALET, CONG. RESEARCH SERV., 80-223 EPW, A BRIEF HISTORY OF U.S. IMMIGRATION POLICY 20 (1980). Today, President Trump’s immigration policies similarly reflect the late nineteenth century’s nativist sentiment. In a recent speech on the Reforming American Immigration for a Strong Economy Act (RAISE Act), Trump emphasized the need to end “chain migration,” change the process for obtaining legal permanent residency, and implement a “competitive application process [that] will favor applicants who can speak English.” *Remarks: Donald Trump Announces New Immigration Reform Act*, FACTBASE (Aug. 2, 2017), <https://factba.se/transcript/donald-trump-remarks-immigration-raise-act-august-2-2017> [<https://perma.cc/J7QD-6UKA>]. He concluded by stating that the RAISE Act would “restore the sacred bonds of trust between America and its citizens . . . [and] help ensure that newcomers to our wonderful country will be assimilated.” *Id.*
20. Amitai Etzioni, *Citizenship Tests: A Comparative, Communitarian Perspective*, 78 POL. Q. 353, 354 (2007); see also Elias, *supra* note 19.

Though the first immigration laws only allowed whites to naturalize, over the next century, citizenship's gates hesitatingly opened to those who were not white.²¹ With the Fourteenth Amendment's passage, all persons born in the United States were granted citizenship.²² In 1848, the treaty ending the U.S.–Mexico War guaranteed citizenship to Mexican subjects in the new territories, and decades later the Naturalization Act of 1870 extended citizenship to immigrants of African birth and descent.²³ Notably, Asian immigrants remained barred from citizenship, and the Chinese Exclusion Act of 1882 prevented them from immigrating to the United States.²⁴ In 1943, President Franklin D. Roosevelt signed into law the Magnuson Act, also known as the Act to Repeal the Chinese Exclusion Acts, overturning previously set limitations on Chinese immigrations and including persons of Chinese descent among immigrants eligible to naturalize.²⁵

As Congress grappled with citizenship requirements, the nation's courts were confronted with interpreting vague and everchanging naturalization statutes. “Any court of record” had jurisdiction to make naturalization decisions, leading to confusion and irregularity between the thousands of local, state, and

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21. Several U.S. Supreme Court decisions from the twentieth century illustrate the time's restrictive judicial interpretation of the meaning of “white” in the naturalization statute. In a 1922 case, *Ozawa v. United States*, the Court denied citizenship to a Japanese man who had lived in the country for twenty years, noting that all of the naturalization acts between 1790 and 1906 confined the “privilege of naturalization” to white persons, with the exception of those of “African nativity and descent” starting in 1870. *Ozawa v. United States*, 260 U.S. 178, 193 (1922). In reaching its decision, the Court wrote that “the words ‘white person’ were meant to indicate only a person of what is popularly known as the Caucasian race.” *Id.* at 197. The Court attempted to sidestep the law's clear racism by writing “[o]f course there is not implied—either in legislation in our interpretation of it—any suggestion of individual unworthiness or racial inferiority.” *Id.* at 198. Later, in *United States v. Thind*, the Court denied citizenship to an Indian man because he was not white. *United States v. Thind*, 261 U.S. 204, 207 (1923). In its lengthy decision, the Court wrote “[t]he words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white. . . . When they extended the privilege of American citizenship ‘any alien, being a free white person’ it was these immigrants—bone of their bone and flesh of their flesh—and their kind whom they must have had affirmatively in mind.” *Id.* at 213.
 22. U.S. CONST. amend. XIV, § 1.
 23. Treaty of Guadalupe-Hidalgo [Exchange copy], February 2, 1848; Perfected Treaties, 1778–1945; Record Group 11; General Records of the United States Government, 1778–1992; National Archives.
 24. See Act of May 6, 1882, ch. 126, 22 Stat. 58 (1882). In 1882, the Chinese Exclusion Act suspended entry of Chinese laborers into the United States and created a registry for those entering the country within the ninety days of the Act's passage.
 25. Magnuson Act (Chinese Exclusion Repeal Act of 1943), 8 U.S.C. ch. 7 §§ 262–297 & 299. Note, that those of Chinese descent but U.S. birth were granted automatic citizenship at birth in 1898 by the Supreme Court in *Wong Kim Ark v. United States*. *Wong Kim Ark v. United States*, 169 U.S. 649 (1898).

federal courts making decisions about a new nation's most powerful classification.²⁶

In response to increasing fraud and inconsistencies in naturalization procedures, Congress reaffirmed their singular authority to delegate naturalization authority and establishing the U.S. Naturalization Service in the Basic Naturalization Act of 1906.²⁷ The law provided for federal administrative supervision of naturalization and centralized the naturalization process. With this centralization, the Bureau of Immigration and Naturalization was responsible for the initial findings and recommendations on each application, which were then submitted to designated courts for final decision.²⁸

In response to a backlogged court system responsible for making final naturalization decision upon the recommendation of the then-Immigration and Naturalization Service (INS), the current statutory scheme was enacted with the Immigration Act of 1990 in hopes of lessening delays and increasing accessibility.²⁹ The 1990 Act places primary responsibility for adjudication into the hands of administrative officers, presently U.S. Citizenship and Immigration Services (USCIS). Under the 1990 Act, an applicant can only benefit from judicial intervention where the agency has failed to adjudicate the case within 120 days after the initial citizenship interview or where an individual has received a final denial of naturalization after pursuing an administrative appeal. Centralization did not cure the inconsistencies that have plagued the naturalization process from its genesis, however. With the judicial appeal system largely replaced by an administrative hearing, the applicant is even more removed from a judicial body.³⁰

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26. Naturalization Act of 1790, ch. 3, 1 Stat. 103; Deborah L. Rhode, *Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings*, 43 LAW & SOC. INQUIRY 1027 (2018); Nancy Morawetz, *Citizenship and the Courts*, 2007 U. Chi. Legal F. 447 (2007).
27. Act of June 29, 1906, ch. 3592, 34 Stat. 596. See also Report to the President of the Commission on Naturalization, HR Doc No 46, 59th Cong, 1st Sess 11 (Dec 5, 1905). For a more detailed discussion of the evolution of naturalization laws during this period see Nancy Morawetz, *Citizenship and the Courts*, 2007 U. Chi. Legal F. 447 (2007); Louis DeSipio and Harry P. Pachon, *Making Americans: Administrative Discretion and Americanization*, 12 Chicano-Latino L Rev 52 (1992); Ruth Z. Murphy, *Government Agencies Working with the Foreign Born*, 262 ANNALS AM. ACAD. POL. & SOC. SCI. 131, 135–36 (1949).
28. Act of June 29, 1906, ch. 3592, 34 Stat. 596.
29. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1994). For a detailed history of the evolution of the system of administrative and judicial review of naturalization cases, see Nancy Morawetz, *Citizenship and the Courts*, 2007 U. CHI. LEGAL F. 447 (2007); Louis DeSipio, *Making Americans: Administrative Discretion and Americanization*, 12 CHICANO-LATINO L. REV. 52 (1992).
30. For a broader discussion of limitations to judicial review not addressed in this article, see Daniel Makled, *De Novo: A Proposed Compromise to Closing the Naturalization Review Loophole*, 90 U. DET. MERCY L. REV. 367 (2013) and Michael Castle Miller, *Checking the DHS: Constitutional and*

Nancy Morowitz points out that “[a]lthough Congress provided the agency with the authority to provide a hearing mechanism at the agency level, it never created a mechanism that could play the role that had previously been performed by the courts.”³¹

With the lesser role of courts in naturalization post-1990, inconsistencies and bias in citizenship adjudication may have become harder to identify and check as adjudication lies in the hands of a single administrative officer. In this manner discriminatory naturalization denials may have become a more covert, yet no less powerful, tool to exclude unwanted aspiring Americans.

A. The Good Moral Character Requirement’s First 150 Years: Varied Judicial Interpretations

For the first 150 years after the enactment of United States’ naturalization laws, Congress did not define good moral character. Lack of a definition coupled with varied jurisdiction over naturalization proceedings left a long trail of disparate and evolving understandings across the nation’s courthouses. For some jurists, that which would pass muster with the average man would be sufficient to establish good moral character. Still for other jurists of the time, good moral character became a test of whether one was worthy enough to join the fold. Even today there is no singular definition or interpretation of good moral character. USCIS uses both statutory bars and discretion to deny naturalization applications on good moral character grounds. Even if an applicant remains statutorily eligible, USCIS may find a lack of good moral character as a matter of discretion, even for dismissed cases, where no arrest was made or for non-criminal behavior altogether.

In the first case to define good moral character, decided in 1878, an Oregon court opined about the differing understandings of the term:³²

What is ‘a good moral character’ within the meaning of the statute may not be easy of determination in all cases. The standard may vary from one generation to another, and probably the average man of the country is as high as it can be set. In one age and country dueling, drinking and gaming are considered immoral, and in another they are regarded as venial sins at most. . . . Upon general principles it would seem that whatever is forbidden by the law of the land ought to be

Substitutional Approaches to Resolving Whether Noncitizens in Removal Proceedings Can Obtain Effective Judicial Review of Naturalization Decisions, 63 AM. U. L. REV. 497 (2013).

31. Nancy Morawetz, *Citizenship and the Courts*, 2007 U. CHI. LEGAL F. 447, 455 (2007).

32. Lapp, *supra* note 7, at 1586.

considered, for the time being, immoral, within the purview of this statute.³³

Another example of the court's interpretation of the clause is found in a 1909 Supreme Court of Illinois case that considered whether an Austrian native who kept his saloon's back door open on Sundays was fit to naturalize. Denying the petition, the court found that one who had "knowingly, willfully and habitually violated the Sunday closing law" did not have the requisite good character.³⁴ A year later, a judge on the United States District Court for the Eastern District of Wisconsin declared:

A good moral character is one that measures up as good among the people of the community in which the party lives; that is, up to the standard of the average citizen. . . . So here, where the law says a good moral character, it means such a reputation as will pass muster with the average man. It need not rise above the level of the common mass of people.³⁵

Law regulating alcohol sale and consumption sparked good moral character discussions during this period in which immigration from European countries grew exponentially. Between 1850 and 1920, the percentage of foreign-born people in the United States increased from 9.7 to 13.2 percent as Germans and Italians arrived in record numbers.³⁶ To many, they, together with other new immigrants, represented a threat to Anglo-Saxon life and American culture, economies, and political institutions.³⁷ New cultural practices relating to the liquor consumption were one aspect of this threat.³⁸ These immigrants were singled out for alleged exaggerated drinking habits that were painted as amoral.³⁹ Owing to racism, industry ties, and broad societal generalizations, immigrant communities during the late nineteenth and early twentieth centuries became

33. *In re Spenser*, 22 Fed. Cas. 921, 921–22 (C.C.D. Or. 1878) (considering whether a man convicted of perjury lacked good moral character).

34. *United States v. Hrasky*, 88 N.E. 1031, 1034 (Ill. 1909) (distinguishing "character" from "reputation"); see also Elmer Plischke, "Good Moral Character" in the Naturalization Law of the United States, 23 MARQ. L. REV. 117, 118 (1939).

35. Plischke, *supra* note 34, at 118 (citing *In re Hopp*, 179 Fed. 561, 562–63 (E.D. Wis. 1910)).

36. Jayesh M. Rathod, *Distilling Americans: The Legacy of Prohibition on U.S. Immigration Law*, 51 HOUS. L. REV. 781, 803 (2014) (citing ROGER DANIELS, *COMING TO AMERICA: A HISTORY OF ETHNICITY AND IMMIGRATION IN AMERICAN LIFE* 125 (2d. ed. 2002)).

37. *Id.* at 803–08.

38. *Id.*

39. *Id.* at 803–04 (tracing the history of alcohol-related legal norms in U.S. immigration law and the "preoccupation with noncitizen drunkenness").

closely linked with alcohol consumption, and alcohol-related laws were used to control noncitizens.⁴⁰

A Missouri district court commented on the difficulty of assessing cases when a petitioner's sole fault was a single violation of the state's liquor sale laws: "Cases involving conduct evil in itself would present little difficulty. Discussion arises where the offense is merely *malum prohibitum*."⁴¹ For this court, like many others analyzing alcohol sale and consumption under the good moral character clause, questions would also arise about (1) whether the crime occurred within the five-year statutory period preceding the naturalization application and (2) whether any mitigating circumstances existed.⁴² Of course, the existence of mitigating circumstances, like the original good moral character inquiry, was a determination wrought with personal bias and societal norms that would differ through geographies and generations.

During its first 150 years, the good moral character clause became a catchall for excluding aspiring Americans with threatening qualities, even when the conduct involved was not evil or any different than what would pass muster with the average man.⁴³ Over time, the U.S. government relaxed previously rigorous standards on vices like gambling, alcohol consumption, and adultery, instead focusing on other perceived wrongs such as potential Communist affiliation.⁴⁴

B. The Good Moral Character Requirement's Modern Development

Even today, the good moral character requirement lacks clear definition, leaving great latitude for discretion, bias, and unequal application. In 1952, the McCarran-Walter Act (hereinafter Nationality Act) set out a number of behaviors that precluded establishing good moral character.⁴⁵

40. See *id.* at 784-86, 798; see also *Hrasky*, 88 N.E. 1031.

41. *In re Trum*, 199 F.361, 362 (W.D. Mo. 1912) (finding that the naturalization applicant lacked good moral character for violating the state's liquor laws and reasoning that "[h]is act was that of a lawbreaker—not one well-disposed to the good order and happiness flowing from attachment to the principles of the Constitution of the United States. . . . Defiance of the established order . . . constitutes bad citizenship, bad behavior, and . . . indicates a perverted moral character").

42. Harold F. Bonacquist Jr. & Philip A. Mittleman, Comment, *The Evaluation of Good Moral Character in Naturalization Proceedings*, 38 ALB. L. REV. 895, 901 (1974).

43. See Rathod, *supra* note 36, at 804 ("In short, 'Irish and German immigrants personified the dangers of moral laxity of alcohol consumption' and were easily scapegoated as enemies for their failure to embrace dominant practices and values.") (quoting MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 110-11 (2004)).

44. PHILIP B. PERLMAN ET AL., PRESIDENT'S COMM'N ON IMMIGRATION & NATURALIZATION, WHOM WE SHALL WELCOME 255 (1953).

45. *Id.* at 246 ("The act of 1952 does not undertake a full definition of good moral character, but the statute attempts to describe certain patterns of conduct that are not to be regarded as fulfilling the

USCIS makes determinations on a “case-by-case basis” taking into account statutory bars and the “standards of the average citizen in the [applicant’s] community of residence.”⁴⁶ Though there is no affirmative good moral character definition, those convicted of murder or an aggravated felony are permanently barred from naturalizing.⁴⁷ Those who furthered persecution, genocide, torture, or severe religious freedom violations are also permanently barred under the good moral character provisions.⁴⁸

The Nationality Act also established temporary bars to proving good moral character. Those found to be “habitual drunkard[s],” those “whose income is derived principally from illegal gambling activities,” those “convicted of two or more gambling offenses,” those who have assisted in Nazi persecution, those with certain other criminal convictions, and those who have been confined as a result of a conviction for an aggregate period of 180 days or more will be barred from establishing good moral character for five years. Those temporarily barred may apply to naturalize after the five-year statutory period is complete.⁴⁹

The same section of the Nationality Act, set out in the United States Code, also delineates that “one who has given false testimony for the purpose of obtaining benefits under this chapter will also be precluded from a finding of good moral character.”⁵⁰ In 1988 the U.S. Supreme Court in *Kungys v. United States* limited “testimony” for good moral character purposes to “oral statements made under oath.”⁵¹ The Court established that false testimony need not relate to a material fact to preclude a good moral character: “[E]ven the most immaterial of lies with the subjective intent of obtaining immigration or naturalization benefits” will prevent a good moral character finding.⁵² By explicitly inserting a intent requirement, the United States Code and the case law that interpreted it sought to protect those who commit an innocent mistake or misunderstanding even when it relates to a material fact as long as they had no intent to deceive.⁵³

requirement of good moral character. In each instance, the new law usually attempts to negate a specific court decision.”).

46. 8 C.F.R. § 316.10(a)(2) (1995).

47. 8 C.F.R. § 316.10(b); 8 U.S.C. § 1101(a)(43) (2012).

48. 8 U.S.C. § 1101(f)(9); 8 U.S.C. § 1182(a)(3)(E) (2012); 18 U.S.C. § 1091 (2012).

49. 8 U.S.C. § 1101(f).

50. 8 U.S.C. § 1101(f)(6).

51. *Kungys v. United States*, 485 U.S. 759, 780 (1988).

52. *Id.* at 779–80.

53. *See id.* at 780; *Plewa v. Immigration & Naturalization Serv.*, 77 F. Supp. 2d 905, 912 (N.D. Ill. 1999) (“It seems incongruous that Congress would consider an innocent mistake, misinterpretation, or incorrect statement as grounds to disqualify an otherwise upstanding person for American citizenship when the speaker had no deceitful intent.”).

An applicant must have offered false testimony during the five-year period preceding the naturalization application to be a basis for denial.⁵⁴ Still, adjudicators are not limited to this five-year period and may look to actions before the statutory five-year period to support negative findings or to question the applicant's credibility.⁵⁵ The burden to prove good moral character rests squarely with the applicant. Previously when courts encountered behavior specified in this Act, whether it be drinking practices, adultery or gambling, jurists often weighed these acts against mitigating circumstances. Some scholars from this period commented that the Nationality Act served to stop any such inquiry in its tracks, while others suggested it was a way to classify actions that demonstrate bad moral character *per se*.⁵⁶ But in its efforts to bring clarity to naturalization adjudication, Congress added language that would become a catchall mechanism to deny good moral character: the false testimony provision.⁵⁷

C. The Road to Citizenship Today

If an immigrant has reached naturalization's doorstep, she has already undergone a series of inquiries, questioning, health screenings, security checks, and other reviews by multiple U.S. government agencies.

To start, unless born to U.S. citizens abroad, generally one must enter the country. Some enter as a permanent resident, others with a temporary visa, and still others with fraudulent documents. The government affords legal permanent resident status to some upon arrival, while others may enter outside delineated border crossings without inspection. Customs and Border Protection (CBP) may turn some away at the border, even asylum-seekers and those with valid documents, arguing their expansive discretion to deny entry to those at the border. Many who enter may naturalize one day, albeit through different routes in the complex immigration maze.⁵⁸

54. 8 U.S.C. § 1427(a)(1)–(3) (2012); *see also* 8 C.F.R. § 316.10(a)(1) (1995).

55. 8 U.S.C. § 1427(e); 8 C.F.R. § 316.10(a)(2).

56. Bonacquist & Mittleman, *supra* note 42, at 901.

57. Section 346(a) of the Nationality Act of 1940, 8 U.S.C.A. § 1101(f)(6), makes it a felony for any noncitizen or other person, whether or not an applicant for naturalization or another immigration benefit, to: “Knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship.”

58. For a general overview of the many steps an immigrant must take before they are able to naturalize, *see Becoming a U.S. Citizen: An Overview of the Naturalization Process*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/citizenship/learners/study->

Those who did not enter the United States as a permanent resident must go through a lengthy and extensive process to obtain lawful permanent residence (commonly called a green card.⁵⁹ Various paths to a green card exist. Some secure their green card affirmatively by petitioning USCIS for status, while others apply for an immigrant visa before an immigration judge to avoid deportation. Some acquire their green card through marriage to a U.S. citizen or Legal Permanent Resident, asylum or other humanitarian relief, extraordinary abilities, or employer sponsorship. Each of these paths come with significant obstacles, including, for example, proving a lasting, bona fide marriage or persecution in your home country or certifying that a sponsoring employer could not have hired a U.S. citizen for the job. Before becoming eligible for a green card, many first secure a immigrant visa. After a statutorily mandated period, many visa holders may apply for legal permanent resident status. But many are indefinitely barred from being admitted to the United States with immigrant visas because of manner of entry, length of out-of-status residence, criminal and health history, and a myriad of other factors.⁶⁰

Obtaining permanent resident status involves the same extensive screening as that required to secure an underlying visa or status. For example, the U.S. government can review the validity of an asylee's underlying asylum grant and will

test/study-materials-civics-test/becoming-us-citizen-overview-naturalization-process [https://perma.cc/RUP3-UMLD].

For an overview of how one receives a green card, a necessary prerequisite of naturalization, see *Green Card Eligibility Categories*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/eligibility-categories> [https://perma.cc/VZ2R-55KX]; *Green Card Processes and Procedures*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/green-card-processes-procedures> [https://perma.cc/CJ82-M6NJ].

For narrative accounts of various iterations of this complicated process, see Smriti Jacob, *A Legal Immigrant's Long Road*, ROCHESTER BEACON (October 29, 2018), <https://rochesterbeacon.com/2018/10/29/a-legal-immigrants-long-road/> [https://perma.cc/LV8E-5BNM]; Michelle Mark, *A Brand-New US Citizen Walks Us Through the "Hell" It Takes to Go From Foreigner to American*, INSIDER (Mar. 23, 2019), <https://www.insider.com/us-citizenship-process-foreigner-to-american-2019-3> [https://perma.cc/XE6X-4S8X]; Lerman Montoya & Adriana de Alba, *Path to Citizenship is Long, Frustrating and Expensive*, CRONKITE NEWS: ARIZ. PBS (Mar. 30, 2018), <https://cronkitenews.azpbs.org/2018/03/30/path-to-citizenship/> [https://perma.cc/KA9K-RV9E].

59. See *Green Card Processes and Procedures*, *supra* note 58.

60. See 8 U.S.C. § 1182 (2012). For examples of potential bars to admissibility that may impact those seeking to adjust status to that of an individual lawfully admitted for permanent resident (a prerequisite to naturalization), see *Unlawful Presence and Bars to Admissibility*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/legal-resources/unlawful-presence-and-bars-admissibility> [https://perma.cc/DJ4E-NQXT]; *Public Charge*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/public-charge> [https://perma.cc/8LZ3-HYWB]; and *USCIS Policy Manual Volume 8, Part B: Health-related Grounds of Inadmissibility*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/policy-manual/volume-8-part-b> [https://perma.cc/LS3H-LX8W].

extensively renew health, security, biometric, and criminal history checks. In addition, the government will again do a comprehensive admissibility screening, considering other factors such as whether the immigrant may become dependent on public welfare programs,⁶¹ whether the immigrant was a communist or other totalitarian party member,⁶² and how long the applicant has maintained physical presence and residency in the United States.⁶³

Many who successfully enter the United States and acquire a green card can apply for citizenship after maintaining legal permanent residence for a statutorily enacted period, five years for most.⁶⁴ The burden of proving eligibility falls on the applicant,⁶⁵ and doubts are to be resolved in the United States' favor.⁶⁶ One must be at least eighteen years old at the time of filing and have maintained continuous physical presence and residence for a requisite period.⁶⁷ To apply, one must file Form N-400, Application for Naturalization, a twenty-page document that asks almost seventy-five questions about everything from identity information and employment and travel history to criminal records and organizational affiliation.⁶⁸ The filing fee, currently \$725.00, is a significant deterrent for many.⁶⁹ After filing the form, the applicant will have to pass a biometrics test and complete a detailed interview. Those who are not eligible for age-based or medical waivers must also pass a civics and English language test. And even if the applicant succeeds with each step of the process, USCIS can ultimately deny citizenship if it finds that the applicant has not established good moral character during the five-years

61. 8 U.S.C. § 1182(a)(4)(A).

62. 8 U.S.C. § 1182(a)(3)(D).

63. 8 U.S.C. § 1255(a) (2012).

64. For a transformative analysis of the evolution of immigration and citizenship law, see HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* (2006) (proposing that new lawful immigrants should be treated like U.S. citizens until they fulfill the residency requirement to be eligible to apply for citizenship, in sum treating new lawful immigrants as "Americans in waiting").

65. 8 C.F.R. § 316.2(b) (1995); *Berenyi v. Dist. Dir., Immigration & Naturalization Serv.*, 385 U.S. 630, 636–37 (1967).

66. *United States v. Manzi*, 267 U.S. 463, 467 (1928).

67. 8 C.F.R. § 316.5(c).

68. See U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 6.

69. See, e.g., Jens Hainmueller et al., *A Randomized Controlled Design Reveals Barriers to Citizenship for Low-Income Immigrants*, 115 *PROC. NAT'L ACAD. SCI.* 939 (2018) (finding that fee vouchers doubled the naturalization application rate among low-income immigrants, indicating that current high fees prevent low-income immigrants from submitting naturalization applications). Note that some may qualify for a fee-waiver by filing Form I-912. See U.S. CITIZENSHIP & IMMIGRATION SERVS., FORM I-912, REQUEST FOR FEE WAIVER (Oct. 9, 2019), <https://www.uscis.gov/i-912> [<https://perma.cc/TBV2-TCXB>].

immediately preceding his or her application, taking into account activity long before that five-year period begins.⁷⁰

Misstatements, omissions, and mistakes are nearly impossible to avoid while navigating this complex immigration web, which makes the false testimony provision an ideal catchall mechanism to deny applications from unwanted aspiring Americans. The remainder of this Article looks closely at the manner in which the government has used this specific provision of the good moral character clause to discriminatorily deny citizenship to those the U.S. seeks to exclude.

II. USING FALSE TESTIMONY ALLEGATIONS TO DENY CITIZENSHIP

Be they alleged drunkards, adulterers, or Communists, a historical survey of naturalization denials appealed to federal courts gives us a window into the sizable grey zone in citizenship adjudication that has been manipulated to discriminatorily adjudicate citizenship from our nation's earliest days. In these cases, even if petitioners met every other element required for naturalization, adjudicators used any iota of evidence contradicting a petitioner's testimony as a basis for denial.

The government can likely insert some doubt into every case no matter how careful or transparent the applicant. In some cases, the government may uncover an allegation about communist association; in others, it can cast doubt about other aspects of citizenship eligibility like travel history, the underlying immigration status or other political and criminal history. Finally, in cases, when all else fails, adjudicators can use any misstatement or omission to justify a naturalization denial.

But, of course, the government approves many naturalization applications. So, in what cases does the government go on a fishing expedition to find contradictions in a naturalization application? Who does the government put under the metaphoric wringer? From 1907 to 1997, the government only denied about 5.6 percent of naturalization applications. Reviewing federal appeals of naturalization denials based on false testimony reveals discriminatory patterns. These patterns disturbingly track the biases and fears our nation displayed at the time.

A. Historical Trends

Throughout U.S. history, the government has pretextually used the good moral character clause to deny citizenship to members of certain suspect groups

70. See 8 U.S.C. § 1427(a) (2012); 8 C.F.R. § 316.10.

who would otherwise be eligible. These denials manipulated naturalization's testimonial requirements to powerfully exclusionary ends. In many of these cases, the applicants' false testimony did not prove them to be dangerous, nor did the alleged false testimony prevent the government from learning about the aspiring citizen's relevant qualities. Rather, the government painted minor inconsistencies as false testimony to legitimize excluding undesirable aspiring Americans at the brink of citizenship.

In the nation's earliest cases involving false testimony, the government used false testimony allegations to deny citizenship to those who allegedly made misstatements or omissions about alcohol sale or consumption, extramarital children, or adulterous relationships. By the early 1900s, cases that indicated any shred of Communist association dominated naturalization denial appeals, reflecting the shifting protective national outlook.

In 1951, the Ninth Circuit considered how and if false testimony would preclude naturalization. In *United States v. Fraser*, the Ninth Circuit considered an appeal of a district court order admitting a mechanist's helper of Scottish descent, Walter Keay Fraser, for citizenship.⁷¹ His record was clean aside from a few drunk arrests, which resulted in no more than five days jail time.⁷² The United States admitted that the offenses for which the applicant was arrested would not preclude good moral character per se.⁷³ The Government instead argued that the applicant's failure to disclose all of the arrests while under oath amounted to "knowing and willful concealment precluding finding of good moral character."⁷⁴ The appellate court described the district court judge's "opportunity to observe [the applicant's] demeanor and gauge his sincerity," and concluded that he had not purposely withheld information, and granted him citizenship.⁷⁵ In determining that good moral character was not precluded, the Ninth Circuit considered the district court's analysis of the applicant's demeanor while the lower court surmised that the applicant may have been ashamed to admit his various arrests. The dissent criticized this analysis as a manner of "walking around" the false testimony provisions where one could "explain away perjured testimony which the government was clearly entitled to have during the administrative process."⁷⁶

Fraser displays a sequence of events that shows up repeatedly in cases in which the government denies naturalization based on false testimony. If the

71. *United States v. Fraser*, 219 F.2d 844, 845 (1955).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 846.

76. *Id.* at 847.

government has no basis to deny an application, they can challenge an applicant's candor and truthfulness on the naturalization application. Sometimes the allegations are about past crimes, but often they are about marriages, residences, travel, political affiliations, and organizational membership.

As open source information about individuals becomes more readily available through the internet, it has become even easier for the government to allege that an applicant provided false testimony. In 2008, the government established the Controlled Application Resolution and Review Program (CARRP).⁷⁷ CARRP, which advocates only excavated through Freedom of Information Act (FOIA) requests, calls for extreme vetting of certain classes of naturalization applicants and systematically denies and delays citizenship to those perceived as security threats. Yet the program is only the most recent legal innovation used to make such denials of citizenship.

1. Then: The Communism Cases

In the early 1900s, when the country feared anarchists, Congress shaped immigration laws to exclude those who would advocate overthrowing the government by violent means.⁷⁸ Congress folded those who were part of "subversive organizations" into these exclusionary laws by the 1920s and, two decades later, included present and former Communist Party members as well.⁷⁹ Whereas prior immigration laws attempted to preserve the predominant sociocultural norms, at this time, their goal shifted to protecting the nation from real or perceived threats.⁸⁰ Naturalization denials on false testimony grounds

77. See Memorandum from Jonathan R. Scharfen on Policy for Vetting and Adjudicating Cases with National Security Concerns, Deputy Dir., U.S. Citizenship & Immigration Servs., to Field Leadership, U.S. Citizenship & Immigration Servs. (Apr. 11, 2008), https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Policies_and_Manuals/CARRP_Guidance.pdf [<https://perma.cc/2L9T-7KSJ>] [hereinafter Vetting Policy]; JENNIE PASQUARELLA, ACLU S. CAL., MUSLIMS NEED NOT APPLY: HOW USCIS SECRETLY MANDATES THE DISCRIMINATORY DELAY AND DENIAL OF CITIZENSHIP AND IMMIGRATION BENEFITS TO ASPIRING AMERICANS 31 (Ahilan Arulanantham et al. eds., 2013), <https://www.aclusocal.org/sites/default/files/carrp-muslims-need-not-apply-aclu-socal-report.pdf> [<https://perma.cc/Y8NV-GQCP>].

78. See Immigration Act of 1903. See also, Julia Rose Kraut, *Global Anti-Anarchism: The Origins of Ideological Deportation and the Suppression of Expression*, 19 IND. J. GLOBAL LEGAL STUD. 169 (2012) (describing the history and implementation of the Immigration Act of 1903 which barred and expelled those classified as anarchists and became the first immigration law excluding and deporting individuals on the basis of their political beliefs).

79. ROBERT A. DIVINE, AMERICAN IMMIGRATION POLICY, 1924–1952 92 (1957).

80. See Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 U. COLO. L. REV. 59, 78 (2004) (citing ROBERT A. DIVINE, AMERICAN IMMIGRATION POLICY, 1924–1952 163 (1957) ("Previously the primary motivation of the restrictionists has been

reflect this evolution from a preservationist to protectionist stance. These cases first focus on policing morality and then later focus on those with certain past political affiliations or religious and racial identities that were (and in some cases, still are) deemed threatening.

In *Klig v. United States*, a fifty-seven-year-old Russian native, Myer Klig, filed a naturalization petition in the United States District Court for the Southern District of New York in 1958.⁸¹ At his naturalization hearing, he stated that he had not been a Communist Party member at any time during his twenty-year continuous residence in the United States and also declared his support for democratic government without reservation. He openly testified about his past membership in the Canadian Communist Party, which he attested he terminated in 1932 when the Canadian government declared membership in the Canadian communist party illegal. The government countered, offering witnesses who testified about Mr. Klig's continued involvement in the Canadian Communist Party from 1932 to 1938 through attendance at certain Party functions. Mr. Klig denied this participation and responded that his attendance at these functions would have only been in connection to his latter involvement in the Canadian labor movement.⁸² The district court admitted that "these facts, so found, in and of themselves, would not have disqualified appellant from citizenship," but went on to assert the applicant had testified falsely about when he had terminated communist activities in Canada and was thus not eligible for naturalization.⁸³ On appeal, the Second Circuit cited a foundational Supreme Court decision in considering the requirement of candor while pursuing naturalization:

Acquisition of American citizenship is a solemn affair. Full and truthful response to all relevant questions required by the naturalization procedure is, of course, to be exacted, and temporizing with the truth must be vigorously discouraged. Failure to give frank, honest, and unequivocal answers to the court when one seeks naturalization is a serious matter.⁸⁴

racial and cultural nationalism—the desire to preserve the predominant cultural patterns and ethnic composition of the United States by limiting immigration. With the rise of totalitarian governments in its most fundamental meaning, the security of the nation, became evident The fear of Communist infiltration, which played such a large role in the mid-20th-century American life, permeated discussions of immigration legislation and tended to replace the old fear of ethnic invasion as the dominating immigration policy.”)

81. *Klig v. United States*, 296 F.2d 343 (2d Cir. 1961).

82. *Id.* at 344.

83. *Id.*

84. *Chaunt v. United States*, 364 U.S. 350, 352 (1960) (revoking naturalization of alleged former Communist who falsely denied ever being arrested).

After establishing that false testimony had been provided, the court went on to look at the applicant's positive equities and remanded the case for further consideration:

Appellant has been a resident of this country for 20 years. There is nothing in that 20 years to which the INS can point which reflects poorly on appellant's character. He has been steadily employed and is law-abiding. He is married to an American citizen. His children are citizens and they reside here. Despite this, his petition for naturalization has been denied . . . because . . . two persons testified differently from him about minor events that transpired more than 20 years earlier.⁸⁵

Three years later, the Supreme Court heard a similar fact pattern in *Berenyi v. District Director*. The court described that Mr. Kalman Berenyi, a Hungarian national, became a Communist Party member in Hungary in 1945.⁸⁶ A few years later, Communists took complete control over Hungary and Mr. Berenyi served in the Hungarian army during his medical studies and later attained the rank of captain as a physician.⁸⁷

When applying to naturalize in 1966, Mr. Berenyi testified that he had never been a Party member.⁸⁸ At his final hearing, the government presented two witnesses who stated they had seen Mr. Berenyi at Communist Party meetings in Hungary.⁸⁹ Mr. Berenyi defended his prior statements denying membership in the Party by describing university pressure to attend meetings, and explained he attended as a nonmember.⁹⁰ Finding Mr. Berenyi's argument unpersuasive, the district court concluded Mr. Berenyi had provided false testimony and denied his application for citizenship on good moral character grounds.⁹¹

The Supreme Court affirmed, noting it was not denying Mr. Berenyi's application based on past, loose associations with the Communist Party, but rather because of his lack of candor about those associations: "The Government is entitled to know any facts that may bear on an applicant's statutory eligibility for citizenship, so that it may pursue leads and make further investigation if doubts were raised."⁹² In both *Klig* and *Berenyi*, the United States government did not question the petitioners' loyalty to the United States or their opposition to

85. *Klig*, 296 F.2d at 347.

86. *In re Berenyi*, 239 F. Supp. 725, 727 (1965).

87. *Id.*

88. *Id.* at 728.

89. *Berenyi v. Dist. Dir., Immigration & Naturalization Serv.*, 385 U.S. 630, 668 (1967).

90. *Id.* at 634.

91. *Id.*

92. *Id.* at 638.

Communism.⁹³ Instead the courts used doubt, no matter how scant, about the applicant's candor to deny citizenship. In their *Berenyi* dissent, Justice Douglas, joined by Chief Justice Warren and Justice Brennan, criticized this insurmountable standard:

Thus, we are confronted with the curious proposition that the speculations of one witness and the hazy memory of another witness as to a statement made in the distant past, can outweigh the overwhelming evidence adduced by the petitioner, and thereby prevent his naturalization. *To me this is tantamount to saying that the Government can merely throw very slim doubt into the case, and deny naturalization when the applicant fails to disprove the ephemeral doubt.* . . . Must the applicant tilt with every windmill thrown in his path by the Government? If the Government's sketchy evidence did raise a doubt, the doubt was clearly dispelled by the overwhelming evidence adduced by the petitioner.⁹⁴

In both *Klig* and *Berenyi* the government presumably expended significant investigative resources to find witnesses to attest to the applicants' attendance at Communist Party events decades earlier in foreign nations.⁹⁵ There was no evidence establishing present Communist Party affiliation in either situation, so the government introduced proof of past association and false testimony allegations. Here false testimony served as a pretense to punish the applicant for past communist association and to prevent the entry and expedite the removal of those feared to be Communists.⁹⁶

93. *Id.*; see also *Klig v. United States*, 296 F.2d 343, 344 (2d Cir. 1961) (“[A]ppellant has declared that he is now opposed to communism and that without any reservations whatsoever he supports the American form of government. This testimony of his, testimony covering the most recent 18 years of his life was uncontroverted in any particular by the Immigration and Naturalization Service (INS).”).

94. *Berenyi*, 385 U.S. at 642–43 (emphasis added).

95. *Klig*, 296 F.2d at 344–45 (“At the hearing before Judge Edelstein on May 25, 1959, the INS sought to establish that appellant had attended Communist Party meetings in New York City in 1936–1939. . . . At the reopened hearing on June 9 and 11, 1959, instead of offering evidence concerning Klig's alleged Communist Party activity in New York City, the INS concerned itself solely with attacking appellant's statement that he terminated his connection with the Communist Party in 1932. The Service presented two witnesses who testified to Klig's continued participation during the period from 1932 to 1938 in Canadian Communist Party affairs through attendance at certain functions of the Party in Toronto. Both of these witnesses were admittedly members of the Canadian Communist Party during those years and both terminated their affiliation with it later than the time when appellant claimed to have severed his connection. Appellant . . . categorically denied attending any Communist Party affairs during the period about which these witnesses testified.”).

96. See *Control of Communist Activities*, 1 STAN. L. REV. 85 (1948); see also D.E. Balch, *Denaturalization Based on Disloyalty and Disbelief in Constitutional Principles*, 29 MINN. L. REV. 405 (1945); *Deportation of Aliens for Membership in the Communist Party*, 48 YALE L.J. 111 (1938);

With the increased technological capacity to capture details of applicants' lives through ones' internet visibility and social media presence, there may no longer be a need to expend significant investigation resources to capture misstatements and omissions. This increase in information via technology may be another basis for the rise of naturalization denials citing false testimony as evinced by the rise of appeals of these types. The formation of the CARRP program, described below, is a direct result of the confluence of increased technological capability and systemic bias.

2. From Individual Adjudicator Bias to Government Policy: The CARRP Program

In the years after September 11, 2001, the United States systematized what before may have functioned as individual adjudicator or judicial bias.⁹⁷ In June 2010, the ACLU of Southern California (ACLU SoCal) filed a FOIA request after practitioners noticed that USCIS subjected naturalization applicants from Arab and Muslim countries to heightened scrutiny and discriminatory delays and denials. In its FOIA letter, ACLU SoCal noted that it was “concerned that USCIS appears to have a pattern and practice of denying naturalization to applicants from [these] nations for reasons unsupported by naturalization law or fact” such as pretextual claims of false statements about organizational associations and charitable giving.⁹⁸ In response to its request, ACLU SoCal uncovered CARRP, a vast and clandestine USCIS program.

Put into place by an internal USCIS policy memo, Congress did not enact CARRP, nor did USCIS promulgate it through the Administrative Procedure Act-mandated notice and comment process.⁹⁹ CARRP established the “systematic review and adjudication of applications or petitions with national security concerns.”¹⁰⁰ “Nearly all applications that convey immigrant and nonimmigrant

Hearing on H.R. 4422 and H.R. 4581 Before the Subcomm. on Legis. of the Comm. on Un-American Activities, 80th Cong., 2d Sess. (1948).

97. It is possible that programs like the Controlled Application Resolution and Review Program (CARRP) existed in the past to guide adjudicators to deny naturalization applications of individuals from populations the nation sought to exclude. The author's research scope did not include ascertaining whether such programs existed in the past.

98. Freedom of Information Act Request (FOIA) Letter from ACLU of S. Cal. to U.S. Citizenship & Immigration Servs. (June 16, 2010), <https://www.aclusocal.org/sites/default/files/wp-content/uploads/2013/01/First-FOIA-Request-June-16-2010.pdf> [<https://perma.cc/JY27-8YWD>].

99. Vetting Policy, *supra* note 77.

100. *Oversight of U.S. Citizenship and Immigration Services: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 19 (2010).

status” are subject to CARRP, including refugee processing and screening.¹⁰¹ CARRP defines a “national security concern” as “an individual or organization [that] has been determined to have an articulable link to prior, current or planned involvement in, or associations with, an activity, individual or organization described in [security- or terrorism-related sections] of the Immigration and Nationality Act.”¹⁰² Once an adjudicator labels an applicant as a national security concern, USCIS seeks to deny an application through any means possible through extensive “vetting.”¹⁰³

As of April 2016, USCIS opened 41,805 CARRP cases nationwide. The top five countries impacted were Pakistan, Iraq, India, Iran, and Yemen.¹⁰⁴ Pakistan, Iraq, Iran and Yemen are majority-Muslim nations, while India is home to 10 percent of the world’s Muslim population.¹⁰⁵ The fact that these nations are at the top of the CARRP list proves that in practice, “national security concern” serves as a thinly veiled metonym for Muslim, and that CARRP joins the “corpus of

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101. Vetting Policy, *supra* note 77, at 1 n.4 (directing USCIS to refer to routine “Operational Guidance” when adjudicating petitions unrelated to conveying immigrant or non-immigrant status, i.e. work authorization applications); *see also* *Refugee Processing and Security Screening*, USCIS, <https://www.uscis.gov/refugeescreening> (listing CARRP as one step in the refugee screening policies put into place by the U.S. Refugee Admissions Program (USRAP)). Further, practitioners have noted seeing applications explicitly excluded by the CARRP guidance appearing to be subject to CARRP as well. *See* KATIE TRAVERSO & JENNIE PASQUERELLA, ACLU S. CAL., PRACTICE ADVISORY: USCIS’S CONTROLLED APPLICATION REVIEW AND RESOLUTION PROGRAM (2016), https://www.nationalimmigrationproject.org/PDFs/practitioners/our_lit/impact_litigation/2017_03Jan-ACLU-CARRP-advisory.pdf.
102. Vetting Policy, *supra* note 77, at 1 n.1; *see also* *Chapter 6: Adjudicative Review*, CSIS, <https://www.uscis.gov/policymanual/Print/PolicyManual-Volume7-PartA-Chapter6.html> [<https://perma.cc/8ZV8-QRUM>] (“The officer should consider the totality of the circumstances to determine whether an articulable link exists between the foreign national (or organization) and prior, current, or planned involvement in, or association with an activity, any foreign national (or organization) described in any of these sections.”); Yesenia Amaro, *Little-Known Law Stops Some Muslims From Obtaining US Citizenship*, LAS VEGAS REV.-J. (April 16, 2016), <https://www.reviewjournal.com/news/little-known-law-stops-some-muslims-from-obtaining-us-citizenship> [<https://perma.cc/KET2-8WG3>].
103. *Id.* at 1.
104. Yesenia Amaro, *Little-Known Law Stops Some Muslims From Obtaining US Citizenship*, LAS VEGAS-REV. J. (April 16, 2016), <https://www.reviewjournal.com/news/little-known-law-stops-some-muslims-from-obtaining-us-citizenship> [<https://perma.cc/KET2-8WG3>]; Daniel Burke, *He Applied for a Green Card. Then the FBI Came Calling*, CNN (Oct. 3, 2019), <https://www.cnn.com/2019/10/03/us/muslim-immigrants-carrp-program/index.html> [<https://perma.cc/2AXR-2DRG>] (“One USCIS document lists 20 countries from which immigrants were subjected to CARRP from 2009–2012. In all except one -- Sri Lanka -- Muslims form a majority of the population.”).
105. *See* *The World in Muslim Populations, Every Country Listed*, GUARDIAN: DATA BLOG (October 2009), <https://www.theguardian.com/news/datablog/2009/oct/08/muslim-population-islam-religion> [<https://perma.cc/VQU5-LM8M>] (citing data from Pew Research Center’s Forum on Religion and Public Life).

immigration law and law enforcement policy that by design or effect applies almost exclusively to Arabs, Muslims, and South Asians.”¹⁰⁶

CARRP training materials list a host of statutory and nonstatutory factors that may indicate an applicant is a national security concern. Foreign government service, knowledge of biology, computer systems, or chemistry, and a name that matches with any on a host of government databases including the TSA “No Fly” List and the FBI Namecheck Database all are listed as possible indicators.¹⁰⁷ Travel to areas of “known terrorist activity” can also lead adjudicators to flag an applicant as a concern.¹⁰⁸ USCIS guidance instructs officers to consider indicators related to the individual’s family members or close associates and determine whether those indicators relate to the applicant as well.¹⁰⁹

Such indicators themselves have long been found to be discriminatory and unreliable,¹¹⁰ inextricably tied to the overpolicing and surveillance of American Muslim communities and those who look like them. For example, TSA and FBI

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106. Muneer I. Ahmad, *A Rage Shared by Law: Post September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1262 (2004); see also Amna Akbar, *Policing “Radicalization,”* 3 U.C. IRVINE L. REV. 809 (2013) (examining “how government concern with radicalization and increased allowances for law enforcement intelligence gathering have allowed law enforcement to marshal significant resources towards monitoring American Muslim communities”); Ramzi Kassem, *Passport Revocation As Proxy Denaturalization: Examining the Yemen Cases*, 82 FORDHAM L. REV. 2099 (2014) (identifying a trend in which the U.S. government suddenly revoked Yemeni Americans’ passports under the pretense that they committed naturalization fraud).
107. U.S. CITIZENSHIP & IMMIGRATION SERVS., CARRP OFFICER TRAINING: NATIONAL SECURITY HANDOUTS 2 (2009), <https://www.aclusocal.org/wp-content/uploads/2013/01/Guance-for-Identifying-NS-Concerns-USCIS-CARRPTraining-Mar.-2009.pdf> [hereinafter CARRP OFFICER TRAINING HANDOUTS].
108. *Id.*
109. Vetting Policy, *supra* note 77; Memorandum from Alanna Ow, Acting Chief, Int’l Operations Division, U.S. Citizenship & Immigration Servs., on Guidance for the Int’l Operations Division on the Vetting, Deconfliction, and Adjudication of Cases with Nat’l Sec. Concerns, to Overseas District Directors, Field Office Directors, & Headquarters Int’l Operations Staff, U.S. Citizenship & Immigration Servs. (April 28, 2008), https://www.uscis.gov/sites/default/files/USCIS/About%20Us/Electronic%20Reading%20Room/Policies_and_Manuals/CARRP_Guidance.pdf [<https://perma.cc/L8V3-WYG>]. See also CARRP OFFICER TRAINING HANDOUTS, *supra* note 107, at 5 (explaining that “[a] close associate includes but is not limited to a roommate, coworker, employee, owner, partner, affiliate, or friend”).
110. See, e.g., Diala Shamas, *A Nation of Informants: Reining in Post-9/11 Coercion of Intelligence Informants*, 83 BROOK. L. REV. 1175 (2018) (documenting the limited safeguards that deter law enforcement misconduct during the informant recruitment process); Margaret Hi, *Algorithmic Jim Crow*, 86 FORDHAM L. REV. 633 (2017) (describing current immigration- and security-related vetting protocols as an “algorithmic” Jim Crow, enabling discrimination in the form of designing, interpreting, and acting upon vetting and screening systems in ways that result in a disparate impact); Shirin Sinnar, *Rule of Law Tropes in National Security*, 129 HARV. L. REV. 1566 (2016) (analyzing the mechanisms, or lack thereof, that led to the use and misuse of “reasonable suspicion” in terrorist watchlisting).

databases are overbroad and include many who share names with persons of interest or provided voluntary interviews to the FBI but were never subject to a national security investigation.¹¹¹

Once USCIS finds an “articulable link,” a term for which USCIS provides no definition or explanation, to vague and overbroad security- or terrorism-related indicators, it puts the application under a magnifying glass. The internal eligibility assessment’s stated purpose is “to ensure that valuable time and resources are not unnecessarily expended externally vetting a case when the individual is otherwise ineligible for the benefit sought.”¹¹² Training manuals instruct the USCIS officer, potentially the same one who flagged the applicant as a national security concern in the first place, to conduct a “thorough review of the record” and deny the application “on any legally sufficient ground.”¹¹³

During the vetting process, adjudicators pay close attention to “inconsistencies,” focusing on aliases and various name spellings, institutions and degrees, school records, roommates, group membership, and travel companions.¹¹⁴ Training manuals instruct field officers to create a detailed timeline for each applicant to “understand temporal relationships” and “create a list of questionable items.”¹¹⁵ To prepare for their interviews with applicants, training materials instruct field officers to “[p]ick a date and time when you can dedicate yourself to the case” and “[b]e ready to explore answers and prepare for resistance.”¹¹⁶

111. Akbar, *supra* note 106, at 879–80 (describing a young Pakistani man who was placed on the No-Fly List after refusing to act as an FBI informant in his community); Sahar F. Aziz, *Caught in a Preventative Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429 (2011–2012) (identifying FBI practices targeting Muslims, including “voluntary” interviews and coercion to act as informants against their communities); *see also* Sameer Ahmed *Targeting Highly-Skilled Immigrant Workers in Post-9/11 America*, 79 UMKC L. REV. 935, 936 (2011) (critiquing the government’s “unprecedented interpretation of immigration regulations” in the post-9/11 world to target Muslims in the United States).

112. Vetting Policy *supra* note 77, at 5. Internal vetting refers to the vetting done internally by the USCIS adjudicator where they are tasked with reviewing the application for any inconsistencies, mistakes or omissions. Where any such issues are found, the adjudicator is directed to use this as justification for denying the application. Where no mistakes are found internally to justify a denial of the application, the application is then referred for external vetting by law enforcement and intelligence agencies to investigate the relevance of the national security concern.

113. PASQUARELLA, *supra* note 77, at 31.

114. *Id.* at 32–33.

115. *Id.* at 55, 59.

116. U.S. CITIZENSHIP & IMMIGRATION SERVS., NAT’L SECURITY DIVISION, CONTROLLED APPLICATION REVIEW AND RESOLUTION PROGRAM (CARRP) VERSION 2.3.1 54–59 (2012) <https://aclusocal.org/sites/default/files/wp-content/uploads/2013/01/CARRP-Course-Powperpoint-Natl-Sec.-Division-FDNS-v.2.3.1-Jan.-2012.pdf> [<https://perma.cc/3VUL-U7T5>] [hereinafter CONTROLLED APPLICATION REVIEW].

In contrast, general USCIS adjudication guidelines provide simple, straightforward instructions for reviewing naturalization applications. For example, the Adjudicator's Field Manual reminds adjudicators to check that the form is completed and signed, supporting documents are unaltered, and the applicant is statutorily eligible for the benefit sought.¹¹⁷ Further, in non-CARRP adjudications, if USCIS plans to deny an application or petition, it routinely issues a Notice of Intent to Deny explaining the nature of the adverse findings and providing the applicant an opportunity to respond or inspect the proceeding record.¹¹⁸ The CARRP training materials do not mention such notice or opportunity to rebut adverse findings or inspect the record of proceedings. The differing instructions set a heightened, often unattainable, naturalization bar for those the U.S. government has labeled suspect or of an undesirable race, religion, nationality, or other suspect group.

The message is clear: The government tasks adjudicators with rejecting an application however they can to prevent a lengthy and extensive external vetting process that would reveal whether the security concern classification was relevant or legitimate in the first place.¹¹⁹ As USCIS touts, a denial of an application on any legally sufficient ground would “preclude[e] lengthy vetting,” increasing efficiency.¹²⁰ In sum, USCIS denies immigration benefits to individuals loosely linked to a set of overbroad security markers solely to save USCIS time.¹²¹ The government prefers to summarily deny naturalization applications of entire groups instead of determining whether a specific applicant is actually a so-called national security concern. Relying on already overbroad and faulty indicators that disproportionately target and impact immigrants from Muslim-majority nations, the lengthy and extensive vetting process is problematic in and of itself.¹²² In

117. See U.S. CITIZENSHIP & IMMIGRATION SERVS., *Chapter 10: An Overview of the Adjudication Process*, in ADJUDICATOR'S FIELD MANUAL—REDACTED PUBLIC VERSION, <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-1067/0-0-0-1166.html> [<https://perma.cc/23YM-GANP>].

118. *Id.*

119. Vetting Policy, *supra* note 77, at 5.

120. U.S. CITIZENSHIP & IMMIGRATION SERVS., NAT'L SECURITY BRANCH, CARRP FOR ROTC VIII, AUG–OCT 2011 11 (2011), <https://aclusocal.org/sites/default/files/wp-content/uploads/2014/07/USCIS-National-Security-Branch-CARRP-Training-Materials-Sep.-2011.pdf> [<https://perma.cc/42MN-FZ3S>].

121. CONTROLLED APPLICATION REVIEW, *supra* note 116, at 54–59 (describing the purpose of CARRP's eligibility assessment “to ensure that valuable time and resources are not unnecessarily expended externally vetting a case...when the individual is otherwise ineligible for the benefit sought”).

122. Recall that the 1990 reforms were made in part to address the delay and inaccessibility inherent in naturalization adjudication when courts were in the sole position to award naturalization. See *supra* Part I. The CARRP program works to undo this reform and create delays and inaccessibility, narrowly targeting and impacting American Muslims applying for naturalization.

furthering this problematic policy, CARRP joins a host of other historical and present-day policies aimed at excluding and removing American Muslims from the United States.¹²³ While historically false testimony-based denials may have resulted from individual adjudicator bias against suspect populations, CARRP institutionalizes discriminatory denials by creating an explicit framework through which the government uses false testimony to pretextually deny citizenship to aspiring American Muslims and those perceived to be Muslim.¹²⁴

B. False Testimony: The Numbers

One way to understand how and why bias shapes naturalization adjudication is to search for patterns in denials. Since, at the first instance, naturalization denial takes place at the administrative level, detailed data on why adjudicators deny naturalization applications is not readily available.¹²⁵ Administrative denials are

Nancy Morawetz described the limited utility of §1447(b)—which allows for judicial intervention when the agency fails to issue a decision within 120 days of the initial examination—pointing out how the government can shift the delay to the period before the examination without redress. She described that “[t]his kind of manipulation obviously undermines Congress’s concern with assuring timely adjudications.” Nancy Morawetz, *Citizenship and the Courts*, 2007 U. CHI. LEGAL F. 447 (2007).

123. See, e.g., Sahar F. Aziz, *A Muslim Registry: The Precursor to Internment?*, 2017 BYU L. REV. 779 (2017) (critiquing recent discriminatory anti-Muslim policy proposals such as a Muslim registry and Trump’s “Muslim bans”); Aziz, *supra* note 111 (discussing mosque infiltration, aggressive prosecutions of Muslim charities, “material support” of terrorism laws, prolonged and arbitrary detention, and more to exclude Muslim communities from public life in the post-9/11 United States); Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 612–14 (2005) (identifying pre-9/11 government programs targeting citizen and noncitizen Arabs and Muslims, including President Nixon’s “Operation Boulder,” which focused FBI surveillance on Arabs, and President Reagan’s “Alien Terrorists and Other Undesirables: A Contingency Plan,” which led to mass arrests of noncitizen Arabs based on “ideological exclusion grounds under the [Immigration and Nationality Act]”); Ramzi Kassem, *Passport Revocation as Proxy Denaturalization: Examining the Yemen Cases*, 82 FORDHAM L. REV. 2099 (2014).
124. Margaret Chon & Donna E. Arzt, *Walking While Muslim*, 68 L. & CONTEMP. PROBS. 215, 222–23 (2005) (discussing how religion has been racialized in the war on terror resulting in widespread targeting of Latinx, African Americans, Asian Americans, and Native Americans); Muneer I. Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1263 (2004) (arguing that post-9/11 racialized violence against Muslims, Arabs, and those perceived to be either or both is not an “isolated phenomenon” but a “major shift in American racial conceptualization”).
125. In 1992, Professor Louis DeSipio highlighted the inconsistency and lack of uniformity in the administration of naturalization, asking a question which reverberates today: “What administrative reviews should be instituted to allow oversight of individual abuse that apparently continues to occur . . . ?” His analysis demonstrated the grave geographic and racial disparities in naturalization adjudication, highlighting differential rejection rates for immigrants from different

issued in the form of letters from USCIS, and not publicly available in the manner that some court opinions are. If USCIS denies naturalization, an applicant can appeal their case through the administrative appeal process, but the results of this process are also not published in a publicly available forum. After this, the case is eligible for federal court review, where resultant opinions are openly published and, in some cases, provide a rare opportunity to understand the underlying agency decision making.

As of October 2019, over 500 federal court cases relate to naturalization and false testimony. Of these, many relate to naturalization revocation.¹²⁶ A small percentage relate to other forms of immigration relief, leaving 158 cases that squarely consider naturalization denials.

The research presented in this Article takes a closer look at the 158 cases in which adjudicators used false testimony allegations as at least one basis to deny naturalization. These numbers only tell a small part of the story, as most applicants are unlikely to appeal naturalization denials to the federal courts. Appeals are expensive, time consuming, and, since most may reapply for naturalization five years after the event that rendered them ineligible (in this case, the provision of false testimony), many choose to wait it out and apply again.¹²⁷ Still others may abandon hopes of naturalization altogether. Further, many who pursue judicial review settle out of court when USCIS offers naturalization in response to

regions of the world. See Louis DeSipio, *Making Americans: Administrative Discretion and Americanization*, 12 CHICANO-LATINO L. REV. 52 (1992).

In 2007, Professor Nancy Morawetz also addressed the concerns identified by Professor DeSipio, underscoring that an adjudicatory system for naturalization should provide for methods of oversight for adjudicators who make erroneous decisions or apply improper standards. See Nancy Morawetz, *Citizenship and the Courts*, 2007 U. CHI. LEGAL F. 447 (2007). Before the revelations about the CARRP program, she highlighted that “a line adjudicator’s assessment of “good moral character” could easily be influenced by discriminatory attitudes” and advocated for the agency to develop “written records of its findings and the facts on which those findings are based.” *Id.*

126. Citizenship revocation is the withdrawal of a person’s citizenship after it was granted based on a violation of a limited number of statutory provisions. Revocation may occur, for example, when it is discovered that a person obtained citizenship unlawfully, committed fraud or willful misrepresentation to procure it, or when someone becomes a member of the Communist party, totalitarian party or terrorist organization within five years of becoming naturalized. A person who obtained citizenship through service in the U.S. armed forces could face revocation if they are discharged before a certain number of years of service, and under dishonorable conditions. 8 U.S.C. § 1451 (2012).
127. An ACLU report identifies prolonged delays in adjudicating naturalization applications, including an eleven-year process for Tarek Hamdi who ultimately received his citizenship in federal court after three previous denials. PASQUARELLA, *supra* note 77, at 7. The report identifies various consequences of prolonged delays, including the stress and cost of filing mandamus lawsuits, inability to vote and “participate in the U.S. democratic process,” and lost professional and academic opportunities. *Id.* at 42. See also MOTOMURA, *supra* note 64.

litigation.¹²⁸ But even with this dataset's limitations, the opinions tell a compelling story that tracks biases and complements the limited data available on the top countries impacted by the CARRP program.¹²⁹

From our nation's founding until September 11, 2001 there are only twenty-eight naturalization appeals cases that appear in the data set involving false testimony.¹³⁰ To account for differences in statutory schemes and the fact that older cases might be less available, one may consider cases after the current statutory scheme was enacted in 1990. With that measure, there are only nine cases between 1990 and September 11, 2001. In the almost nine years between September 11, 2001 and April 2008, when USCIS introduced the CARRP program, the number rose exponentially to thirty-seven. Courts have considered another ninety-three such cases in the decade since CARRP's implementation. These numbers point toward the marked increase in the use of false testimony to deny citizenship in the years after 9/11.

To look at who was impacted by these denials, 45.9 percent of cases involving false testimony from 9/11 until CARRP's implementation involved a naturalization applicant from a Muslim-majority nation.¹³¹ After CARRP's

128. See, e.g., *Adam v. U.S. Dep't of Homeland Sec.*, No. 1:16-cv-06725-WFK (E.D.N.Y. Mar. 1, 2017).

129. *Amaro*, *supra* note 104.

130. See *supra* notes 4 & 5 to understand the body of data these findings describe. This description refers to cases that were found via targeted searches and are limited by what is available on those legal search platforms. For the earlier part of our nation's history, petitions could be filed in any common law court and thus may not have been consolidated on to available legal research platforms.

131. See *Islam v. Harrington*, 3:00-CV-1683-P, 2001 WL 1335851 (M.D. AL Oct. 23, 2001); *Poka v. Immigration & Naturalization Servs.*, No. Civ. A. 3:01CV1378, 2002 WL 31121382 (D. Conn. Sept. 19, 2002) (court accepted that applicant had misunderstood the word "arrested" when he denied two previous arrests due to his limited English proficiency, case denied on other grounds); *St. Amanze v. Immigration & Naturalization Servs.*, No. Civ. A. 02-502T, 2003 WL 22061870 (D.R.I. Mar. 28, 2003) (discussion about whether Nigerian petitioner may have understood questions about past immigration violations); *Zaher Abu Saad v. Barrows*, No. Civ. A. 3:03-CV-1342G, 2004 WL 1359165 (N.D. Tex. June 16, 2004) (finding misstatements about marital status to be "innocent mistakes," court looks towards lack of criminal history, employment records, remanded to exhaust administrative remedies); *Omari v. Gonzales*, 3:05-CV-0397-P, 2005 WL 2036498 (N.D. Tex. Aug. 11, 2005) (natz denial upheld); *United States v. Hovsepian*, 422 F.3d 883, 888 (9th Cir. 2005) (looks to vagueness of question where applicant describes organizational affiliation as a youth group instead of a political party, court finds "no intent to deceive," and applicants have GMC); *Edem-Effiong v. Acosta*, No. Civ. A. H-04-2025, 2006 WL 626406 (S.D. Tex. Mar. 13, 2006) (assessing whether question about applicant's children was vague where applicant failed to mention out-of-wedlock child); *Farah v. Gonzales*, CIV. 05-1944 DWFAJB, 2006 WL 1116526 (D. Minn. Apr. 26, 2006); *Naserallah v. U.S. Citizenship & Immigration Servs.*, No. 1:05 CV 1022, 2006 WL 991073 (N.D. Ohio Apr. 13, 2006) (where applicant concealed a crime, court looked to see if applicant was aware that the crime would not have precluded naturalization); *Shalan v. Chertoff*, No. 05-10980-RWZ, 2006 WL 1308175, at *2 (D. Mass. May 9, 2006) (naturalization granted even after USCIS denies application based on plethora of alleged omissions related to prior charges, a temporary restraining order, a "red flag" about employment,

implementation this number held steady at 46.2 percent. Though they made up nearly half of the petitioners in appealed cases initially denied on account of false testimony, between 2005 to present, an average of only 11.525 percent of all naturalization applicants were from Muslim-majority nations.¹³² This dataset, and the qualitative analysis of the cases it includes, shows that the government used false testimony allegations disproportionately against aspiring American Muslims since, and perhaps even before, September 11, 2001. Long before the government systemized the use of false testimony allegations to deny naturalization applications under CARRP, biased adjudication disproportionately impacted those from Muslim-majority nations.

and his use of family name versus formal name); *Damra v. Chertoff*, 1:05CV0929, 2006 WL 1786246 (N.D. Ohio June 23, 2006); *Ibrahim v. Gonzales*, 434 F.3d 1074 (8th Cir. 2006); *Hussain v. Chertoff*, 486 F. Supp. 2d 196 (D. Mass. 2007) (USCIS denies naturalization after prolonged adjudicative delay due to a single prior 16-year-old charge for writing a bad check; no discussion of intent); *Butt v. U.S. Citizenship & Immigration Servs.*, No. 06-805(JLL), 2007 WL 446922 (D.N.J. Feb. 7, 2007) (district court upholds USCIS denial due to omission of dismissed charges even though applicant claimed he misunderstood the legal system and was not aware that he had been criminally charged); *Azziz v. Chertoff*, 527 F. Supp. 2d 188 (D. Mass. 2007) (naturalization denial upheld where applicant omitted out-of-wedlock child, USCIS felt this was relevant to lawful marriage); *Aarda v. U.S. Citizenship & Immigration Servs.*, 06-1561 RHK/AJB, 2008 WL 53280 (D. Minn. Jan 3, 2008) (court found that district court review was premature because administrative review had not been exhausted).

132. These averages were formulated employing data from a Center for Immigration Studies article and the author's additional calculations relying on DHS records. See Dan Cadman, *Is There Bias Against Muslims Who Apply for Naturalization?* CTR. FOR IMMIGR. STUD. (June 22, 2016), <https://cis.org/There-Bias-Against-Muslims-Who-Apply-Naturalization#3> [<https://perma.cc/WBK4-E9BR>]; U.S. Department of Homeland Security, *Yearbook of Immigration Statistics*, Fiscal Year 2017, Table 21.

TABLE 1: Judicial Review of Naturalization Denials by Era

Time Period	Number of Naturalization Denials Involving False Testimony Allegations Appealed to Federal Court	Number of Applicants From Muslim-Majority Nations**	% of Cases Where Applicant From Muslim-Majority Nation**
Founding–Passage of Immigration Act of 1990	19	1	.05%
Immigration Act of 1990 –9/11 (~11 year)	9	4	44.4%
9/11–CARRP’s Implementation* (~ 8.5 years)	37	17	45.9%
CARRP’s Implementation*– Present (~11.5 years)	93	43	46.2%
Total	158	65	41.1%

*According to internal USCIS documents, it enacted CARRP in April 2008 and, to the author’s knowledge, the program remains in effect. CARRP remains listed as one of the mechanisms through which USCIS completes “National Security Processing” on its webpage describing Refugee Screening, *available at* <https://www.uscis.gov/refugeescreening> [<https://perma.cc/3ZKV-NHUY>].

** Includes those from Muslim-majority nations, and seven applicants who are placed within this group because they have names which distinctly indicate a Muslim heritage. *See* U.S. v. Abdulghani, 671 F. Supp. 754 (N.D. Georgia 1987); Gholamreza Nagahi v. I.N.S., 219 F.3d 1166 (10th Cir. 2000); Naserallah v. .S. Citizenship & Immigration Servs., 1:05 CV 1022, 2006 WL 991073 (N.D. Ohio, April 13, 2006); Shalan v. Chertoff, No. 05-10980-RWZ, 2006 WL 1308175, at *2 (D. Mass. May 9, 2006); Ayman Girgis v. Chertoff, 06-B-538-NE, 2006 WL 8436580 (N.D. Al. Dec. 7, 2006); Mukarram v. Collett, 649 F.Supp.2d 418 (D. Md., May 5, 2009); Iqbal v. Sec. of U.S. Dep’t of Homeland Sec., 190 F. Supp. 3d 322, 326 (2016).

According to the Pew Research Center's 2017 Survey of U.S. Muslims, 69 percent of foreign-born U.S. Muslim adults are naturalized U.S. citizens.¹³³ The Center for Immigration Studies compiled United States Department of Homeland Security data showing the percentage of naturalizations by applicants from Muslim-majority countries has risen from 11.27 percent of the total pool of naturalized Americans in 2005 to 13.16 percent in 2014.¹³⁴ According to the Center for Immigration Studies, this data disproves allegations of bias against aspiring American Muslims in the immigration system.¹³⁵

Though more individuals from Muslim-majority nations may have naturalized in 2014 than 2005, this data disguises the difficult terrain aspiring American Muslims, and those who may look or sound like them, face when naturalizing. To start, these total percentages are volatile; in 2007 and 2008, those from Muslim-majority nations made up only 9.79 percent and 7.69 percent of the pool of naturalizations, respectively. These numbers increased to 14.3 percent, 13.4 percent, and 12.3 percent of total naturalizations in 2015, 2016 and 2017, respectively.¹³⁶ Changes in global migration patterns all contribute to this volatility, which is why bias and discrimination are hard to uncover when looking only at data that measures a final grant. For example, this data does not account for extensive delays or for approvals won after filing administrative and judicial appeals. Though, applicants from Muslim-majority nations have made up a larger percentage of the pool in some years, USIS may still be using false testimony allegations pretextually and disproportionately to deny some petitions.

In the federal case law reviewing naturalization denials, two clearly different adjudication standards come into clear focus. The vast majority of applicants who appeal their naturalization denials allegedly misstated or omitted past arrests, convictions, or a fact that implicated the underlying immigration status that opened the path to naturalization. In these cases, the penalized misstatement or

133. *U.S. Muslims Concerned About Their Place in Society, But Continue to Believe in the American Dream*, PEW RES. CTR.: RELIGION & PUB. LIFE (July 26, 2017), <http://www.pewforum.org/2017/07/26/findings-from-pew-research-centers-2017-survey-of-us-muslims> [<https://perma.cc/4KDR-6PTX>].

134. Note that the Center for Immigration Studies (CIS) has been designated as a "hate group" by the Southern Poverty Law Center. Their arguments and methodology are offered here only to refute commonplace arguments denying the discriminatory practices highlighted in this article. *Center for Immigration Studies*, S. POVERTY LAW CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/center-immigration-studies> [<https://perma.cc/37RY-FSKD>].

135. Cadman, *supra* note 132. Note that this estimate strictly accounts for only those applicants who come from Muslim-majority nations, presumably undercounting those Muslims who immigrate from those nations that do not have a Muslim-majority.

136. Calculations made by author using the U.S. Department of Homeland Security, *Yearbook of Immigration Statistics*, Fiscal Year 2017, Table 21, employing identical methodology as the Center for Immigration study discussed at *supra* note 132.

omission usually had a direct relation to specific statutory requirements (or bars) to naturalization. Note that a focus on non-violent minor crimes, dismissed cases and traffic violations, permeates the data set generally, including in cases from non-Muslim majority nations. This focus on omissions about minor criminal activity likely has an outsized effect on communities of color who are subject to greater policing, compounding the discriminatory impacts of false testimony-based denials.¹³⁷

In a curious set of cases, though, adjudicators deny naturalization applications based on misstatements or omissions relating to aliases, organizational associations, extramarital affairs, travel and employment history, taxes, land ownership, and almost anything else in the N-400.¹³⁸ Sometimes these

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137. A study of how false testimony allegations impact communities of color more broadly is outside the scope of this article. According to U.S. Senate data from 1987 on administrative adjudication of naturalization, analyzed by Professor Louis Desipio, naturalization applicants from Africa and Spanish-speaking areas of Latin America and the Caribbean are more likely than applicants from other regions to be given a recommended denial by the then-INS. See Desipio, *supra* note 125. The study of racial animus in the development of crime-based deportation and immigration removals and admissions generally has been well-studied by immigration scholars. See, e.g., Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 UC DAVIS L. REV. 171 (2018); Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993 (2016).
138. See, e.g., *El-Ali v. Carroll*, 83 F.3d 414 (4th Cir. 1996) (USCIS denied naturalization in part because El-Ali failed to report income from a single employment site); *Hovsepian*, 422 F.3d at 888 (looks to vagueness of question where applicant describes organizational affiliation as a youth group instead of a political party, court finds “no intent to deceive,” and applicants have GMC); *Shalan*, 2006 WL 1308175, at *2 (naturalization granted even after USCIS denies application based on plethora of alleged omissions related to prior charges, a temporary restraining order, a “red flag” about employment, and his use of family name versus formal name); *Hussain*, 486 F. Supp. 2d 196 (USCIS denies naturalization after prolonged adjudicative delay due to a single prior sixteen-year-old charge for writing a bad check; no discussion of intent); *Ghaffarpour v. Gonzalez*, No. 06 C 3842, 2008 WL 4686161 (N.D. Ill. May 29, 2008) (USCIS denied naturalization alleging applicant provided false testimony about land ownership in Iran, and natz was granted by district court after finding applicant’s testimony credible); *Keaik v. Dedvukay*, 557 F. Supp. 2d 820 (E.D. Mich. 2008) (USCIS denied because applicant failed to reveal speeding offenses); *Hayek v. Chertoff*, No. 07 CV 1957, 2008 WL 11380197 (N.D. Ohio, Aug. 4, 2008) (Lebanese physician denied naturalization where misstatements about travel, addresses and organizational association led to denial under false testimony and physical presence requirements); *Gedi v. Gonzalez*, No. 1:07-CV-2507-RWS, 2009 WL 2515627 (D. N.D. Ga. 2009) (omits single trip to Somalia); *Sekibo v. Chertoff*, No. H-08-2219, 2010 WL 2196271 (naturalization denied where applicant lied about filing tax returns which were filed weeks after the naturalization interview); *Atalla v. U.S. Citizenship & Immigration Servs.*, 541 Fed. Appx. 760 (9th Cir. Oct. 2, 2013) (USCIS denies on good moral character grounds because applicant failed to disclose CBP interview and charitable giving. Further, because of claims that this false testimony in and of itself was a CIMT, the Court of Appeals upheld a grant of naturalization by district court and found that applicant answered questions carefully and the government’s approach was imprecise and muddled); *Hamdi v. U.S. Citizenship & Immigration Servs.*, No. EDCV 10-894 VAP, 2012 WL 632397 (C.D. Cal. Feb. 25, 2012) (court finds that alleged misrepresentations about organizational affiliations,

accusations are lumped on top of other more serious bases for denials; other times, these immaterial misstatements are the sole reason for denial.¹³⁹ Often the misstatements have no bearing on the core components of citizenship eligibility and USCIS's sole reason for denying naturalization is that the false testimony evinced a lack of good moral character.

The vast majority of recent applicants denied citizenship in this manner are either from Muslim-majority nations or have names that indicate they may have Muslim origins, a pattern which begins appearing in 1970 and endures until the present day.¹⁴⁰ Historically, those judged to have communist associations or those from formerly communist nations were also disproportionately impacted by allegations involving false testimony related to organizational associations.¹⁴¹ In

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- residences, and minor dates were not made with the requisite intent to rise to false testimony); *Hajro v. Barrett*, No. C 10-01772 MEJ, 2011 WL 2118602 (N.D. Cal. May 27, 2011) (court finds it a triable issue of fact whether petitioner failed to disclose organizational and military associations in order to gain immigration benefit, dismissing government's motion for summary judgment); *Abusamhadaneh v. Taylor*, 873 F. Supp. 2d 682 (E.D. Va. 2012) (organizational memberships); *Bankole v. Holder*, No. 6:14-cv-01104-EFM-JPO, 2014 WL 3734209 (D. Kan. July 29, 2014) (USCIS denies naturalization where applicant failed to reveal traffic citations, in denying government's motion to dismiss court states that question of subjective intent cannot be resolved at pleading stage); *Khalil v. Holder*, No. 1:13-MC-486, 2015 WL 3629634 (S.D. Texas June 10, 2015) (Court finds omissions regarding residency history amount to false testimony); *Iqbal v. Sec. of U.S. Dep't of Homeland Sec.*, 190 F. Supp. 3d 322, 326 (2016) (USCIS denies application on the basis that applicant allegedly failed to disclose past due taxes but then recants, stating denial based on employment issues and "involvement with others' immigration papers").
139. *Compare Omar v. Chertoff*, No. 106CV02750, 2008 WL 4380200 (N.D. Ohio Aug. 21, 2008) (after naturalization was first denied due to allegations that plaintiff was not living in marital union for require statutory period, USCIS additionally alleged that applicant had given false testimony), *Hayek*, 2008 WL 11380197 (Lebanese physician denied naturalization where misstatements about travel, addresses and organizational association led to denial under false testimony and physical presence requirements), and *Khalil*, 2015 WL 3629634 (finding omissions regarding residency history amount to false testimony), with *Hamdi*, 2012 WL 632397 (finding alleged misrepresentations about organizational affiliations, residences, and minor dates were not made with the requisite intent to rise to false testimony).
140. Applicants included in this study whose country of origin is not apparent from the public filings but whose names indicate a Muslim heritage/identity include: Includes those from Muslim-majority nations, and seven applicants who are placed *U.S. v. Abdulghani*, 671 F. Supp. 754 (N.D. Georgia 1987); *Gholamreza Nagahi v. I.N.S.*, 219 F.3d 1166 (10th Cir. 2000); *Naserallah v. S. Citizenship & Immigration Servs.*, 1:05 CV 1022, 2006 WL 991073 (N.D. Ohio, April 13, 2006); *Shalan v. Chertoff*, No. 05-10980-RWZ, 2006 WL 1308175, at *2 (D. Mass. May 9, 2006); *Ayman Girgis v. Chertoff*, 06-B-538-NE, 2006 WL 8436580 (N.D. Al. Dec. 7, 2006); *Mukarram v. Collett*, 649 F.Supp.2d 418 (D. Md., May 5, 2009); *Iqbal v. Sec. of U.S. Dep't of Homeland Sec.*, 190 F. Supp. 3d 322, 326 (2016).
141. *See, e.g., Klig v. United States*, 296 F.2d 343, 346 (2d Cir. 1961) (accused of testifying falsely about attendance at communist party meetings twenty years prior to naturalization application); *Berenyi v. Dist. Dir., Immigration & Naturalization Serv.*, 385 U.S. 630, 668 (1967) (naturalization denied where accused of providing false testimony about communist party attendance); *In re Kwong Hai Chew*, 278 F.Supp. 44 (S.D.N.Y. 1967) (where applicant denied prior Community

fact, allegations of false testimony based on lies or misstatements about organizational associations only appear in cases in which the applicant was from a Muslim-majority country, had a name which indicated a Muslim heritage, or where USCIS was concerned about ties to Communism. The apparent use of these denials only in situations involving those deemed suspect by the U.S. government indicates that the government is using the false testimony provision as a catchall mechanism to deny naturalization to those it wants to exclude from U.S. citizenship.

III. THE JUDICIAL RESPONSE

Federal courts give immense deference to the U.S. government when reviewing immigration-related matters; the naturalization context is no different. It is well established that any doubts regarding naturalization eligibility “should be resolved in favor of the United States and against the claimant.”¹⁴² The most common cause of action in the studied naturalization denials suits is under 8 USC § 1421(c), which grants *de novo* review where USCIS has denied an application. A portion of the cases in the data set also reviewed delays in administrative action in response to a mandamus action or review under 8 USC § 1447(b) which allows applicants to pursue district court intervention where USCIS has failed to take action within the 120-day period after the naturalization examination. In the included cases litigating delays, the matter was administratively adjudicated and challenged while the federal court case was pending.

In the context of false testimony–based denials, at least, the sparse number of cases—158 cases since the first case appears in 1942 until the present—show the limited breath of judicial review that this policy has received. In comparison, in fiscal year 2013 alone, 779,929 naturalization petitions were granted while 83,112 petitions were denied.¹⁴³ Litigation related to naturalization delay and denials are on the rise, though. In the last five years there has been a 66 percent increase in naturalization related litigation.¹⁴⁴ Though, this may partially account for why there is an increased number of cases involving false testimony appearing in the data set in the last decade, it does not explain why Muslim applicants appeared 46

Party membership and U.S. government produces three witnesses to refute this denial, district court grants naturalization and sets aside problematic evidence).

142. *United States v. Macintosh*, 283 U.S. 605, 626 (1931). *See also Berenyi*, 385 U.S. at 637.

143. *Recent Trends in Naturalization Application Lawsuits*, TRAC IMMIGRATION (June 30, 2014), <https://trac.syr.edu/immigration/reports/357> [<https://perma.cc/2WU3-LJGP>].

144. *See Increased Litigation for Denials and Delays on Naturalization Applications*, TRAC IMMIGRATION (January 22, 2019), <https://trac.syr.edu/tracreports/civil/544> [<https://perma.cc/4EA4-DRCF>].

percent of the time when they made up less than 12 percent of the total pool of naturalization applications.

In the studied set, courts upheld USCIS's naturalization denial (or in the pre-1990 scheme, denied naturalization at the first instance) 63 percent of the time (99 of the 158 cases).¹⁴⁵ Courts overturned USCIS's denial (and/or granted citizenship in the pre-1990 scheme) only 20 percent of the time (32 of the 158 cases). The remaining cases are pending, have sealed, out-of-court agreements or settlements, were remanded back to the administrative adjudicator or scheduled for fact finding hearings with unknown results.¹⁴⁶ Finally, in a few instances federal courts dismiss cases as moot due to lack of jurisdiction, where CIS adjudicates applications while pending, or administrative remedies had not been exhausted.

The following Subparts analyze the judicial response to naturalization denials with a special focus on the reaction, or lack thereof, to the government's discriminatory application of eligibility criteria. Some of these cases reveal legal mechanisms and tests that scale back bias, implicit or intentional, at the administrative level. In overturning USCIS denials, courts usually focused on the false testimony provision's intent requirement. When USCIS clearly expended investigatory resources to pretextually deny the application, courts sometimes questioned why some applications were thrown "out in the cold"¹⁴⁷ and whether naturalization laws really "require perfection in our new citizens."¹⁴⁸ Even in these cases, though, courts only allude to the fact that certain subsets of applicants are subject to discriminatory enforcement of naturalization laws in isolated dicta, giving USCIS free reign to continue these practices and expand them against the vilified suspect immigrant group *du jour*.

A. Applicants "Thrown Out in the Cold": The Courts' Failure to Address Discriminatory Naturalization Adjudications

A select few reviewing courts have explicitly identified discriminatory adjudication practices, and even amongst these cases they have inconsistently overturned the underlying naturalization denial. Other courts have been

145. Both the grant and denial data include the disposition of the 19 cases that fall within the data pool preceding the 1990 statutory scheme. In these cases, district courts were either granting naturalization at the first instance, or appeals courts were affirming or denying grants made by district courts.

146. Given the difficulty in determining final dispositions for many matters, data about the judicial response is offered not for its statistical significance but only as an observation.

147. Lajevardi v. U.S. Dep't Homeland Sec., No. SACV 14-1249-AG (ANx), 2015 WL 10990359, at *5 (C.D. Cal. Oct. 16, 2015).

148. Klig v. United States, 296 F.2d 343, 346 (2d Cir. 1961).

completely silent in the face of discriminatory denials of naturalization. Take the recent case CARRP-era, *Lajevardi v. Department of Homeland Security*.¹⁴⁹ When Amir Lajevardi applied to become a citizen, he offered an array of evidence to prove the continuous physical presence required to naturalize. Mr. Lajevardi offered compelling and thorough evidence through his business records, passport, taxes, and corroborating declarations.¹⁵⁰ The government discounted each piece of evidence, alleging that the affidavits were “self-serving” and “he might have managed those businesses outside of the United States.”¹⁵¹ The government argued the passport-related evidence, too, was insufficient because “it does not show exit dates from the United States.”¹⁵²

In Amir Lajevardi’s case, the government essentially required back-to-back time sheets to show continuous presence and relied on *Berenyi v. District Director*,¹⁵³ noting that “doubts ‘should be resolved in favor of the United States and against the claimant.’”¹⁵⁴ When the court questioned how the applicant could account for weekends, the government responded that the applicant had the burden of accounting for time between work weeks. The court was unconvinced that such a “detailed showing that essentially presumes international travel on weekends” was required and found no genuine issue of material fact concerning Mr. Lajevardi’s continuous presence.¹⁵⁵ The government further contended that Mr. Lajevardi did not establish good moral character because he had provided false testimony about how many days he spent in Mexico on vacation.

Granting Mr. Lajevardi’s motion for summary judgment, the court commented: “During the hearing on the motions, the Court asked counsel for both sides whether there was a lingering equal protection issue concerning the United States being generous on immigration issues with one group of people, while throwing this application out in the cold. This result also resolved any looming equal protection issues.”¹⁵⁶ In questioning why Lajevardi’s application was “thrown out in the cold” the court observed that the government scrutinized certain applications for any reason to deny them while it granted others without any such scrutiny.

Though adjudicated in the CARRP-era, there is no confirmation that Mr. Lajevardi’s application was subject to CARRP. Still, USCIS’s treatment of his

149. 2015 WL 10990359.

150. *Lajevardi*, 2015 WL 10990359, at *2–3.

151. *Id.* at *3.

152. *Id.*

153. *Berenyi v. Dist. Dir., Immigration & Naturalization Serv.*, 385 U.S. 630, 668 (1967).

154. *Lajevardi*, 2015 WL 10990359, at *3.

155. *Id.* at *3–4.

156. *Id.* at *5.

application reflects the CARRP policy where USCIS explicitly directs adjudicators to require an impossibly high standard of detail and accuracy about topics like travel history, organizational membership, charitable giving, and taxes. Cases during the period when the United States was preoccupied with Communism, like *Berenyi* and *Klig v. United States*,¹⁵⁷ reflect similar a similar level of review.¹⁵⁸ The government seems to reserve intense questioning and high level of detail for applicants from backgrounds deemed suspicious at the time. When an applicant was so situated, USCIS used allegations about false testimony to deny an application if there was no other reason to do so.

In a handful of cases, the court noticed and rejected the awkward and often last-minute attempt to deny an application based on good moral character.¹⁵⁹ In *Lajevardi*, the court stated, “[p]laintiff mentions that, for ‘the first time out of this long process, Defendants now claim that Plaintiffs lacks [good moral character] because he stated in the interview at the airport that he was out in 2012 for one (1) week on a trip to Mexico and then stated he was out for twenty (20) days during the same trip on his N-400 application.’ . . . Indeed, it does not appear that this good moral character issue was raised earlier. The Court is not convinced that it can consider issues not raised during the earlier proceedings, even applying de novo review. But even if the Court did consider the good moral character issue, it would grant summary judgment in Plaintiff’s favor.”¹⁶⁰

In a few other isolated examples like *Lajevardi*, courts observed and commented on government bias. Take, for example, *Tiere v. Immigration & Naturalization Service*.¹⁶¹ Mr. Frank Tieri was born in Italy in 1904 and was lawfully admitted to the United States at age seven. His naturalization application revealed six arrests, an adulterous relationship, and two out-of-wedlock children. As the court described, “[a]rmed with the foregoing information, and apparently motivated in part by the firm but unprovable conviction that petitioner was connected with the ‘Mafia’, the Immigration and Naturalization Service conducted an extensive investigation . . . into petitioner’s eligibility for citizenship.”¹⁶² Though the Second Circuit upheld the naturalization denial, the court’s observation into the motivation behind the “thorough” agency investigation suggests that but for the applicant’s Italian background and

157. 296 F.2d 343, 346 (2d Cir. 1961).

158. *Berenyi*, 385 U.S. 630; *Klig v. United States*, 296 F.2d 343 (2d Cir. 1961).

159. *Lajevardi*, 2015 WL 10990359, at *4–5.

160. *Id.*

161. 457 F.2d 391, 392 (2d Cir. 1972).

162. *Tieri v. Immigration & Naturalization Serv.*, 457 F.2d 391, 392 (2d Cir. 1972).

presumed mafia ties, the government would not have subjected him to such an extensive inquiry.

In the 1996 case, *El-Ali v. Carroll*,¹⁶³ the court remanded a Qatari government employee's naturalization denial based on incorrect and incomplete tax records for further proceedings.¹⁶⁴ The single piece of evidence the government offered to support its false statement allegation were signed tax returns bearing Mr. Ali Mohammed El-Ali's in-laws' address instead of his own, an arguably innocent mistake. In the concurrence, Judge Peter Hall pointed out:

Finally, I must say that I am troubled by the alleged conduct of the interview examiner in this case. According to El-Ali, the examiner called him a "crook" and a "criminal," accused him of committing fraud, and opined that he "should be deported, [because] we don't want people like you in this country." I hasten to point out that the interview examiner has flatly denied making such statements, but, if the allegations are true, it seems to me that the INS has a much larger problem than a few incorrect tax returns.¹⁶⁵

In cases like these, we see how a citizenship application can succeed or fail on personal whims and bias. Individual adjudicatory bias is rarely as explicit as in *El-Ali* because adjudicators have broad discretion to deny a naturalization petition based on any false testimony. Any iota of contradicting evidence can justify a denial,¹⁶⁶ thus masking discriminatory intent and action.

Tieri, *Lejvardi*, and *El-Ali* involved adulterous relationships, questions about tax records, and isolated travel histories, all facts that were arguably irrelevant to core eligibility for naturalization. Many might falter and omit information or misstate facts like those. In contrast, in most false testimony cases under judicial review, false testimony was only an issue if the applicant lied about a matter that impacted underlying immigration status or involved arrests or convictions that may have statutorily precluded them from citizenship eligibility.¹⁶⁷ For example, Raymoundo Bernal immigrated to the United States as

163. 83 F.3d 414 (4th Cir. 1996).

164. *Id.*

165. *Id.* at *6 (Hall, J., concurring).

166. See, e.g., U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS POLICY MANUAL, VOLUME 12: CITIZENSHIP AND NATURALIZATION, PART F- GOOD MORAL CHARACTER, CHAPTER 2: ADJUDICATIVE FACTORS, <https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-2> [<https://perma.cc/34HQ-7LGF>] (describing how an adjudicating officer must assess the totality of circumstances and weigh all factors when making a good moral character determination).

167. See, e.g., *Deluca v. Ashcroft*, 203 F. Supp. 2d 1276 (M.D. Ala. 2002) (answered no to questions on N-400 about whether he had ever been arrested because she had been adjudicated as youthful offender, denial upheld); *Poka v. Immigration & Naturalization Servs.*, No. Civ. A. 3:01CV1378, 2002 WL 31121382 (D. Conn. Sept. 19, 2002) (omitted arrests, court found his explanation to be

the unmarried son of a lawful permanent resident alien. Yet, he was previously married.¹⁶⁸ Had the U.S. government known about this marriage, Mr. Bernal would have never been able to receive a green card under the unmarried child preference category.¹⁶⁹ Therefore, his naturalization application's underlying basis was improperly granted. Since his marriage directly impacted his eligibility for legal permanent residence and, in turn, naturalization, Mr. Bernal's lie was directly relevant to his naturalization eligibility.

In another similar case, *Chan v. Immigration and Naturalization Services*,¹⁷⁰ petitioner Harry Chan asked the district court to review his citizenship denial based on false testimony about prior marriages and a previous arrest. On various immigration forms Mr. Chan submitted in a multidecade attempt to gain status in this country, he had sometimes denied or omitted that he was married to a woman in Singapore, which made him ineligible for a green card based on marriage to a U.S. citizen. Additionally, Mr. Chan denied ever being arrested on his naturalization form, but he had been arrested and indicted, though never prosecuted, for heroin possession and distribution. In this example, both marriage and criminal records may directly impact whether Mr. Chan was eligible for naturalization in the first place. If he was still married in Singapore, his marriage to a U.S. Citizen was invalid, invalidating his eligibility for a green card based on

truthful after considering his limited English proficiency but naturalization denied on other grounds); *Cacho v. Ashcroft*, 403 F. Supp. 2d 991 (D. Haw. 2004) (granted naturalization after USCIS flags discrepancies between sexual battery account to then-INS and police reports about the incident); *Nguyen v. Monica*, No. 05-3021, 2006 WL 2788211 (E.D. Pa. Sept. 26, 2006) (omitted DUI conviction, court upholds naturalization denial); *Lora* (though he had old convictions, court felt it "unfair to conclude that these crimes should deprive him of citizenship 17 years later"); *Serrano v. U.S. Citizenship & Immigration Servs.*, No. CV-05-0364-LRS, 2007 WL 2303328 (E.D. Wa. Aug. 7, 2007) (naturalization denial upheld after applicant lied about arrest for smuggling); *Camara v. Chertoff*, No. C-06-7552 EMC, 2008 WL 80933 (N.D. Cal. Jan. 7, 2008) (naturalization denial upheld where petitioner did not enter the U.S. lawfully as an unmarried child); *Seijas v. Zannoti*, No. Civ. 07-5191 SRC, 2008 WL 413739 (D.N.J. Feb. 11, 2008) (naturalization denied due to false testimony about whether he had committed a crime for which he had not been arrested due to a seventeen-year-old drug indictment); *Scott v. Collett*, No. ELH-13-02022, 2014 WL 3725086 (D. Md. July 23, 2014) (false testimony found where failed to disclose charges of operation vehicle with suspended license made when applying for adjustment of status); *Grunbaum v. U.S. Citizenship & Immigration Servs.*, No. 10-10147, 2012 WL 2359966 (E.D. Mi., May 21, 2012) (omitted failure to pay child and spousal support, naturalization denied and summary judgment granted to USCIS).

168. *Bernal v. Immigration & Naturalization Serv.*, 154 F.3d 1020, 1021 (9th Cir. 1998).

169. See *Green Card for Family Preference Immigrants*, U.S. CITIZENSHIP & IMMIGRATION SERVS., <https://www.uscis.gov/greencard/family-preference> [<https://perma.cc/ZLR9-WR2M>] for description of the Second preference category (F2A). This category allows for foreign nationals who are family members of U.S. citizens and lawful permanent residents to become lawful permanent residents where their spouse or child is unmarried and under the age of 21. *Id.*

170. No. 00 MISC 243(FB), 2001 WL 521706 (E.D.N.Y. May 11, 2001).

marriage to a U.S. Citizen. Further, since controlled substance offenses during the statutory period render one *per se* ineligible for naturalization under the statute, Mr. Chan's denials regarding related criminal activity may have prevented this inquiry.¹⁷¹

Even still, the court granted Mr. Chan's naturalization petition, finding that the "misrepresentations" were not made with intent to gain an immigration benefit, but rather were a result of a limited command of English and a lack of understanding of the American criminal system.¹⁷² In this case, too, Mr. Chan's testimony had a direct relation to his eligibility to naturalize because his invalid marriage to a U.S. Citizen nullified his eligibility for permanent residence based on that marriage. Further, his drug-related arrests may have made him ineligible for naturalization during the statutory period if they were considered controlled substance offenses.¹⁷³

In contrast, the appeals data set displays that the government has predominantly used false testimony allegations focusing on irrelevant and immaterial facts against populations they seek to exclude. Throughout the 1950s and 1960s, most false testimony cases unrelated to criminal history or underlying immigration status involve applicants from Eastern European nations, Italy, and China who were charged with providing false testimony about their communist ties or adulterous relationships.¹⁷⁴ During this period, district courts thwarted the agency recommendations and awarded naturalization in almost every instance, but rarely commented on the possibility that biased adjudicators were enforcing naturalization laws unequally against certain populations.

171. 8 C.F.R. § 316.10(b)(2)(iii), (iv) (1995). Note that Mr. Chan only omitted information about an arrest and indictment. According to the judicial opinion, he was never charged. Nevertheless, the statute related to controlled substance offences requires only a "violation of any law" not a "conviction."

172. *Chan*, 2001 WL 521706 at *7.

173. 8 C.F.R. § 316.10(b)(2)(iii), (iv). See discussion *supra* notes 172 & 137.

174. See, e.g., *Petition of K*, 174 F. Supp. 343 (D. Md. 1959) (where false testimony provided about whether applicant ever committed adultery, court denied petition stating that applicants shall not be "admitted to citizenship however illiterate, immoral or disloyal they may be"); *Klig v. United States*, 296 F.2d 343, 344 (2d Cir. 1961) (petition denied because petitioner was alleged to lie about attendance at communist party meetings more than two decades earlier, rehearing granted); *In re Messina*, 207 F. Supp. 838 (E.D. Pa. Aug. 7, 1962) (court grants naturalization even where INS recommended denial on ground that petitioner willfully concealed committing adultery); *Berenyi v. Dist. Dir., Immigration & Naturalization Serv.*, 385 U.S. 630, 668 (1967) (naturalization denied where petitioner was accused of providing false testimony about communist party attendance); *In re Kwong Hai Chew*, 278 F. Supp. 44 (S.D.N.Y. 1967) (naturalization granted where applicant denied prior Community Party membership and U.S. government produces three witnesses to refute this denial).

For example, in *Klig*, the Second Circuit reversed the denial of Mr. Klig's application because of misstatements concerning attendance at Communist Party functions almost twenty-five years earlier. The court recognized that "these facts, so found, in and of themselves would not have disqualified appellant from citizenship."¹⁷⁵ The court granted Mr. Klig's naturalization application and declared "we do not require perfection in our new citizens."¹⁷⁶ But, the court did not comment on the discriminatory investigation of Mr. Klig's application in which the government brought in international investigators to describe the events he attended twenty years earlier. Though Justice Douglas's scathing dissenting opinion in *Berenyi* describes the speculative government evidence used to insert "ephemeral doubt" into the application, he does not mention the elephant in the room: Mr. Berenyi had perhaps only been subject to this scrutiny because of his alleged attendance at Communist Party meetings in medical school.¹⁷⁷

From the 1970s through the 1990s, the false testimony allegation reared its head in a variety of contexts. A bulk of the reviewed cases involve false testimony related to underlying immigration status, criminal and arrest history, or other ongoing criminal investigations.¹⁷⁸ As described previously in Part II, these denials, both historically and presently, are also likely to disproportionately impact communities of color and others who are targets of aggressive policing, surveillance and discriminatory immigration enforcement.

Certain populations during this period, too, seem to be pretextually denied citizenship: an applicant from Hungary whose application was denied for providing false testimony about his sexuality,¹⁷⁹ an Italian applicant was denied naturalization where the INS "was apparently motivated in part by the firm and unprovable conviction that petitioner was connected with the Mafia,"¹⁸⁰ and British and Chinese applicants who faced allegations related to denied communist

175. *Klig v. United States*, 296 F.2d 343, 344 (2d Cir. 1961).

176. *Id.* at 346.

177. *Berenyi*, 385 U.S. at 638–43.

178. See, e.g., *In re Yao Quinn Lee*, 480 F.2d 673 (2nd Cir. 1973) (provided false testimony about whether he was living with his wife while seeking to naturalize under special three-year residency provisions applicable to those married to United States citizens); *Tan v. Immigration & Naturalization Serv.*, 931 F. Supp. 725 (D. Haw. 1996) (granting naturalization because of petitioner's distinguished professional record as an active-duty noncommissioned officer in United States Army despite false testimony about ten year scheme to immigrate his wife and son); *Bernal v. Immigration & Naturalization Serv.*, 154 F.3d 1020, 1021 (9th Cir. 1998) (upholding denial where false testimony regarding marriage in the Philippines when he immigrated to the U.S. as an unmarried son of LPR parents); *Plewa v. Immigration & Naturalization Serv.*, 77 F. Supp. 2d 905 (N.D. Ill. 1999) (finding applicant cannot be denied citizenship when she failed to disclose arrest because of erroneous advice of experienced immigration counselor).

179. *In re Kovacs*, 476 F.2d 842 (2d Cir. 1973).

180. *Tieri v. Immigration & Naturalization Serv.*, 457 F.2d 391, 392 (2d Cir. 1972).

affiliations.¹⁸¹ As these examples show, applicants appearing in the appealed pool of denials seemed to carry a common thread of belonging in a suspect category, whether they were gay, Mafia-affiliated, or suspected communists. In the same manner, as we move toward the turn of the century, the government uniquely singled out applicants from Muslim nations for false testimony denials based on statements that did not otherwise impact their citizenship eligibility. This pattern continued into the 2000s and was systematized with CARRP and, more recently, administrative directives calling for extreme vetting with a focus on decades-old travel histories, employment records, and social media handles.¹⁸²

Laws leaving immense discretion and judgment in the hands of a single public officer created avenues for discrimination and unequal enforcement at many points in our history. In the foundational *Yick Wo v. Hopkins*, the Supreme Court considered whether San Francisco's application of an ordinance prohibiting unpermitted laundry facilities in wooden buildings violated the Equal Protection Clause.¹⁸³ At the time, 95 percent of San Francisco's laundry facilities were in wooden buildings and Chinese immigrants operated 75 percent of those facilities. When operators began applying for permits, the Board of Supervisors denied all petitions from Chinese owners, while granting all but one from non-Chinese owners.¹⁸⁴

In considering whether a race-neutral law administered in a prejudicial manner violates equal protection, the Court cited *City of Baltimore v. Radecke*,¹⁸⁵ which viewed with concern a similar ordinance enforced at officer discretion:

[The ordinance] commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam-engine in the prosecution of any business in the city of Baltimore to cease to do so, and, by providing compulsory fines for every day's disobedience of such notice and order of removal, renders his power of the use of steam in that city practically absolute, so that he may prohibit its use altogether. *But if he should not choose to do this, but only to act in particular cases, there is nothing in the ordinance to guide or control his action.* It lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented. It is clear that giving and enforcing these notices may, and quite likely will, bring ruin to the

181. *In re Duncan*, 713 F.2d 538 (9th Cir. 1983); *In re Kowng Hai Chew*, 278 F. Supp. 44 (S.D.N.Y. 1967).

182. See Michael D. Shear, *Trump Administration Orders Tougher Screening of Visa Applications*, N.Y. TIMES (March 23, 2017), <https://www.nytimes.com/2017/03/23/us/politics/visa-extreme-vetting-rex-tillerson.html> [<https://perma.cc/A9UF-7AGU>].

183. *Yick Wo v. Hopkins*, 118 U.S. 356, 357 (1886).

184. *Id.* at 359.

185. 49 Md. 217 (1878).

business of those against who they are directed, while others, from whom they are withheld, may actually be benefited by what is thus done to their neighbors; and, when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment, and difficult to be detected and exposed, it becomes unnecessary to suggest or comment upon the injustice capable of being wrought under cover of such a power¹⁸⁶

Finding the San Francisco ordinance arbitrarily deprived the plaintiffs of their property interest in earning a living, the *Yick Wo* Court concluded the ordinance violated the Fourteenth Amendment's Equal Protection Clause.¹⁸⁷ Though "fair on its face," the ordinance was "applied and administered by public authority with an evil eye and an unequal hand" against Chinese immigrants.¹⁸⁸ The case was the first to rule that a law that is neutral on its face, but prejudicial as administered is in violation of the Equal Protection Clause.

Like the permit adjudicator in *City of Baltimore* and the prosecutor in *Yick Wo*, naturalization decisions lie at the will of a single officer. This vast discretion and resulting discrimination is a stark reminder of the necessity of constitutional checks when the government misuses its plenary powers to regulate the nation's borders in a discriminatory manner in the name of economic, moral, racial, or national security. Though a robust judicial appeals process could protect against unbridled discretion, the appeals studied in this Article show that individual courts reviewing naturalization have not yet captured or corrected large-scale discrimination. Given the limited cases that make it up to judicial review, courts are not in the best position to observe these broader patterns outside the context of multi-party suits. Still, they remain the only check on administrative action to ensure cases are adjudicated correctly and fairly.

Suits that have directly challenged the CARRP program have surfaced how the policy discriminates based on national origin, is motivated by racial animus, and has a disparate impact on people of color. As seen in the naturalization appeals process more generally, federal litigation challenging the CARRP program is quickly resolved out of court as long delayed applications are suddenly adjudicated by USCIS after suit is filed, leading district courts to dismiss constitutional challenges as moot.¹⁸⁹ In the single lawsuit challenging CARRP to survive

186. *Id.* at 372–73 (emphasis added).

187. U.S. CONST. amend. XIV, § 1.

188. *Id.* at 373–74. For an in-depth discussion of constitutional protections granted to noncitizens, see Karen Nelson Moore, *Aliens and the Constitution*, 88 N.Y.U.L. REV. 801 (2013).

189. See, e.g., *Judgement of Dismissal, Arapi v. U.S. Citizenship & Immigration Servs.*, No. 4:16-CV-00692-JAR (E.D. Mo. Oct. 17, 2019); *Order Dismissing Case, Muhanna v. U.S. Citizenship &*

dismissal, *Wagafe v. Trump*,¹⁹⁰ the District Court found the equal protection claims alleging the discriminatory application of CARRP sufficient to survive a motion to dismiss and reiterated that “naturalization applicants have a property interest in seeing their naturalization claims adjudicated lawfully.”¹⁹¹ The *Wagafe* plaintiffs alleged that they had met all the statutory requirements to naturalize, and that the CARRP practice of pretextually denying applications attached extra-statutory requirements that deprived plaintiffs of their due process rights; the District Court found this argument sufficient to survive the motion to dismiss.¹⁹²

B. Requiring Intent: Holding USCIS to the Statutory Intent Requirement

While courts have been reluctant to cite the underlying agency’s discriminatory practices to overturn naturalization denials, they have been more likely to overturn these denials when the government does not prove that the applicant made a false statement with the subjective intent of obtaining immigration benefits or when the statements do not meet the strict definition of what amounts to “testimony.” In *Kungys v. United States*,¹⁹³ the Supreme Court found that false testimony for purposes of denying a naturalization application is found where “even the most immaterial of lies” is made with the “subjective intent of obtaining immigration or naturalization benefits.”¹⁹⁴ In the case, Juozas Kungys applied for an immigrant visa in Stuttgart, Germany in 1947. He received a visa, came to the United States, and naturalized in 1954. Almost thirty years later, the United States filed a complaint pursuant to 8 U.S.C. § 1621(a) to denaturalize Mr. Kungys. The government claimed he had executed over 2000 Lithuanian civilians and lied about his date and place of birth, wartime occupation, and residence. The government thus argued he “illegally procured” citizenship because his false testimony demonstrated a lack of good moral character.¹⁹⁵ Examining the false testimony provision, the Supreme Court determined that:

Immigration Servs., No. 14-CV-05995, 2016 WL 500550 (C.D. Cal. Feb. 9, 2016). *See also* Harleen Gambir, *Summary: Wagafe v. Trump, a Preview of ‘Extreme Vetting’ Litigation*, LAWFARE BLOG (Jan. 3, 2018, 9:00 AM), <https://www.lawfareblog.com/summary-wagafe-v-trump-preview-extreme-vetting-litigation> [<https://perma.cc/3NTR-DKZX>].

190. No. 17-CV-0094-RAJ, 2017 WL 2671254 (W.D. Wash. June 21, 2017).

191. *Id.* at *8.

192. *Id.* Note the court found that plaintiffs impacted by CARRP who were seeking to adjust status did not have a protected property interest in adjustment, as adjustment of status is a discretionary decision in the hands of the Attorney General. *Id.* at *9.

193. 485 U.S. 759 (1988).

194. *Id.* at 780.

195. *Id.* at 764–65, 780.

On its face, § 1101(f)(6) does not distinguish between material and immaterial misrepresentations. Literally read, it denominates a person to be of bad moral character on account of having given false testimony if he has told even the most immaterial of lies with the *subjective intent* of obtaining immigration or naturalization benefits . . . [I]t means precisely what it says.¹⁹⁶

In addition to highlighting the subjective intent requirement, the Court observed that “testimony” is limited to “oral statements made under oath,” not including “other types of misrepresentations or concealments, such as falsified documents or statements not made under oath.”¹⁹⁷ These two limitations gave the Court confidence that reading the statute literally would not produce “draconian results” where individuals would be denied citizenship because of misunderstandings, mistakes, or misinterpretations.¹⁹⁸ The Court was unpersuaded by the United States’ argument that “Kungys’ so-called pattern of lies” in and of themselves reflected a subjective intent to obtain immigration benefits and remanded the case to determine whether Mr. Kungys gave false testimony within the meaning of Section 1101(f)(6).¹⁹⁹

Though *Kungys* involved citizenship revocation, courts reviewing citizenship denials have used the *Kungys* test to determine whether an applicant gave alleged false testimony with the required subjective intent. In *Chan*, where the petitioner omitted a valid marriage in Singapore and drug-related arrests, the district court concluded Mr. Chan’s mistakes were not misrepresentations aimed to deceive the government, but rather resulted from Mr. Chan’s “confusion, misunderstandings, limited command of English, and lack of a full appreciation of the factors that would constitute and render impregnable his arrest under the American legal system.”²⁰⁰

Unfortunately for groups the U.S. government has sought to exclude, the specific intent requirement has not avoided “the draconian results” the Supreme Court sought to avoid in *Kungys*. The administrative record presented during the appellate stage often has little mention of USCIS’s requisite intent findings at the administrative denial stage. Some courts have upheld these denials with little to no discussion or fact finding about requisite intent.²⁰¹ Though courts have rarely

196. *Id.* at 779–80 (emphasis added).

197. *Id.* at 780.

198. *Id.* at 780.

199. *Id.* at 782.

200. *Chan v. Immigration & Naturalization Serv.*, No. 00 MISC 243(FB), 2001 WL 521706, at *7 (E.D.N.Y. May 11, 2001).

201. *See, e.g., Hussain v. Chertoff*, 486 F. Supp. 2d 196 (D. Mass. 2007) (USCIS denies naturalization after prolonged adjudicative delay due to a single prior sixteen-year-old charge for writing a bad

called out discriminatory patterns, they have in some cases overturned denials when they found the applicant did not have the required subjective intent to deceive.²⁰² This suggests the intent requirement may be one counter against discriminatory naturalization denials. Where an applicant can display their intent to tell the truth by being forthcoming, explicit in how they understand the parameters of the questions they are being asked, and follow-up with USCIS where they remember new information not previously revealed they strengthen defenses against any future allegations of malintent.²⁰³

1. Inferring Intent

It appears that, contrary to clear statutory²⁰⁴ and judicial mandates,²⁰⁵ the administrative record presented by appellate courts indicate that USCIS often overlooks intent when examining false testimony. The CARRP training materials do not mention intent when instructing adjudicators to deny cases with inconsistencies. In defending denials, the U.S. government has circularly furthered that a misrepresentation in and of itself proves intent to deceive.²⁰⁶ While a misrepresentation itself is offered as proof of intent, the U.S. government has further argued that quantity may matter as well, arguing that multiple misrepresentations can be evidence of mal intent.²⁰⁷ Rejecting this argument, the

check; no discussion of intent);); *Keaik v. Dedvukay*, 557 F. Supp. 2d 820 (E.D. Mich. 2008) (USCIS denied because applicant failed to reveal speeding offenses, no specific discussion of how intent was found) *Hayek v. Chertoff*, No. 07 CV 1957, 2008 WL 11380197 (N.D. Ohio, Aug. 4, 2008) (Lebanese physician denied naturalization where misstatements about travel, addresses and organizational association led to denial under false testimony and physical presence requirements, though discussion of case law relating to intent no reasoning of how and why Hayek had a subjective intent to deceive); *Fatayer v. Swacina*, 2:07-cv-00527, 2008 WL 4279688 (M.D. Fla. Aug 23, 2007) (omits dismissed case related to fraudulent checks so naturalization is denied on false testimony grounds, no discussion of intent to obtain immigration fraud, dismissed on jurisdictional grounds).

202. See, e.g., *Hamdi v. U.S. Citizenship & Immigration Servs.*, No. EDCV 10-894 VAP, 2012 WL 632397 (C.D. Cal. Feb. 25, 2012) (court finds that alleged misrepresentations about organizational affiliations, residences, and minor dates were not made with the requisite intent to rise to false testimony); *Hajro v. Barrett*, No. C 10-01772 MEJ, 2011 WL 2118602 (N.D. Cal. May 27, 2011) (court finds it a triable issue of fact whether petitioner failed to disclose organizational and military associations in order to gain immigration benefit, dismissing government's motion for summary judgment).

203. For a comprehensive discussion of practitioner tips where representing applicants who may be subject to CARRP, see TRAVERSO & PASQUERELLA, *supra* note 101.

204. 8 U.S.C. § 1101(f)(6); 8 C.F.R. § 316.10(b)(2)(vi) (1995)

205. See *Kungys v. United States*, 485 U.S. 759 (1988); 8 U.S.C. § 1101(f)(6).

206. *Id.*

207. *Moore v. Thompson*, No. 09-1747 (RBK/KMW), 2010 WL 398633, at *6 (D. N.J. 2010) (discussing how the U.S. government relied on *Golding v. Department of Homeland Security*, No.

District Court of New Jersey stated: “Respondents’ logic, if followed, would mean that all misrepresentations are per se evidence of an intent to achieve benefits.”²⁰⁸

In reviewing naturalization denials, however, courts have frequently followed the government’s logic, inferring intent when an applicant misstated or omitted a fact. For example, in *Gedi v. Gonzalez*, petitioner Abdullah Mohamed Gedi omitted a single, 1994 trip to Kenya from his N-400’s travel history section.²⁰⁹ Despite receiving the opportunity to correct this information in 2000 before verifying under oath that its contents were true, Mr. Gedi did not do so.²¹⁰ Without offering any proof, the government maintained that Mr. Gedi omitted his trip to Kenya to improve his citizenship prospects. They argued that the misrepresentation prevented the examiner from exploring whether Mr. Gedi abandoned his permanent residence as a result of his prolonged absence from the United States.²¹¹ Consequently, they argued, he “directly benefitted” from his misrepresentation because “he improved his prospects by not having to undergo extensive questioning about his prolonged absence from the country.”²¹² The court found that the misrepresentation at least raised a question about Mr. Gedi’s intent that would be best assessed at a hearing.²¹³

In *Gedi*, the government’s only evidence of Mr. Gedi’s subjective intent to gain an immigration benefit was the contrived notion that the information *may* have led to questioning that *may* have led to a determination that Mr. Gedi had abandoned his green card. The court accepted that the “potential benefit” of avoiding this conversation alone could evidence a subjective intent to gain immigration benefit even though Mr. Gedi maintained that the omission was simply an “isolated oversight.”²¹⁴

In another case, *Usude v. Luna*, Nigerian native Christopher Usude neglected to mention a child for which he had not provided paternity payments. The court found, “[p]etitioner . . . had reason to lie about his paternity . . . to prevent inquiry

05-21095, 2009 WL 2222779, at *13 (S.D. Fla. July 27, 2009), to support the proposition that multiple misrepresentations show a subject intent.)

208. *Id.*

209. *Gedi v. Gonzalez*, No. 1:07-CV-2507-RWS, 2009 WL 2515627, at *1 (D. N.D. Ga. 2009).

210. *Id.*

211. *Id.* at *4.

212. *Id.*

213. *Id.* In *Maina v. Lynch*, the court stated, “[a]s a general rule, [i]t is rarely appropriate on summary judgment for a district court to make a finding on state of mind.” *Maina v. Lynch*, No. 1:15-cv-00113-RLY-DML, 2016 WL 3476365, at *6 (S.D. Ind. June 27, 2016) (citing *McGreal v. Ostrov*, 368 F.3d 657, 677 (7th Cir. 2004)). It also cautioned, “courts should be careful . . . not to grant summary judgment if there is an issue of material fact that is genuinely contestable, which an issue of intent often though not always will be.” *Id.* (citing *Wallace v. SMC Pneumatics*, 103 F.3d 1394, 1396 (7th Cir. 1997)).

214. *Gedi*, 2009 WL 2515627, at *4.

into Petitioner's failure to financially support" his child, making it "more likely than not that Petitioner lied about his paternity in order to obtain an immigration benefit."²¹⁵

Similarly, a Louisiana district court upheld Mohamed Saleh's naturalization denial because he did not disclose his detention at JFK airport in response to the question "[h]ave [you] ever been arrested, cited, or detained by any law enforcement officer (including INS and military officers) for any reason?"²¹⁶ Mr. Saleh testified that he did not consider himself detained at the airport because he felt free to leave. The district court found he lacked credibility for three reasons: (1) He "show[ed] a history of mendacity when interacting with law enforcement[.]" (2) had a "chronic inability to recall past events with clarity," and (3) gave testimony that directly contradicted that of the adjudicating officer.²¹⁷

In direct contrast to the guidance laid out by *Kungys*, the court stated it would have been more inclined to find Mr. Saleh did not act with requisite intent had the testimony in question been immaterial.²¹⁸ Citing the *Kungys* dissent, the district court noted, "when false testimony forecloses a line of questioning into the applicant's past that could influence . . . his eligibility for naturalization, the most logical conclusion is that the statement was made for the purpose of obtaining immigration benefits."²¹⁹ The court found Mr. Saleh offered no credible reason for failing to disclose his detention so the "repeated non-truths, non-disclosures, and convenient lapses of memory fully support the Government's argument."²²⁰

Assuming intent based simply on the fact that a misstatement or omission exists is problematic because naturalization application errors are exceedingly common. In another naturalization denial involving false testimony, *Maina v. Lynch*, a USCIS officer stated, "it is common for an applicant to make 'a lot' of mistakes when filing out a Form N-400." In the case at issue, the plaintiff's application contained ten corrections, including an omitted arrest, two omitted trips outside the United States, and a new home address. The USCIS officer noted, "ten changes is not 'a lot,' but is actually 'about average.'"²²¹ The frequency of errors shows that any application may have mistakes that in some way prevent inquiry into a material fact relevant to some aspect of citizenship eligibility. By legitimizing arguments that assume intent if a misstatement exists or if the misstatement may have foreclosed a relevant line of inquiry, courts are essentially disregarding the

215. *Usude v. Luna*, No. CV 15-00301-AB (SSx), 2018 WL 522250, at *7 (C.D. Ca. Jan. 23, 2018).

216. *Saleh v. U.S. Dept. of Justice*, No. 12-425, 2013 WL 1288233, at *2 (E.D. La. March 26, 2013).

217. *See id.* at *6-7.

218. *Id.*

219. *Id.*

220. *Id.* at *7.

221. *Maina v. Lynch*, No. 1:15-cv-00113-RLY-DML, 2016 WL 3476365, at *2 (S.D. Ind. June 27, 2016)

intent requirement, which was crafted to prevent draconian naturalization denials based on commonplace errors.

2. Finding Other Explanations for Misstatements and Omissions

Not all federal courts assume that misstatements or omissions imply an intent to obtain benefits, some credit misunderstandings, innocent mistakes and confusion for the alleged false testimony in lieu of an intent to deceive.²²² The *Kungys* Court found that “willful misrepresentations made for other reasons, such

222. See, e.g., *Poka v. Immigration & Naturalization Servs.*, No. Civ. A. 3:01CV1378, 2002 WL 31121382 (D. Conn. Sept. 19, 2002) (court accepted that applicant had misunderstood the word “arrested” when he denied two previous arrests due to his limited English proficiency and his misrepresentations were not made with intent to obtain an immigration benefit, case denied on other grounds); *St. Amanze v. Immigration & Naturalization Servs.*, No. Civ. A. 02-502T, 2003 WL 22061870 (D.R.I. Mar. 28, 2003) (discussion about whether Nigerian petitioner may have understood questions about past immigration violations); *Zaher Abu Saad v. Barrows*, No. Civ. A. 3:03-CV-1342G, 2004 WL 1359165 (N.D. Tex. June 16, 2004) (finding misstatements about marital status to be “innocent mistakes,” court looks towards lack of criminal history, employment records, remanded to exhaust administrative remedies); *United States v. Hovsepian*, 422 F.3d 883, 888 (9th Cir. 2005) (looks to vagueness of question where applicant describes organizational affiliation as a youth group instead of a political party, court finds “no intent to deceive,” and applicants have GMC); *Edem-Effiong v. Acosta*, No. Civ. A. H-04-2025, 2006 WL 626406 (S.D. Tex. Mar. 13, 2006) (assessing whether question about applicant’s children was vague where applicant failed to mention out-of-wedlock child); *Naserallah v. U.S. Citizenship & Immigration Servs.*, No. 1:05 CV 1022, 2006 WL 991073 (N.D. Ohio Apr. 13, 2006) (where applicant concealed a crime, court looked to see if applicant was aware that the crime would not have precluded naturalization); *Ajuz v. Mukasey*, No. 07-MC-0185, 2009 WL 902369 (E.D. Pa. Apr. 2, 2009) (overturning USCIS finding precluding GMC where applicant allegedly concealed his marriage, where he adjusted status as an unmarried son, court found it was an innocent mistake and considered that applicant provided date of marriage and wife’s name elsewhere in the application); *Nesari v. Taylor*, 806 F. Supp. 2d 848, 864–65 (E.D. Va. 2011) (naturalization denied on other grounds but court recognizes that “questions that Nesari was asked concerned specific details of events that took place in 1996, almost 13 years before his July 8, 2009 naturalization interview” and so it was “entirely possible that Nesari was simply confused and inadvertently mixed up dates After all, it would be the rare person indeed who is able to recall with perfect clarity what happened to them over a decade ago,” and so the court refrained from making a judgment as to whether these statements amounted to false testimony.); *Hamdi v. U.S. Citizenship & Immigration Servs.*, No. EDCV 10-894 VAP, 2012 WL 632397 (C.D. Cal. Feb. 25, 2012) (court finds that alleged misrepresentations about organizational affiliations, residences, and minor dates were not made with the requisite intent to rise to false testimony); *Hajro v. Barrett*, No. C 10-01772 MEJ, 2011 WL 2118602 (N.D. Cal. May 27, 2011) (court finds it a triable issue of fact whether petitioner failed to disclose organizational and military associations in order to gain immigration benefit, dismissing government’s motion for summary judgment); *Abusamhadaneh v. Taylor*, 873 F. Supp. 2d 682 (E.D. Va. 2012) (the court finding petitioner’s omissions about religious organizational memberships reasonable based on confusion and his understanding of attorney’s advice and not made with the intent to deceive).

as embarrassment, fear, or a desire for privacy, [are] not deemed sufficiently culpable to brand the applicant as someone who lacks good moral character.”²²³

When naturalization appeals cases survive summary judgment and proceed to a hearing on intent, some courts explore factors like language skills, the clarity of the question asked and cultural context that may have led to misstatements or omissions.²²⁴ For example, when Chioma Ihejirika, a Nigerian national, applied for citizenship, she checked “no” where the N-400 application asked if she had ever given false or misleading information to a government official.²²⁵ In her application for adjustment of status six years earlier, though, she admitted to entering on a passport that was not her own. The government initially denied her naturalization application because she “conceal[ed] her use of another’s passport to gain entry into the United States in order to secure a favorable decision regarding [petitioner’s] application for naturalization.”²²⁶ On appeal, Ms. Ihejirika claimed she forgot how she entered, thought she was forgiven for the past fraudulent entry, and did not completely understand the question.²²⁷ Finding her credible, the court found that any discrepancies between her answers were “consistent with her limited command of English, her nervous inexperience with the naturalization process, and her lack of understanding of the scope of the questions being asked.”²²⁸

Courts have also looked towards the vagueness of the question asked when determining whether omissions or misstatements were warranted. This has been especially helpful in cases where applicants have omitted answers to broad questions about organizational associations or may not know what constitutes an

223. *Kungys v. United States*, 485 U.S. 759, 780 (1988).

224. See, e.g., *Poka v. Immigration & Naturalization Servs.*, No. Civ. A. 3:01CV1378, 2002 WL 31121382 (D. Conn. Sept. 19, 2002) (court accepted that applicant had misunderstood the word “arrested” when he denied two previous arrests due to his limited English proficiency, case denied on other grounds); *St. Amanze*, 2003 WL 22061870 (discussion about whether *pro se* Nigerian petitioner may have understood questions about past immigration violations); *Hovsepian*, 422 F.3d 883 (looks to vagueness of question where applicant describes organizational affiliation as a youth group instead of a political party, GMC found); *Ajuz v. Mukasey*, No. 07-MC-0185, 2009 WL 902369 (E.D. Pa. Apr. 2, 2009) (overturning USCIS finding precluding GMC where applicant allegedly concealed his marriage, where he adjusted as an unmarried son, court found it was an innocent mistake and considered that applicant provided date of marriage and wife’s name elsewhere in the application); *Bankole v. Holder*, No. 6:14-cv-01104-EFM-JPO, 2104 WL 3734209 (D. Kan. July 29, 2014) (USCIS denies naturalization where applicant fails to reveal a traffic citation, court finds no requisite intent and grants the application partially due to the fact that USCIS instructions guide applicants not to submit information about traffic incidents unrelated to drugs or alcohol).

225. *Ihejirika v. Klapakis*, No. 10-3190, 2011 WL 4499301, at *1 (E.D. Pa. Sept. 29, 2011).

226. *Id.* at *2 (internal quotations omitted).

227. *Id.*

228. *Id.* at *4.

“arrest or “violation.”²²⁹ In *U.S. v. Hovsepien*, the court conceded that a question which asked “Have you at any time, anywhere, ever ordered, incited, assisted or otherwise participated in the persecution of any person because of race, religion, or national origin, or political opinion?” was “susceptible to many interpretations” and that a negative answer was warranted because of the applicants’ “reasonable interpretation of the terms used in the question”²³⁰

Courts have additionally looked to whether an attorney counseled an applicant to answer in a certain manner,²³¹ or whether the applicant was even aware that the omission or misstatement may or may not preclude naturalization.²³²

This body of cases displays that factors such as language ability and cultural context may influence courts’ intent inquiry. This inquiry can function as a crucial check on the administrative agency’s assumption of requisite intent when they find misrepresentations or omissions.

3. Using External Factors to Deduce Intent

Courts also turn to external factors to determine whether an applicant gave false testimony.²³³ In *Saleh*, the court’s inquiry into Mr. Saleh’s credibility expanded beyond the false testimony in question. The court considered his “mendacity when interacting with law enforcement” and the fact that he had “not

229. See, e.g., *Hovsepien*, 422 F.3d 883 (looks to vagueness of question where applicant describes organizational affiliation as a youth group instead of a political party, court finds “no intent to deceive,” and applicants have GMC); *Edem-Effiong v. Acosta*, No. Civ. A. H-04-2025, 2006 WL 626406 (S.D. Tex. Mar. 13, 2006) (assessing whether question about applicant’s children was vague where applicant failed to mention out-of-wedlock child, finding a question requesting applicant to list “all” children is not vague).

230. *Hovsepien*, 422 F.3d at 888.

231. *Abusamhadaneh v. Taylor*, 873 F. Supp. 2d 682 (E.D. Va. 2012) (the court finding petitioner’s omissions about religious organizational memberships reasonable based on confusion and his understanding of attorney’s advice and not made with the intent to deceive, applicant understand attorney advice to say he had a right to not list religious organizations).

232. *Naserallah v. U.S. Citizenship & Immigration Servs.*, No. 1:05 CV 1022, 2006 WL 991073 (N.D. Ohio Apr. 13, 2006) (where applicant concealed a crime, court looked to see if applicant was aware that the crime would not have precluded naturalization).

233. See, e.g., *El-Ali v. Carroll*, 83 F.3d 414 (4th Cir. 1996) (USCIS denied naturalization in part because El-Ali failed to report income from a single employment site, court remands because questions about his “willfulness”); *Zaher Abu Saad v. Barrows*, No. Civ. A. 3:03-CV-1342G, 2004 WL 1359165 (N.D. Tex. June 16, 2004) (finding misstatements about marital status to be “innocent mistakes,” court looks towards lack of criminal history, employment records, remanded to exhaust administrative remedies); *Petition of Kostas*, 169 F. Supp. 77, 79 (D. Del. 1958) (though naturalization was denied where false testimony related to length of cohabitation with U.S. citizen wife, the court looked toward other “ameliorating factors,” citing that petitioner led “quiet, peaceful and hardworking existence,” had no criminal record, “bears a good reputation,” and advised applicant to have a “more candid attitude” in the future).

registered for the Selective Service and repeatedly denied knowledge of the obligation to do so” even though the record reflected that he was previously aware of this obligation.²³⁴ With this discussion, the court expanded the inquiry into Mr. Saleh’s false testimony by drawing on other aspects of Ms. Saleh’s life. Essentially, the court assumed his history with law enforcement and lies about selective service meant he intentionally lied to benefit his naturalization process.²³⁵

By analyzing aspects of an applicant’s life that are irrelevant to naturalization eligibility to assess credibility, courts subject applicants to additional eligibility screening not provided for in the statute, thwarting lawmaking that is clearly within the purview of Congress about one of the most central tenets of American life, citizenship itself.²³⁶

CONCLUSION

It bears repeating that “American citizenship is a right no less precious than life or liberty, indeed of one which today comprehends those rights and almost all others.”²³⁷ The elevated status of citizenship gives those who attain it privileged access to our nation’s political, social, and economic systems that, in theory, should render them indistinguishable from citizens *jus soli*.

Noncitizens, however, remain an explicit other class, left without many constitutional protections. They are denied access to the political, social, and economic systems of the nation where they reside, work, and invest. If citizenship is moored with stability, the constant prospect of insecurity and displacement overshadows the noncitizen.

The United States citizenship rubric has always rested on a policy of exclusion. The United States has explicitly created residency requirements, literacy tests, racial prohibitions, and national quotas to tightly control the face of America’s future. This Article argues that the United States has used the false testimony provisions specifically and good moral character allegations generally as another means to exclude certain classes of aspiring Americans. While the most recent targets of this tool are disproportionately those who appear to be Muslim, this study also reflects how the United States government used this tool against perceived Communists, Eastern Europeans, and Irish and Italian immigrants in our

234. *Id.* at *6.

235. *Id.*

236. The court’s thinking here undoubtedly reflects the analysis an adjudicator may also employ when determining whether an applicant is lying: Is the applicant the type of person the adjudicator thinks may lie? This question adds another layer of bias to the discretionary inquiry.

237. *Klapprott v. United States*, 335 U.S. 601, 616 (1949).

recent past. The result? False testimony denials hide systematized and individual discrimination in naturalization adjudications, compounding the impacts of discriminatory immigration policies that have long disadvantaged immigrants of color.

Accountability and redress for this discrimination is grossly inadequate. The discriminatory application of naturalization eligibility criteria has gone largely unchecked because of wide adjudicator discretion, broad language governing good moral character, the limited use of judicial review, and the judiciary's general deference when the executive's plenary powers are at stake. Even when the judiciary has overturned individual cases, it has been nearly silent about the danger of a naturalization process governed by individual adjudicators with the statutory and discretionary tools to deny almost any application.

Citizenship is an expensive proposition, and when communities learn of possible denial and delay, individuals may not apply in the first place. If the United States denies an individual's application, it may seem easier to reapply after the relevant statutory period to avoid costly and time-consuming judicial review. Those who do seek judicial review may be subject to lengthy and intrusive discovery, questioning, and depositions, exposing themselves to even greater scrutiny than during the administrative application process.

The implications of naturalization policies that target and demonize certain classes of citizens are about more than citizenship denial. Discriminatory naturalization denial others minorities, chills constitutionally protected activity, and creates a flawed rubric for what constitutes American behavior.²³⁸

With the growing demonization of immigrant populations, the United States is employing increasingly aggressive enforcement policies to deny immigration benefits and deport immigrants in growing numbers using tactics that have long marred our history. In the midst of this instability, advocates encourage immigrants to naturalize as the ultimate protection against aggressive deportation policies. Nevertheless, citizenship—this once untouchable status—is no longer untouchable. Globally, citizenship revocation is a growing trend, another tool linked to the post-9/11 expansion of so-called security measures.²³⁹

238. See generally PASQUERELLA, *supra* note 77.

239. See generally David J. Trimbach and Nicole Reiz, *Unmaking Citizens: The Expansion of Citizenship Revocation in Response to Terrorism*, CTR. MIGRATION STUD. (January 30, 2018), <http://cmsny.org/publications/unmaking-citizens> [https://perma.cc/QZ2N-UBZX] (“Citizenship revocation expansion is a growing and troubling trend that requires immediate attention, particularly from policymakers and human rights’ advocates. While historical precedence exists for revocation, particularly in relation to fraud or treason, revocation is expanding in light of growing fears and threats of transnational terrorism.”); Audrey Macklin, *Sticky Citizenship*, in *THE HUMAN RIGHT TO CITIZENSHIP: A SLIPPERY CONCEPT* (Rhode E.

In June 2018, USCIS announced new initiatives to identify and denaturalize those who procured citizenship fraudulently.²⁴⁰ The United States has arrested and charged a growing number of citizens under a rarely used federal statute criminalizing the procurement of naturalization “contrary to law.”²⁴¹ A conviction under this statute leads to automatic naturalization revocation. Notably, allegations of misstatements and omissions during the naturalization process are also frequently used in the denaturalization context to allege that naturalization was acquired “contrary to law.”²⁴² As in the citizenship denial context, the facts at issue in revocation hearings often relate to events that took place decades prior, and applicants offered the allegedly false statements in response to vague and overbroad questions.²⁴³

Howard-Hassman & Margaret Walton-Roberts eds., 2015); Diana Stancy Correll, *DOJ Moves to Rescind Naturalized US Citizenship of Chicago Man Who Provided Support to Terrorists*, WASH. EXAMINER (July 3, 2018), <https://www.washingtonexaminer.com/news/doj-moves-to-rescind-naturalized-us-citizenship-of-chicago-man-who-provided-support-to-terrorists> [https://perma.cc/R4SZ-RSPL] (“The [U.S.] will use every available law enforcement tool to combat terrorism,” Acting Associate Attorney General Jesse Panuccio said in a statement . . . ‘Civil denaturalization is thus one important tool in our anti-terrorism efforts,’ he added.”).

- [https://perma.cc/R4SZ-RSPL] (“The [U.S.] will use every available law enforcement tool to combat terrorism,” Acting Associate Attorney General Jesse Panuccio said in a statement . . . ‘Civil denaturalization is thus one important tool in our anti-terrorism efforts,’ he added.”).
240. Seth Freed Wessler, *Is Denaturalization the Next Front in the Trump Administration’s War on Immigration?*, N.Y. TIMES MAG. (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/magazine/naturalized-citizenship-immigration-trump.html> [https://perma.cc/AX6G-5Q3E] (outlining the rise in denaturalization cases since the end of the Obama Administration, when DHS planned to refer 120 cases to face federal charges, to the Trump Administration’s present desire to refer 1600 individuals to the Justice Department to revocation hearings). In this administration the agency has “referred 167 cases to the Justice Department for civil charges, nine of which have already led to denaturalization.” *Id.* As ICE expands the amount of files under review, the “total number of files under scrutiny” amounts “to more than one million.” *Id.* See also, Anna Giaritelli, *Homeland Security Will Strip Citizenship From Naturalized Americans Who Lied on Their Applications*, WASH. EXAMINER (June 13, 2018), <https://www.washingtonexaminer.com/news/homeland-security-will-strip-citizenship-from-naturalized-americans-who-lied-on-their-applications> [https://perma.cc/G98W-B8D] (noting that USCIS “has begun hiring dozens of lawyers and immigration officers to staff the forthcoming USCIS office in Los Angeles . . . to review and initiate the civil denaturalization process against individuals who had been ordered removed and intentionally used multiple identities in order to defraud the government and the American people to obtain citizenship”).
241. 18 U.S.C. § 1425(a).
242. *Maslenjak v. United States*, 137 S. Ct. 1918, 1923 (2017) (discussing revocation where applicant lied about husband’s service in Bosnian Serbian Army); see also Wessler, *supra* note 240 (describing the civil case against Shorab Hussain who is charged with intentionally misspelling his name, by one letter, to alter his identity and naturalize after he had a final order of removal issued against him). Additionally, Wessler describes the case against Norma Borgona, a 64 year-old grandmother, where the Office of Immigration Litigation (OIL) claimed Borgona “should have alerted U.S.C.I.S.” to her role in an ongoing crime she plead guilty to four years after she naturalized, “even though it is plausible she may not have been aware, at that point, that she was participating in a crime.”
243. See Teo Armus, *Virginia Man Accused of Human Rights Abuses Charged With Lying on Citizenship Form*, WASH. POST (Aug. 18, 2018), <https://www.washingtonpost.com/local/public->

In *Maslenjak v. United States*,²⁴⁴ the Supreme Court examined how false testimony could be used to denaturalize a citizen, holding that the false testimony must have “justified denying naturalization or would predictably have led to other facts warranting that result.”²⁴⁵ In *Maslenjak*, the petitioner had lied about her husband’s service in the Bosnian Serbian Army during the Bosnian Civil War. The Court questioned whether this fact, even if properly revealed, would have prevented Ms. Maslenjak’s naturalization.²⁴⁶ The Court required a causal relationship between the false testimony and the procurement of citizenship, reigning in potentially unbridled prosecutorial discretion.²⁴⁷ Still, criminal prosecutions of illegal procurement of naturalization are on the rise, vulnerable to the same discriminatory bias in investigation and prosecution as naturalization denials.²⁴⁸

Using inconsistencies, omissions, and immaterial misstatements to deny or revoke immigration benefits impacts immigrants at every stage of the process—from entry visa procurement to attaining legal permanent residence to gaining and keeping naturalized status. Whether at a consular interview in their home county, before a Border Patrol agent at a point of entry, or with a USCIS adjudicator at an adjustment interview, U.S. officials question and investigate at their personal discretion. The more one is questioned at these stages, the more likely she is to omit or misstate information. Any finding of willful misrepresentation or doubts about an applicant’s credibility may result in a denial.

Whether looking at the earliest stages of an immigrant’s admission, adjustment to permanent residence, or naturalization, an aspiring American’s fate rests in an administrative review process governed by personal discretion vulnerable to racial animus. While federal courts can review naturalization denials in limited instances, there is no judicial review for those denied visas and only

safety/virginia-man-accused-of-human-rights-abuses-charged-with-lying-on-citizenship-form/2018/08/18/54094660-a2f1-11e8-83d2-70203b8d7b44_story.html?utm_term=.fd73d3c6a572 [https://perma.cc/XA2F-7KWX] (“Prosecutors said that Negussie failed to disclose that he had committed a crime or offense for which he had never been arrested, another question on the application for citizenship. He also allegedly lied about having never provided false or misleading information to immigration officials while gaining entry to and benefits in the United States.”).

244. 137 S. Ct. 1918 (2017).

245. *Id.* at 1923.

246. *Id.*

247. *Id.* at 1926–27. In the naturalization denial context, applicants remain unprotected by the *Maslenjak* limitations as even immaterial omissions can lead to citizenship denial.

248. See Wessler, *supra* note 240 (“From 2004 to 2016, denaturalization cases filed by the [Office of Immigration Litigation] and by United States attorneys have averaged 46 each year. In each of the last two years, prosecutors filed nearly twice that many cases.”).

limited redress for those denied permanent residence status. For many, citizenship is foreclosed because of bias-laden policies and discretionary decisions long before they even reach naturalization's gates. And unfortunately, even in the naturalization review process, judicial checks on unbridled administrative authority are often too sparse to identify and correct adjudicator bias. When courts do correct discriminatory behavior, it will come far too late for many aspiring Americans because our country's face will have already been carefully shaped to exclude them and their future generations.

Exhibit D



Cleopatra Restaurant
 Islamic Book Store
 Ramalla Cafe
 Meena House Cafe
 Arabesque Arab Cafe

Al Firdous
 Trespure Islam
 House of knowledge
 Islam Fashion
 Al Qaraween Islamic Books

Ya Leil Ya Eien
 Bay Ridge Int'l Cafe
 Zahran
 6M Hair Stylists
 Mazza Plaza
 Karam Restaurant

MAPPING MUSLIMS: NYPD Spying and its Impact on American Muslims



About the Authors

The Muslim American Civil Liberties Coalition (MACLC) is a New York-based coalition of citizens, community and faith leaders, organizers, advocates, attorneys, and organizations. MACLC aims to give voice to absent perspectives on issues of national security, counterterrorism, law enforcement, and civil rights, especially as they impact Muslim communities in post-9/11 New York City. MACLC first formed in response to the publication of the New York City Police Department’s policy report entitled *“Radicalization In The West: The Homegrown Threat.”* The group aimed to engage the NYPD in a constructive dialogue to challenge the report’s false assumptions and harmful conclusions. MACLC met on three occasions with Commissioner Raymond Kelly and the authors of the NYPD Report, Mitch Silber and Arvin Bhatt, to register concerns and delineate flaws within the NYPD Report. In response to MACLC’s efforts, the Department only issued a clarification but did not disavow the report’s findings. The 2012 reporting on the NYPD surveillance program has essentially confirmed what MACLC had warned about in 2007 and 2008, and has led MACLC to join community leaders, elected officials, and other civil rights groups in calls for oversight, accountability and transparency. MACLC has also continued to seek to constructively engage with the NYPD. To that end, the Coalition has issued an invitation to Commissioner Kelly to a town-hall meeting to allow him to hear Muslim communities’ concerns with suspicionless surveillance. To date, that invitation has been ignored.

The Creating Law Enforcement Accountability & Responsibility (CLEAR) project is housed at Main Street Legal Services, Inc., the clinical arm of the CUNY School of Law. CLEAR primarily aims to address the legal needs of Muslim, Arab, South Asian, and other communities in the New York City area that are particularly affected by national security and counterterrorism policies and practices. Our work is defined by our relationships with communities and grassroots organizations whose members wish to shape and respond to national security and counterterrorism policies and practices affecting them. CLEAR’s community-oriented approach combines free legal representation with other services directed at satisfying the fuller range of community concerns.

The Asian American Legal Defense and Education Fund (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF focuses on critical issues affecting Asian Americans, including immigrant rights, civic participation and voting rights, economic justice for workers, language access to services, affirmative action, educational equity, housing and environmental justice, and the elimination of anti-Asian violence, police misconduct, and human trafficking.

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Executive Summary

Since 2001, the New York City Police Department (NYPD) has established a secret surveillance program that has mapped, monitored and analyzed American Muslim daily life throughout New York City, and even its surrounding states. In 2011, the unveiling of this program by the Associated Press (AP) and other journalists¹ who had obtained leaked internal NYPD documents led to an outcry from public officials, civil rights activists, American Muslim religious leaders, and members of the public. Protesters and advocates held that such racial and religious profiling was not only an example of ineffective policing and wasteful spending of taxpayer dollars, but it also marginalized and criminalized a broad segment of American Muslims. Almost a year later, in August 2012, the Chief of the NYPD Intelligence Division, Lt. Paul Galati admitted during sworn testimony that in the six years of his tenure, the unit tasked with monitoring American Muslim life had not yielded a single criminal lead.²

Proponents of the sprawling surveillance enterprise have argued that, regardless of its inefficacy, mere spying on a community is harmless because it is clandestine and that those who are targeted should have nothing to fear, if they have nothing to hide. Our findings, based on an unprecedented number of candid interviews with American Muslim community members, paint a radically different picture. We have found that surveillance of Muslims' quotidian activities has created a pervasive climate of fear and suspicion, encroaching upon every aspect of individual and community life. Surveillance has chilled constitutionally protected rights—curtailing religious practice, censoring speech and stunting political organizing. Every one of our interviewees noted that they were negatively affected by surveillance in some way - whether it was by reducing their political or religious expression, altering the way they exercised those rights (through clarifications, precautions, or avoiding certain interlocutors), or in experiencing social and familial pressures to reduce their activism. Additionally, surveillance has severed the trust that should exist between the police department and the communities it is charged with protecting.

Section One of the findings highlights the impact of NYPD surveillance on religious life and expression. Interviewees felt that the NYPD's spotlight on American Muslims' practice of their faith, their degree of religiosity and their places of worship disrupted and suppressed their ability to practice freely. Many also indicated that within heterogeneous Muslim communities, this has resulted in the suppression of certain *practices* of Islam more than others. Interviews also highlighted the atmosphere of tension, mistrust and suspicion that permeates Muslim religious places – which the NYPD has infiltrated with informants and undercover agents, deeming them “hot spots.” These law enforcement policies have deeply affected the way Muslim faith is experienced and practiced in New York City.

Section Two documents how NYPD surveillance has chilled American Muslims' freedom of speech. Interviewees noted a striking self-censorship of political speech and activism. Conversations relating to foreign policy, civil rights and activism are all deemed off-limits as interviewees fear such conversations would draw greater NYPD scrutiny. This same fear has deterred mobilization around Muslim civil rights issues, and quelled demands for law enforcement accountability. Parents discourage their children from being active in Muslim student groups, protests, or other activism, believing that these activities would threaten to expose them to government scrutiny. Surveillance has also led to a qualitative shift in the way individuals joke, the types of metaphors they use, and even the sort of coffee house chatter in which they engage.

¹ Long-time police reporter and columnist Leonard Levitt also obtained many of the same documents, and published some of them in columns available on his website, www.nypdconfidential.com.

² *Handschu v. Special Servs. Div.*, No. 71CIV.2203, Galati Dep. 128-129 (June 28, 2012), available at http://www.nyclu.org/files/releases/Handschu_Galati_6.28.12.pdf.

Section Three turns to the communal and social consequences of surveillance. As American Muslims learn that members of their own communities are recruited as informants or undercover officers to spy on their communities, an atmosphere of mistrust has settled in. Interviewees unanimously observed that everyone scrutinizes everyone, noting particular hesitation with regards to new faces in the community, or converts to Islam. Many interviewees admitted to shunning individuals who behaved differently, awkwardly, or even those who showed interest in political topics or in exploring Islam. Similarly, some described an aversion to those who appeared overtly religious or political, because they were assumed to be more likely targets of surveillance. Finally, in addition to suspicion within the American Muslim community, the section outlines consequences of NYPD scrutiny on American Muslim communities' relationships with non-Muslims. American Muslims fear that non-Muslim Americans will view them with suspicion because law enforcement has branded them a population "of concern" – work or school relationships have suffered as a result, and Muslims' political marginalization has been compounded.

Section Four explores the distinct harm the NYPD surveillance program has had on the department's relationship with American Muslims. An inability to trust their local police is deeply harmful to American Muslims, many of whom have worked hard since September 11 to develop positive relationships and constructive dialogue with their local precincts as well as the NYPD brass. Interviewees noted deep apprehension of the NYPD's intentions and practices towards them. This has trickled into the day-to-day interactions with beat-police officers, whether it is hesitation about filing stolen phone complaints, asking an officer for directions, or reporting hate crimes. Muslim institutions have similarly felt compelled to distance themselves from the NYPD. Interviewees noted that because the NYPD has blurred distinctions between its community affairs divisions, its precinct-level law enforcement, and intelligence gathering, American Muslim leaders' duties towards their communities require a more cautious approach with the NYPD.

Section Five turns to the impact of NYPD surveillance on speech, religiosity and community dynamics on college campuses. College students are afraid to discuss politics, civil rights issues, or international affairs within their student organizations and in their classrooms. Professors have described this chilling of student life as "devastating" to the student experience. By chilling students' propensity to engage in activism during their formative college years, surveillance is deterring a generation of American Muslims from developing their leadership skills and mobilizing for social causes. The potential long-term effects of this phenomenon on those students' communities has yet to be fully grasped.

This report concludes with some key recommendations, many of which echo those already articulated by many American Muslim and civil rights advocates: The need for meaningful oversight, transparency, and accountability when it comes to the NYPD has never been greater.

Methodology

In response to growing concerns about the ability of American Muslims to enjoy their constitutional freedoms, the Muslim American Civil Liberties Coalition (MACCLC) tasked two of its partner organizations, the Creating Law Enforcement Accountability & Responsibility (CLEAR) project and the Asian American Legal Defense and Education Fund (AALDEF), to explore and document the effects of the NYPD's surveillance practices on the ability of American Muslims to speak without restriction, practice religion, associate freely and simply go about daily life.

To identify and document these impacts reliably, CLEAR and AALDEF interviewed 57 American Muslims in New York City.³ In identifying interviewees as well as verifying our findings, we drew on our respective organizations', as well as MACCLC's member organizations' knowledge and experience working within affected communities. We spoke with Muslim religious figures, youth, business owners, mosque-goers, professionals, and law enforcement officers, including former NYPD Intelligence Division employees. Many of our interviewees' mosques, businesses, student groups, and neighborhoods had been directly mentioned in leaked NYPD Intelligence Division documents. We told all interviewees that our research aims to document the impacts of the NYPD surveillance program on them and their community. All were given the option of being interviewed anonymously. The overwhelming majority of our interviewees agreed to being interviewed on condition of anonymity, some on the further condition that we not disclose even generic information about them, including their class year, college, or country of origin. This request was as common for young students with foreign-born parents as it was for well-established and affluent young professionals, and even civil rights attorneys. To honor these concerns, we used aliases for those interviewees who requested to remain anonymous, and have marked names with an asterisk whenever aliases were used. In addition, we have scrubbed details that might identify a particular mosque or Muslim students' association, to respect the privacy of other members whom we have not necessarily interviewed but whose interests are implicated in the representation of their community or sentiments.

We have grouped accounts according to the major areas of impact – religious life, speech, community life, relationships with law enforcement, and education – to display how NYPD surveillance has permeated every layer of American Muslim life. The following pages present a unique and unprecedented collection of the stories of those directly impacted, in their own words.

³ Two interviewees were from outside New York City, members of mosques that the NYPD had surveilled in Long Island and in New Jersey.

PART ONE. Background: Mapping & Monitoring American Muslims

In the years after 9/11, the NYPD Intelligence Division took advantage of the climate of “public tolerance” for aggressive police practices⁴ and began systematically spying on American Muslim concentrations throughout New York City and its surrounding metropolitan area. A secret unit within the Intelligence Division mapped and spied on the residential, social, and business landscape of American Muslims. The unit, called the Demographics Unit – which has since been renamed the “Zone Assessments Unit” – focused explicitly on twenty-eight listed “ancestries of interest,” including almost every Muslim-majority country in the world, along with “American Black Muslims.”⁵

In August of 2011, the Associated Press revealed the NYPD’s surveillance program in a series of Pulitzer Prize-winning investigative reports. Though the post-September 11 expansion of the NYPD’s intelligence gathering was well known,⁶ the leaked documents first described the nuts and bolts of the programs and the depth of the NYPD’s reach into American Muslim daily life. The reporting also highlighted the NYPD’s unique ties with the Central Intelligence Agency (CIA), as the modern Intelligence Division was built by a former CIA official, was further developed by another CIA official working at the NYPD while on leave from the Agency, and until 2012 even employed a high-level clandestine CIA operative.⁷

Sadly, race and dissent-based surveillance has a long lineage in the NYPD. Police surveillance of dissident and minority groups can be traced as far back as 1904, when the NYPD created an “Italian Squad” to monitor the practices and activities of Italian immigrants.⁸ In 1906 the NYPD had an “anarchist squad” which focused on harassing anarchists and labor activists.⁹ The NYPD’s surveillance of political activists of various kinds – communists, anarchists, labor activists, and civil rights activists – continued through the 1930s and the 1960s, under various names: the Bomb Squad, the New York Radical Bureau, and the Bureau of Special Services (BOSS).¹⁰

“I NEVER MADE A LEAD FROM THE RHETORIC THAT CAME FROM A DEMOGRAPHICS REPORT, AND I’M HERE SINCE 2006.”

Thomas Galati,
Commanding Officer of
the Intelligence Division,
June 2012.

⁴ Adam Goldman & Matt Apuzzo, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, ASSOCIATED PRESS (Aug. 23, 2011), available at <http://www.ap.org/Content/AP-in-the-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas>. [hereinafter “AP Aug. 23, 2011 Article”].

⁵ N.Y. POLICE DEP’T., *THE DEMOGRAPHICS UNIT* (2006), available at <http://wid.ap.org/documents/nypd-demo.pdf>; See also *Handschu v. Special Servs. Div.*, No. 71CIV.2203, Galati Dep. 25-27 (June 28, 2012), available at http://www.nyclu.org/files/releases/Handschu_Galati_6.28.12.pdf.

⁶ See, for example, CHRISTOPHER DICKEY, *SECURING THE CITY* (Simon & Schuster 2009). In addition to publicly available information, CLEAR and AALDEF clients, and communities that MACLC works with have long known about the NYPD Intelligence Division’s policies through their own experiences.

⁷ AP Aug. 23, 2011 Article; Adam Goldman & Matt Apuzzo, *CIA to Pull Officer from NYPD After Internal Probe*, Associated Press (Jan. 26, 2012), available at <http://www.ap.org/Content/AP-In-The-News/2012/CIA-to-pull-officer-from-NYPD-after-internal-probe>.

⁸ N.Y. CIVIL LIBERTIES UNION, *POLICE SURVEILLANCE OF POLITICAL ACTIVITY - THE HISTORY AND CURRENT STATE OF THE HANDSCHU DECREE* (2003) available at <http://www.nyclu.org/content/testimony-police-surveillance-of-political-activity-history-and-current-state-of-handschu-de>.

⁹ *Id.* (citing FRANK DONNER, *PROTECTORS OF PRIVILEGE, RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA* (1990)).

¹⁰ *Id.*



A history of NYPD mapping: In 1919, the NYPD and State Police created “ethnic maps” of New York City, identifying neighborhoods in which certain immigrants groups and their offspring predominated, with the aim to investigate socialists, communists or anarchists.

BOSS notoriously focused its investigations on dissident groups and individuals, including the NAACP, the American Civil Liberties Union, the Fifth Avenue Peace Parade Committee, and the Lower East Side Mobilization for Peace Action, compiling detailed profiles of organizations and individuals. BOSS informers and undercover agents were required to submit detailed reports including specific information on “future plans, unlawful activities, trouble makers, leaflets, weapons, speakers, and statements.”¹¹

NYPD surveillance of political groups is ongoing.¹² But after September 11, 2001, the NYPD fixed its attention on American Muslims. While the methods are reminiscent of prior incarnations of NYPD spying, here the police uniquely focused on religion and religious practice. For example, the NYPD took special interest in signs of Muslim religiosity and actively implemented a surveillance program guided by a deeply flawed theory of Muslim “radicalization.” As a result, NYPD agents documented how many times a day Muslim students prayed during a university whitewater rafting trip,¹³ which Egyptian businesses shut their doors for daily prayers,¹⁴ which restaurants played Al-Jazeera, and which Newark businesses sold halal products and alcohol.¹⁵ Not only did the NYPD

¹¹ *Id.*

¹² N.Y. POLICE DEP’T, DEPUTY COMMISSIONER’S BRIEFING (APR. 25, 2008), available at <http://hosted.ap.org/specials/interactives/documents/nypd/dci-briefing-04252008.pdf>.

¹³ N.Y. POLICE DEP’T, WEEKLY MSA REPORT (2006), available at <http://hosted.ap.org/specials/interactives/documents/nypd-msa-report.pdf>.

¹⁴ N.Y. POLICE DEP’T, EGYPTIAN LOCATIONS OF INTEREST REPORT (July 7, 2006), available at <http://hosted.ap.org/specials/interactives/documents/nypd/nypd-egypt.pdf>.

¹⁵ N.Y. POLICE DEP’T, NEWARK, NEW JERSEY DEMOGRAPHICS REPORT (Sept. 25, 2007), available at http://hosted.ap.org/specials/interactives/documents/nypd/nypd_newark.pdf.

SECRET SURVEILLANCE: IS IT EFFECTIVE POLICING?

The NYPD has frequently justified the broad based surveillance of American Muslim communities by claiming its effectiveness in thwarting terrorist plots. In the wake of the Associated Press reports, an NYPD Deputy Commissioner, Paul Browne, credited the NYPD Intelligence Division with thwarting terrorist plots. New York City officials have asserted that surveillance has thwarted 14 terrorist plots.^A

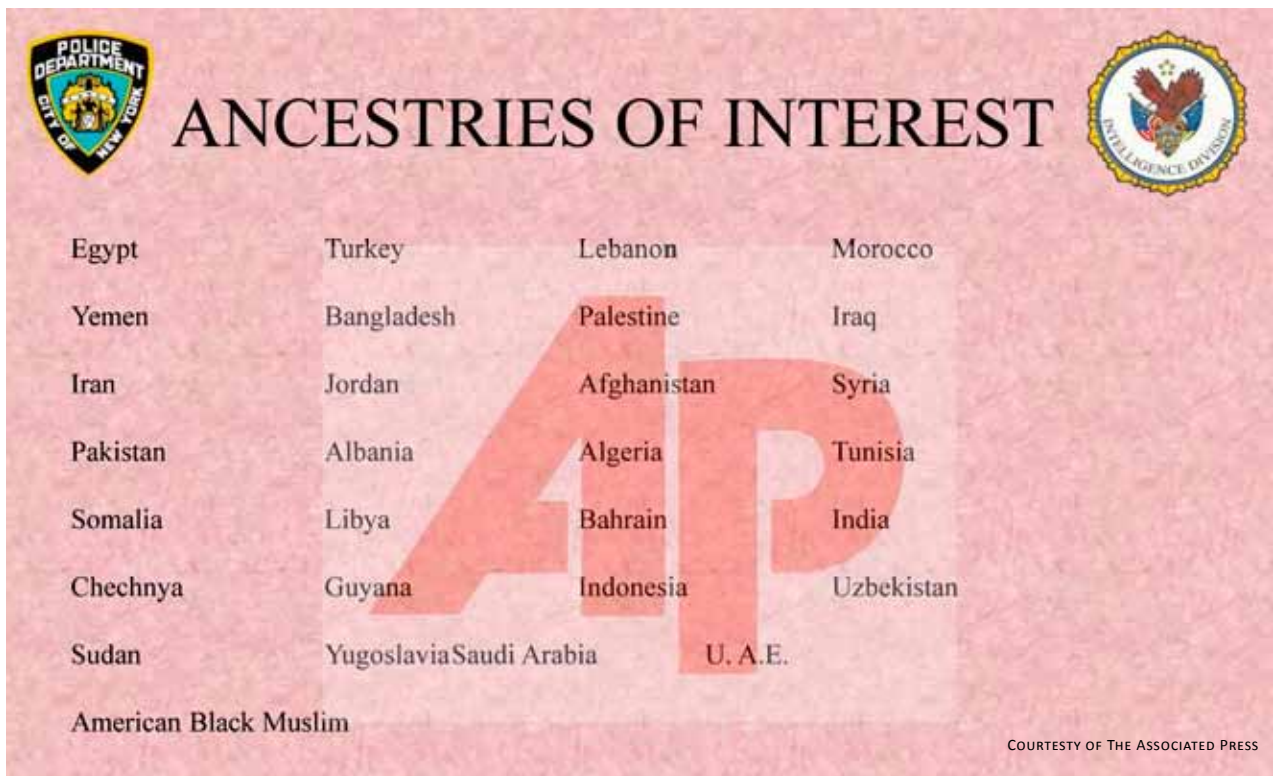
On closer scrutiny, however, such claims of the program's effectiveness seem to lack any factual basis. Investigative reporters have debunked the notion that any plots that the NYPD "helped thwart" were a result of its spying activities. In reality, of the fourteen plots listed on the NYPD website only three were actual potential terrorist plots, and not one was prevented by the NYPD. Further, the other cases either involved government informants who played a dominant and enabling role in the plot, were so lacking in credibility that federal officials declined to bring charges, or were instances where plots were abandoned.^B

Nor has the NYPD shown that its secret surveillance program has any role to play in yielding leads to potential criminal activity. In fact, the Intelligence Division's documents themselves show an emphasis on separating intelligence gathering from criminal investigation. Our interviews with ex-NYPD intelligence or counterterrorism officials confirmed that the Demographics Unit's efforts to spy, map, and document American Muslim life were unrelated to active investigations. Correspondingly, Assistant Chief of the Intelligence Unit, Thomas Galati, testified that the Demographics Unit never led to a single lead or investigation.^C Undercover spying and the mapping of communities did not play any tangible role in thwarting terrorist attacks. Rather, as our findings highlight, surveillance has stifled constitutionally protected activity and destroyed trust between American Muslim communities and the agencies charged with protecting them.

^A Press Release, N.Y. Police Dep't., New York Times is Wrong: NYPD Lawfully Thwarts Terror & Suppresses Violence (March 18, 2012), *available at* http://www.nyc.gov/html/nypd/html/pr/pr_2012_03_18_ny_times_is_wrong.shtml.

^B Justin Elliott, *Fact Check: How the NYPD Overstated Its Counterterrorism Record*, PROPUBLICA.ORG (July 10, 2012).

^C Handschu v. Special Servs. Div., No. 71CIV.2203, Galati Dep. 128-129 (June 28, 2012), *available at* http://www.nyclu.org/files/releases/Handschu_Galati_6.28.12.pdf. In fact, the Demographic Unit's own documents indicate that intelligence gathering is deliberately kept separate from investigations.



single out American Muslims for surveillance, but officers found every facet of American Muslim religiosity and outward practice of Islam – whether Sunni or Shi’a – worthy of exceptional scrutiny. Further, where the NYPD was spying in Arab neighborhoods with sizeable populations of Syrian Jews and Egyptian Christians, the intelligence unit explicitly focused on the Muslim populations.¹⁶

Thus, NYPD sketched a detailed picture of the American Muslim community throughout New York City’s five boroughs and beyond, in New Jersey, Connecticut and Pennsylvania. They sent undercover officers, whom they called “rakers,” into identified neighborhoods to isolate what the NYPD called “hot-spots:” restaurants, cafes, halal meat shops and hookah bars. Capitalizing on their ability to recruit a diverse force with diverse language capabilities, the NYPD was able to send officers with various ethnic and linguistic backgrounds into communities, matching them accordingly.¹⁷ Undercover Pakistani officers were sent into Pakistani communities and Arabic-speaking officers were dispatched into the Egyptian community to “listen to neighborhood gossip” and get an overall “feel for the community.”¹⁸ They were instructed to visit schools and interact with business owners and patrons to “gauge sentiment.”¹⁹ They identified locations where community members socialize (coffee shops, hookah bars) and participated in community cricket matches and student trips.²⁰ Blending into every facet of their assigned neighborhoods, rakers discreetly set-up “listening posts” and observed

¹⁶ N.Y. POLICE DEP’T, SYRIAN LOCATIONS OF CONCERN REPORT (date unknown) *available at* <http://hosted.ap.org/specials/interactives/documents/nypd/nypd-syria.pdf>.

¹⁷ Handschu v. Special Servs. Div., No. 71CIV.2203, Galati Dep. 112 (June 28, 2012), *available at* http://www.nyclu.org/files/releases/Handschu_Galati_6.28.12.pdf; *see also* N.Y. POLICE DEP’T, THE DEMOGRAPHICS UNIT (2006), *available at* <http://wid.ap.org/documents/nypd-demo.pdf>.

¹⁸ N.Y. POLICE DEP’T, SYRIAN LOCATIONS OF CONCERN REPORT (date unknown) *available at* <http://hosted.ap.org/specials/interactives/documents/nypd/nypd-syria.pdf>.

¹⁹ Handschu v. Special Servs. Div., No. 71CIV.2203, Galati Dep. 68-69 (June 28, 2012), *available at* http://www.nyclu.org/files/releases/Handschu_Galati_6.28.12.pdf.

²⁰ Handschu v. Special Servs. Div., No. 71CIV.2203, Galati Dep. 104-105 (June 28, 2012), *available at* http://www.nyclu.org/files/releases/Handschu_Galati_6.28.12.pdf, *see also*, Matt Apuzzo & Adam Goldman, *Inside the spy unit that NYPD says doesn’t exist*, ASSOCIATED PRESS (Aug. 31, 2011).

“EMPHASIS IS ON INTELLIGENCE COLLECTION, NOT CRIMINAL INVESTIGATION.”

NYPD Intelligence Division.

Muslim community members and employ a tactic dubbed “create and capture,” where the informant would try to start a conversation about terrorism or another controversial topic, record the response elicited, and share it with the NYPD.

Investigative reporters gave the public documentation proving the existence and sweep of a secret intelligence program that communities had long suspected they were dealing with in their own experiences. Still, individuals, organizations, mosques and businesses throughout New York were shocked to see their names in classified NYPD documents. The geographical scope was expansive: the NYPD monitored Muslim Students Associations from Philadelphia to New Haven; rakers had visited, observed and documented American Muslim businesses from Newark to Queens; and mosque crawlers had spied and reported on sermons and post-Friday prayer conversations in more than 250 mosques.²² The NYPD was monitoring even its closest partners in anti-terrorism work, including imams who frequently appeared at the Mayor’s side.²³

The leaked documents also confirmed one of the communities’ worst fears: an extensive collaboration between the precinct-level police doing beat work and the Intelligence Division, as the Intelligence Division mined precincts’ “local knowledge” of the communities they are meant to serve and to protect.²⁴ For example, the Citywide Debriefing Team, a unit within the Intelligence Division, was tasked with going to precincts or jails to question – or “debrief,” in NYPD terms – arrestees of Muslim or Arab background.²⁵ As CLEAR and AALDEF clients’ experiences confirmed, upon being taken to the precinct – for a traffic violation, or even for filing an identity theft complaint – individuals have been met by officers or detectives from another unit and questioned about their community, and their religious or political beliefs.

²¹ Handschu v. Special Servs. Div., No. 71CIV.2203, Galati Dep. 101 (June 28, 2012), available at http://www.nyclu.org/files/releases/Handschu_Galati_6.28.12.pdf.

²² Adam Goldman & Matt Apuzzo, *Documents Show NY Police Watched Devout Muslims*, ASSOCIATED PRESS (Sept. 6, 2011), available at <http://www.ap.org/Content/AP-In-The-News/2011/Documents-show-NY-police-watched-devout-Muslims>.

²³ Eileen Sullivan, *NYPD Spied on City’s Muslim Anti-Terror Partners*, ASSOCIATED PRESS (Oct. 6, 2011) available at <http://www.ap.org/Content/AP-In-The-News/2011/NYPD-spied-on-citys-Muslim-anti-terror-partners>.

²⁴ N.Y. POLICE DEP’T, INTELLIGENCE STRATEGY REPORT, at 3 (May 15, 2006) (noting that intelligence units should “utilize precinct personnel to gain a better understanding of the Shi’a communities within their command”).

²⁵ Adam Goldman & Matt Apuzzo, *NYPD Eyed US Citizens In Intel Efforts*, ASSOCIATED PRESS (Sept. 22, 2011), available at <http://www.ap.org/Content/AP-In-The-News/2011/NYPD-eyed-US-citizens-in-intel-effort>; Leonard Levitt, *The Spoils of Spying*, NYPD CONFIDENTIAL (Jan. 8, 2012), available at <http://nypdconfidential.com/columns/2012/120109.html>. In addition, several CLEAR clients have noted that a traffic stop, or an arrest, often results in questioning about their religious beliefs, their acquaintances, and even recruitment as informants. Shamiur Rahman, the informant who publicly acknowledged that he had been working for the NYPD Intelligence Division was also initially recruited after being arrested on marijuana possession charges. see Matt Apuzzo & Eileen Sullivan, *Informant: The NYPD paid me to “bait” Muslims*, ASSOCIATED PRESS (Oct. 23, 2012), available at <http://bigstory.ap.org/article/informant-nypd-paid-me-bait-muslims>.

PART TWO: FINDINGS

SECTION ONE: SUPPRESSING RELIGION

It's as if the law says: the more Muslim you are, the more trouble you can be, so decrease your Islam.

– Sari*, 19, Brooklyn College.

The NYPD's emphasis on indicators of religiosity as hallmarks of radicalization, and on religious spaces as generators of radicalization, has put the very practice of religion at the center of the NYPD's counterterrorism policing. The perpetual and palpable scrutiny has deeply disrupted New York Muslims' ability to practice their faith. This becomes apparent in every facet of religious identity – from how one chooses to dress, to what types of religious activities one engages in, to where one prays, how one interacts with other members of his or her faith, and even what *type* of Islam American Muslims feel comfortable practicing.

This section traces the different ways in which Muslim religious life is affected by Muslims' awareness of surveillance and of the suspicion that the NYPD directs towards Muslims and Islam. In the aggregate, it becomes clear that law enforcement policies have deeply affected the way Muslim faith is experienced and practiced in New York City. This raises grave concerns about the erosion of the right to practice one's religion freely and without meddling by the State.

1. The Mosque: From Sanctuary to "Hot Spot"

The whole area around [my mosque] is now "tainted" by the idea that it is a hot spot.

- Tahanie Aboushi, lawyer.

They [the NYPD] don't have that sense of sanctity coming into our places of worship.

- Ali Naquvi, community organizer.

Places of worship are the prime focus of the NYPD Intelligence Division's attention. The Demographics Unit mapped, photographed or infiltrated at least 250 mosques in the New York City and its surrounding areas. The NYPD deemed these places of worship "hot spots," with any activity in or around the mosques meriting surveillance.

As a result, attendance at mosque – a religious duty for many Muslims – has become tantamount to placing oneself on law enforcement's radar. The often visible presence of NYPD surveillance at many mosques has founded an assumption within the American Muslim community that every mosque in New York City is subject to some form of surveillance.

Everyone in the community knows that our mosque is being surveilled.... A few years back they used to just park this undercover car outside the mosque. They would just watch people walk in and out. - Amira*, 22, Sunday school teacher.

There are always parked, unmarked cars outside of mosques. - Imam Khalil*, 31, Queens.

“[GOVERNMENT MAY NOT] INFLUENCE A PERSON TO ... REMAIN AWAY FROM CHURCH AGAINST HIS WILL”

United States Supreme Court, *Everson v. Board of Education of the Township of Ewing*.

RELIGION AS “RADICALIZING”

In a 2006 policy report entitled *Radicalization in the West: The Homegrown Threat*, the NYPD presented its theory of how individuals become “radicalized.” The report described many of the spaces where Muslims congregate in their daily life as “radicalization incubators” and “venues that provide extremist fodder.” These included mosques, cafes, cab driver hangouts, and student associations.

The report also highlighted “typical signatures” that individuals on a purported trajectory towards violence adopt: wearing traditional Islamic clothing, growing a beard, becoming involved in social activism and community issues, even giving up drinking, cigarettes and gambling. Thus, in addition to social spaces, signs of community mobilization and religious practice were all explicitly designated as potential signs of radicalization and meriting close police surveillance.

The NYPD’s *Radicalization in the West* report cast a shadow of suspicion on a large swath of Muslim life. The Muslim American Civil Liberties (MACLC) first convened to respond to this report, noting its troublesome implications for racial and religious profiling.[^] After several meetings with various NYPD officials, the NYPD appended a “clarification” to the published document, noting that the report is not intended to be “policy prescriptive.”[^] Years later, with the publication of the leaked documents, it has become evident that the NYPD’s flawed radicalization theory was in fact a blueprint for a policy of profiling and suspicionless surveillance.

[^] See MACLC, Community Statement to NYPD Radicalization Report (Nov. 23, 2007), *available at* <http://maclc1.files.wordpress.com/2008/09/communitystatementonnypdreport.pdf>.

[^] Mitchell D. Silber & Arvin Bhatt, NYPD Intelligence Div., *Radicalization in the West: The Homegrown Threat* (2007).

Religious leaders noted that congregants are acutely aware of the surveillance of their mosques, and may be chilled from attending services.

Not everyone has the same level of *imaan* [faith]. They'll get discouraged. People tell me 'I'll make my *salaah* [prayer] at home.' They mention the [NYPD] camera right outside the mosque as the reason. - Imam Mustapha*, Brooklyn.

One former officer in the NYPD's Intelligence Division said he took it upon himself to explain to his unit the basic tenets of Islam, including the emphasis on prayer in groups and congregation on Fridays, because he realized that the intelligence unit was viewing with undue suspicion large groups of men congregating outside a mosque after Friday prayers. He continued:

[An NYPD unit] would park outside every mosque listening to what's going on. One time they came to my mosque. I told them you're not going to find anything there; they're all doctors, engineers. I don't know exactly what they were looking for..... Some people stopped going to the mosque as a result, and complained to me. It's obvious it was there. - Yousuf*, former Intelligence Division officer.

For many, the risk of subjecting oneself to being featured in a police file is reason enough to cease attending the mosque or praying with other Muslims:

The week of the news [referring to Associated Press investigations], the students wouldn't come to the prayer room. They felt they couldn't meet in their own space. The idea of being surveilled – for a 19 or 20 year old – is a terrifying thing. - Amin*, chaplain for a New York City-area college Muslim student group.

This withdrawal is particularly devastating to the more vulnerable members of the community, particularly those who have themselves been subject to more direct forms of NYPD pressure or harassment. Ahsan Samad, a 26-year-old resident of Brooklyn who was visited by two NYPD Intelligence Division detectives and questioned at length about his online activities, commented:

I used to go to the masjid [mosque] quite a lot. That stopped as soon as they [the NYPD] knocked on the door. - Ahsan Samad, 26, Brooklyn resident.

Similarly, another young man who befriended a fellow mosque goer only to find out that his friend was an NYPD undercover responded by severing his relationship with the mosque altogether for a year. He has since returned to the mosque, but refuses to involve himself in the mosque's activities, or to befriend anyone. He just goes to pray, and then promptly leaves, believing that anything more might put him at risk.²⁶

Imams we spoke with felt that their own ability to fulfill their role as spiritual advisors and guidance were hindered

“NO PERSON CAN BE PUNISHED FOR ENTERTAINING OR PROFESSING RELIGIOUS BELIEFS OR DISBELIEFS, FOR CHURCH ATTENDANCE OR NON-ATTENDANCE”.

United States Supreme Court, *Everson v. Board of Education of the Township of Ewing*.

²⁶ Interview with Adam*, 23.

by surveillance. Some noted that they were unable to guarantee confidential consultations in their surveilled spaces. Others noted that they avoided providing one-on-one consultations because they could never be sure that a question posed by a congregant is a sincere one, or whether it is an attempt by an informant to elicit opinions that he or she will then pass on to their handlers.

The relationship of trust and confidentiality between an imam and his congregation is no less sacred than that of pastors, rabbis or others, and those whom they serve. The actions of the NYPD have compromised this sacred relationship. In this day and time when people look to their spiritual leaders for sincere, faith-based guidance in various matters, violation or compromise of the sacred contract of confidential consultation is particularly reprehensible and damaging. It not only weakens the capacity of some Muslim religious leaders to serve as advisors in sensitive matters, but it also compromises their effectiveness as partners in the struggle against extremism. After all, how can a leader give guidance in matters that he or she is hesitant to discuss in any way, for fear of covert monitoring or entrapment? - Imam Al-Hajj Talib ‘Abdur-Rashid, Majlis Ash-Shura (Islamic Leadership Council) of Metropolitan New York.

One imam at a large mosque described a qualitative and quantitative change in the mosque experience, caused by suspicion and fear of surveillance. He noted a definitive decline in demand for activities and overall involvement of members. Now the mosque – the largest one in its community – does not operate at its full potential: “People come, pray and leave.” The congregants no longer plan extracurricular events, Sunday school trips, or other activities that transform a mosque into a true community center. This change in activity is especially troubling given that the imam described such activities as among the core functions of the religious institution.²⁷

2. Looking and Acting Muslim

I can't grow my beard, I'll get in trouble. I can't dress like this, I can't talk like that... It's stressful.
- Kaled Refat, 24, New Jersey resident.

Almost all our interviewees noted that appearing Muslim, or appearing to be a certain type of Muslim, invites unwanted attention or surveillance from law enforcement. Outward displays of Muslim identity could include the choice to wear the hijab (headscarf), the *niqab* (full covering), grow a beard, or dress in certain kinds of traditional or Islamic clothing. That surveillance should focus on such details results from the NYPD's radicalization theory, which posits that decisions about dress or appearance are no longer just signifiers of personal, religious choices or cultural identities but rather serve as indicators of “dangerousness.”

There's always been a sense of stereotyping about dress. But now the veil thing has become more than just about being different. It has become charged with suspicion. A hijab or a beard isn't just about being different and not fitting in. But now, it's not just that, it's also that people will see me as prone to violence. - Assia*, interfaith community organizer.

Younger interviewees described how parents have voiced concern about their choices of dress, and how Muslim they look. One Brooklyn College student said that his parents did not want him to go to Muslim Student Association (MSA) events or wear his Muslim hat. Another Queens College student who wears the *niqab*, or face veil, noted that her mother asked her to stop wearing all black because she worried her dress

²⁷ Interview with Sheikh Rafiq*, Imam, Bronx.

NYPD'S RADICALIZATION THEORY: MISLABELING SALAFIS

In its policy paper "*Radicalization in the West*," the NYPD explicitly identified certain routine American Muslim behaviors as suspicious and broadly characterized these behaviors as *Salafi*. The NYPD then claimed that anyone who participates in these *Salafi* behaviors may be exhibiting indicators of "radicalization." The contention is deeply problematic because it broadly associates *Salafism* with radicalization and because it mischaracterizes a set of routine behaviors as necessarily *Salafi*.

Salafism – derived from the Arabic word *Salafa*, which means "what precedes" – refers to a particular methodology of Islamic interpretation and practice. Which particular beliefs and practices fall under this rubric remains the subject of much dispute both within and outside of Muslim communities. Despite complex theological debates, the NYPD Radicalization report broadly declares *Salafism* as a marker of radicalization while providing no factual grounding for such an association. Rather, it lists "typical signatures" of individuals who adopt *Salafism* to include:

- Becoming alienated from one's former life; affiliating with like-minded individuals
- Joining or forming a group of like-minded individuals in a quest to strengthen one's dedication to Salafi Islam
- Giving up cigarettes, drinking, gambling and urban hip-hop gangster clothes
- Wearing traditional Islamic clothing, growing a beard
- Becoming involved in social activism and community issues

One Islamic scholar with whom we spoke, who self-identifies as *Salafi* and who has, as a result, been targeted by the NYPD for surveillance, explained:

Salafism refers to a particular methodology of understanding Islam, and has nothing to do with degrees of religiosity. A *salafi*, simply put, is one who believes that the appropriate form of interpreting Islamic texts looks at the original and earliest writings. As a result, technically, it is possible to be *salafi*, and not have a beard, or not even be pious. *Salafism* also does not correlate with any one political movement, and certainly not any ideology of violence.
- Mohammad Elshinawy, lecturer and teacher, Brooklyn.

By associating a wide range of normal American Muslim behaviors with *Salafism* and in turn associating *Salafism* with radicalization, the NYPD stigmatizes many routine American Muslim practices. Those who identify with *Salafi* Islam are also placed under blanket suspicion without any basis.

The NYPD's assumptions about and attention to *Salafism* are not lost on American Muslims, as one interviewee stated:

When I was on the MSA board, we were two niqabis [women who wear the face-veil] and two brothers with big beards. I've heard from some people that they thought we were *Salafi* - but that's just because we looked the part. Technically, we weren't. But that's how we were labeled and I think that's how the NYPD has labeled us, too. - Asma*, 19, CUNY student.

This meant that scholars affiliated with *Salafi* ideology – even if wrongly so – are also stigmatized and silenced. Many students we interviewed noted a policy at their MSAs of vetting speakers for those who may be perceived as *Salafi*, although they could only venture guesses as to what exactly that might be:

We try to position ourselves by thinking whether the NYPD is going to think the speaker is *Salafi*, or whether the person has training from Saudi, that might give us unwanted attention from the NYPD. - Jamal*, 23, CUNY student.

would draw police scrutiny. In contrast, she noted that her mother was not as concerned about her brother because “he doesn’t necessarily ‘look Muslim.’” An imam at a Brooklyn mosque recounted parents’ attempts to shield their children from the possible consequences of increased religious observance: one family at the mosque prevented their daughter from attending religious events, and another parent worried about his son who had recently become more religious, started growing a beard, and prayed at a certain mosque. The parent felt these choices meant his son would “fit the bill” for surveillance.

Law enforcement scrutiny of outward manifestations of “Muslim” characteristics led some interviewees or their friends to change their appearance and practice of religion.

I’ve seen this emerging again: the number of young women who are not wearing hijab, young men shaving their beard, people changing their names. These decisions are made in part based on psychological trauma that these people are experiencing. - Debbie Almontaser, educator and community organizer.

For some people, this [scrutiny of Muslim characteristics] has made them “water down” Islam, which is really sad. - Asma*, 19, City University of New York (CUNY) student.

Beyond clothing, many interviewees avoid becoming involved in particular Muslim social, religious and political movements, or expressing passion about their faith, for fear that such involvement will draw increased police scrutiny. At a City University of New York (CUNY) Muslim Students’ Association listed in the NYPD documents, two young female students who wear the *niqab* (face veil) felt that other students were concerned about associating with “religious people” like themselves. They expressed feeling ostracized because of the way they look.²⁸

One parent and activist interviewed described her anxiety about the choices her teenage son faces:

He’s already feeling estranged from community and community organizations because the larger world is telling him that these are places, beliefs and ideas not to trust. So he’s naturally not going to gravitate towards those spaces. He would have to consciously decide to go to his school MSA. And if he chooses to make that decision, then I don’t know if that’s a safe space to go to. Maybe he shouldn’t seek support for his religious identity through these institutions. - Assia*, interfaith community organizer.

3. Mistrust of Fellow Congregants and Converts.

It’s not like everybody stopped going to mosque – it’s just that everybody looks around wondering who everyone else is.

- Faisal Hashmi, activist, Queens.

The person I took my shahadah [formally converted] in front of ended up being an informant. I felt disappointed and angry when I found out about that.

- Hassan*, 20, board member of a CUNY MSA.

As Section Three discusses in further detail, suspicion of informants and undercover officers is widespread. This section focuses on the consequences of this phenomenon on religious practice.

²⁸ Interviews with Samia*, 20, and Inas*, 21, CUNY students.

The NYPD's broad-based surveillance of an entire religious community has turned religious spaces, intended to provide a haven for new and old congregants to forge bonds and support networks, into the opposite – a space where interactions have become marred by mutual suspicion. Many former regular mosque-goers have decreased mosque attendance, and those who attend do so to just pray and leave, looking over their shoulders for eavesdropping spies the entire time.

One young woman who is responsible for organizing youth activities in her mosque noted how congregants have internalized the need to self-edit religious Sunday school curriculums.

It's very difficult, it's very hard, you don't know what to say, I have to think twice about the sentences I say just in case someone can come up with a different meaning to what I'm saying.
- Amira*, 22, Sunday school teacher.

Individuals expressing an interest in Islam are viewed with suspicion. Interviewees have noted that they would be concerned by or suspicious of people who "talk really passionately about Islam," or even by non-Muslims who come to the mosque expressing interest in learning about Islam.²⁹

One interviewee who is responsible for mosque security at a Brooklyn mosque noted:

We have to be suspicious of people coming in . . . Sometimes, we start asking people "where are you from, what are you doing?" We've even asked "what masjid [mosque] did you attend before?" That's not a good thing for the masjid. So naturally, members are uncomfortable. - Muhammad*, mosque administrator, Brooklyn

Everybody I see in the mosque, if they act a little abnormal, I always wonder whether they're an informant, or just a regular person. This is really sad: sometimes when we get converts, and they are finding all this interest in Islam, I start wondering if they're an informant. - Amira*, 22, Sunday school teacher.

One is now paranoid about someone becoming Muslim and doing the same thing [becoming an informant]. - Inas*, 20, CUNY student.

Suspicion of fellow congregants makes it difficult to pursue meaningful spiritual development and foster a religious community. New congregants, whether recent converts, new arrivals to the community or former inmates, feel the most marginalized:

If a new person shows up at the mosque, everyone's eyes and ears are on the person.
- Mahmood*, 37, Staten Island.

When new faces come in, there's definitely a sense of "who are you?" - Lana*, 29, Brooklyn Resident.

Such a tense atmosphere in mosques puts at risk the very viability of these religious institutions. Mosques' income and activities are almost entirely membership-dependent. A qualitative change of the mosque experience, resulting in difficulty recruiting new members and reduced or chilled participation by existing members undermines the basic function of this important community institution.

²⁹ Interview with Amira*, 22, Sunday school teacher.

FORMER INMATES

According to internal documents, the NYPD is concerned about “radicalization” in prisons, and has targeted those mosques perceived to have strong connections to prisons, ones that receive many phone calls from prisons, or whose imams also serve as prison chaplains. Conversely, these ties also make some community members suspicious: several of our interviewees noted that former inmates, like other recent converts, are viewed as having a higher likelihood of being potential informants.

Some *masaajid* (mosques) have a lot of people in and out of jail, so I tell the imam to be careful. - Muhammad, mosque administrator, Brooklyn.

The result is that former inmates and recent converts find themselves doubly-victimized. One imam who serves as a chaplain in State prisons described the essential role that community and the mosques play in a former inmate’s reintegration.

It connects them with the outside community. They become Muslim in prison, they have no clue what Islam is in a community setting, in a mosque, Islam as a family. It’s a whole different culture. So when they embrace Islam, they need to have that connection. It gives inmates a kind of hope, something to look forward to when they come out, to continue their education, to find a community, to continue their development, to be moral, upright. We’ve had phenomenal success in integrating former inmates. - Amin Abdul Latif, Imam, Brooklyn.

SECTION TWO: STIFLING SPEECH & ASSOCIATION

Free speech isn't a privilege that Muslims have.

- Ahsan Samad, 26, Brooklyn.

The NYPD premises its surveillance of American Muslims not on suspicious activity, but on their speech and expressive activities. Law enforcement officers focus on markers of expression when choosing whom to monitor and what locations to mark as “hot spots.” The NYPD considers a spectrum of political and religious speech to be “of concern.” Such speech includes mainstream Arabic-language news channels, religious texts and discussions of political figures. NYPD’s Assistant Chief Thomas Galati also testified that merely speaking in certain languages, particularly Urdu and Arabic, could trigger surveillance.³⁰ Ironically, the NYPD also found that discussions about anti-Muslim bias by American Muslims to be “of value.”

American Muslim interviewees stress that the ever-present surveillance chills – or completely silences – their speech whether they are engaging in political debate, commenting on current events, encouraging community mobilization or joking around with friends. Political organizing, civic engagement and activism are among the first casualties of police surveillance. Based on our research and interviews, it is clear that the surveillance program has, in fact, quelled political activism, quieted community spaces and strained interpersonal relationships.

This curtailment of free speech not only implicates individual liberties but also reaches civic debate and the development of an informed electorate. Knowledge of surveillance leads not only to self-censorship on many religious and political topics, but also to an inability to discuss even the surveillance itself, thereby deterring a pivotal constitutional right—the discussion of problematic government policies. The Supreme Court has repeatedly held that speech concerning public affairs is the essence of self-government.³¹ Though Americans, Muslim and non-Muslim alike, rally and organize against expansive surveillance, many American Muslim organizations and individuals hesitate to participate in protests, to lobby, and to speak out.

Even if we know we have rights, we know that they don't apply equally to everyone. - Amira*, 22, Sunday school teacher.

1. Self-Censorship of Political Speech & Activism

We're Arabs, we talk about politics all the time...Politics is all we do! Every coffee shop, it's either Al Jazeera or a soccer game on TV. This new idea that we must be suspicious of those who speak about politics -- something's wrong.

- Linda Sarsour, community organizer.

Both keepers of community spaces and those who visit those spaces feel pressured to censor the discussions going on within their walls. Business owners, mosque leaders and community members alike actively censor conversations, event programming, and internet usage in hopes that avoiding certain political content will keep them and their respective religious and social spaces off the NYPD’s radar.

³⁰ Handschu v. Special Servs. Div., No. 71CIV.2203, Galati Dep. 85-86 (June 28, 2012), available at http://www.nyclu.org/files/releases/Handschu_Galati_6.28.12.pdf; Adam Martin, *NYPD Spying Led to Lunches, Not Leads*, THE ATLANTIC WIRE (August 21, 2012), available at <http://www.theatlanticwire.com/national/2012/08/nypd-spying-led-lunches-not-terror-leads/56008/>.

³¹ See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

THE USE OF THE TERM “JIHAD”

A central concept in Islam, *jihad*, is translated from Arabic as “to strive.” The term is used in Muslim life as an everyday term denoting an effort, endeavor, or struggle to improve one’s morality. It is meant to be frequently discussed, debated, explained and aspired to. Though used to justify political violence by some, the term was also used to describe Gandhi’s non-violent liberation of India and the women’s liberation movement. Because of the automatic association in mainstream parlance of violence and militancy with the word *jihad*, for American Muslims under surveillance it has become an alarm-word that automatically triggers further surveillance. As a result, many interviewees said they avoid the term altogether. When it is used, speakers will make every effort to clarify their intentions.

We don’t use the word *jihad*. Sometimes speakers will steer away from that word, or make extra effort to explain it more, explain exactly what we mean, so that nobody can misinterpret or get the wrong idea, especially in larger gatherings. - Amira,* 22, Sunday school teacher.

I don’t talk about the concept of *jihad*. But anytime someone asks that question, my first reaction is to deflect that question to someone else who can answer without me having to talk about it. Because of the known things that happen when you talk about jihad, it’s one of those words that can trigger automatic surveillance. - Jawad Rasul, 25, CUNY student

Business owners are concerned that charged political discussion could garner increased law enforcement attention, or keep other, more wary customers away. Thus, some business owners have consciously taken steps to avoid political discussion by muting, or completely banning, popular news channels. When approached by CLEAR and AALDEF, many individuals or owners of businesses that were listed in the NYPD reports were unwilling to comment on the surveillance altogether, for fear of unwanted attention.

I don't allow Al-Jazeera on in our hookah bar. Particularly when things flare up in the Middle East. We can't control what people start saying in response to the news, and we never know who else is in the bar listening. - Hamza, owner of business mapped by the Demographics Unit.

Ironically, a leaked Demographics Unit document notes that the owner of a particular restaurant did not allow the screening of the Al Jazeera channel out of fear of attracting law enforcement attention.³²

The stifling of expression is not limited to topics relating to Islamic nations, Arab politics and domestic surveillance policies. Even current events unrelated to Islam or Muslims but generally related to any type of protest or racially charged controversy made some members of the community uncomfortable.

Even regular discussions - like Trayvon Martin, [people] say don't bring that up, let's just talk about Hajj [pilgrimage]. They wonder why this guy wants to talk about politics, it's seen as suspicious. - Sheikh Mustapha*, Imam, Brooklyn.

Surveillance has also deterred mobilization related to law enforcement accountability and reform because people fear that speaking out against surveillance would only lead to greater surveillance:

I don't talk about the NYPD on Facebook. We'll put articles up, but we will never comment on them, put our own words. Maximum we'll say "it's sad that this is happening." But we will never show our anger, that we're really, really angry. Some people aren't afraid, but I am. - Amira*, 22, Sunday school teacher.

As one activist in the Shi'a community described:

Many of the Shi'a organizations who were approached by activists to speak up or speak out were hesitant to do so ... A lot of it seems to be fear, they don't want to be targeted for additional surveillance. - Ali Naquvi, community organizer.

This concern was particularly evident among immigrant parents, who, out of concern for their more outspoken American Muslim children's safety, urged them to stay away from protesting the NYPD's policies, or even from being outspoken on political issues affecting Muslims in America.

I come from a family of activists. My parents, when I first told them the Associated Press story is about to break, my dad told me don't do anything about it. That was the first time my dad ever told me anything like that. This was the first time in my own family where safety trumped what was the right thing to do. - Ali Naquvi, community organizer.

³² N.Y. POLICE DEP'T, EGYPTIAN LOCATIONS OF INTEREST REPORT (July 7, 2006), available at <http://hosted.ap.org/specials/interactives/documents/nypd/nypd-egypt.pdf>.

At [the] Youth Center, a girl said that the idea of being arrested isn't something that's far fetched, that's unbelievable; it's something very real, very possible for her. She thought it was really important to lay low because it would break her mom's heart if she got arrested "Laying low" means not being politically active, literally going on with their everyday lives. A lot of people feel like being at these protests is counterproductive, that it would draw more attention, more of being spied on. - Sireen*, 23, student at Hunter College.

My mother always tells us to be careful about Facebook, and tells us to be careful about rallies, or questions whether it's a good idea for us to go. Sometimes you just want to go out there, you want to join organizations or certain causes, but you stop yourself. When your speech is limited, you can't really do much: you can't write on the internet, you can't talk on the phone because they're tapped, you can't speak in public. When your speech is constrained you get lazy and you just go with the flow and try to survive and live a normal life, and not do much in society. - Amira*, 22, Sunday school teacher.

An American Muslim organizer we spoke with commented on the nature of organizing in a climate of fear:

Almost every rally and public forum I've attended in the last year begins with some type of disclaimer or call-out of informants and undercovers who might be in attendance and recording the conversation. Most speakers don't even know if such a disclaimer protects them in any way, but I feel it to be a necessary announcement so that the audience participants are conscious of the environment in which we are organizing. - Cyrus McGoldrick, community organizer.

Thus, NYPD surveillance of Muslim neighborhoods, activities, speech and religious practice has not only chilled and altered Muslims' political and religious expression, but has also stifled opposition to the surveillance itself, creating a space void of dissent, agitation and much needed calls for accountability.

2. A Qualitative Shift: Clarifications, Mistranslations and Humor

Alongside self-censorship interviewees feel the need to repeatedly emphasize their peaceful position or clarify their use of terminology when going about their day-to-day lives or discussing current events. When interviewees mention foreign policy or controversial individuals, they explain their position in detail. When they do discuss news of surveillance, they opt for cursory references shrouded in humor. The primacy of security concerns means that organizations and individuals spend their energies finding careful wording and caveats, rather than on the primary topic of conversation. At an organizational, religious, and communal level, this results in missed opportunities for richer conversations, for organizing, for developing institutions and agendas, and for participation in the public exchange of ideas.

The reality of surveillance is now always on our minds, when we organize, when we speak, when we meet, when we plan. Meetings for political organizing I leave until we can meet in person, and even when we do have in-person meetings, we are all very conscious of what we say and how, taking time to clarify or make a joke out of phrasing that could be interpreted as somehow contentious. - Cyrus McGoldrick, community organizer.

I think twice before every time I put something on Facebook. I have to make sure it doesn't give the wrong idea to law enforcement. I would *never* say 'jihad' on Facebook, or 'Osama Bin Laden.' If I want to say something about the uprisings overseas, I try to be as detailed and precise as I can be, I won't talk about any of the violence going on there, will never say I don't like this person or that person. - Amira*, 22, Sunday school teacher.

Those we interviewed also expressed concern with how terms and expressions they use in their native languages might be literally translated and misinterpreted by law enforcement. A prominent Queens business owner explained how a common Arabic phrase to denote excitement could be mistranslated into English to convey that the one is so excited that he will "explode." The business owner explained that such phrases, commonly used to denote emotion, are seldom used anymore.³³

Similarly in Arabic, the term *sarookh* is used to humorously describe someone who is extremely good-looking. The literal translation is "missile". One interviewee, a young college student, commented on the use of this phrase: "you have to watch out how you joke around now."³⁴

Walking on eggshells in their own safe spaces, individuals are also scared to directly address political comments that make them uncomfortable. Many interviewees noted that a common way to avoid such confrontations was by resorting to humor.

The silencing is done through a joke. For example, if someone is talking about politics or surveillance, people joke "oh I'm going to go home now!" - Amira*, 23, Sunday school teacher.

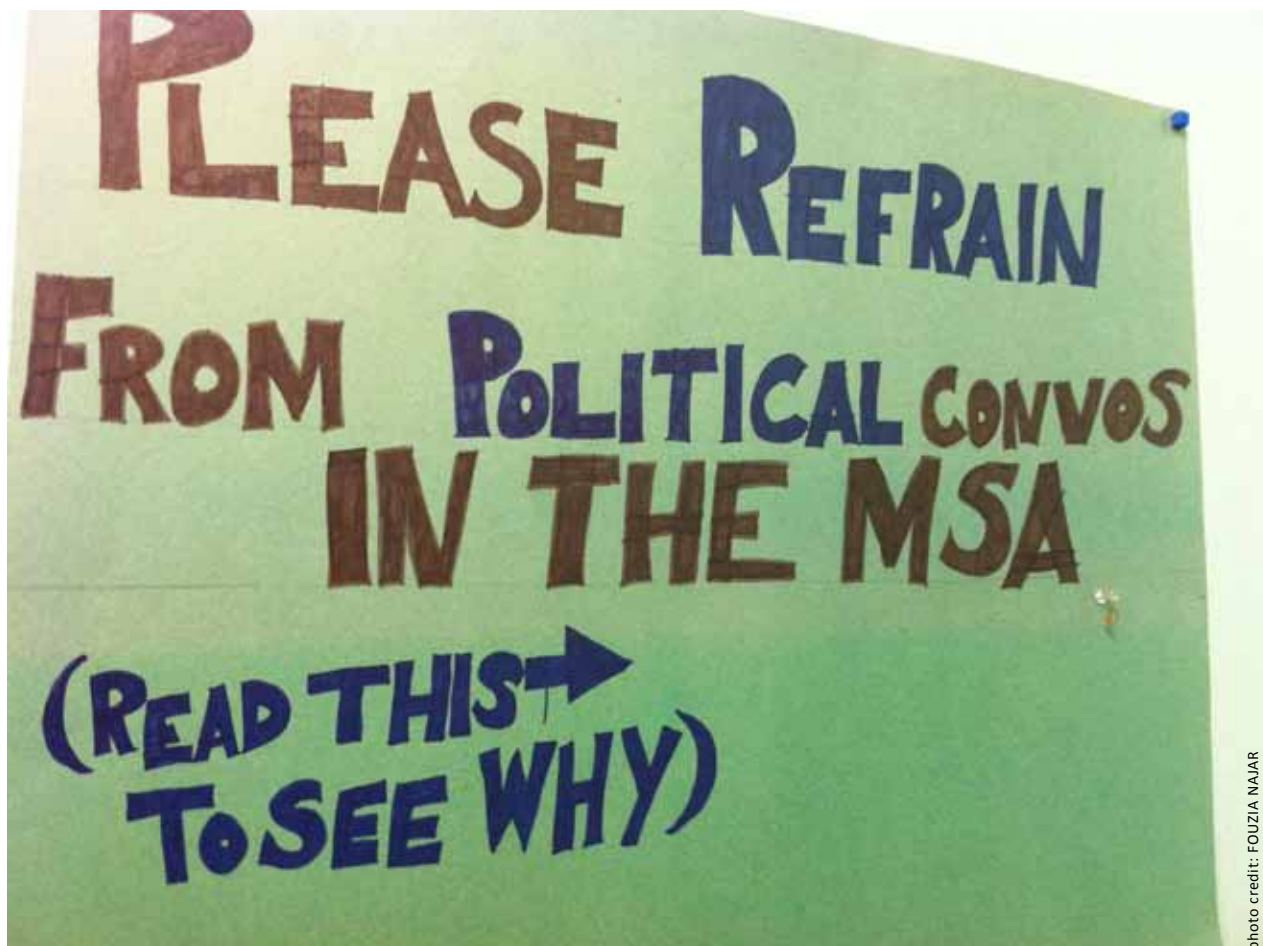
Everyday humor, allegory and metaphors are not only key parts of linguistic heritage but also function to relay emotion, inspire political mobilization and pass down stories within communities. By putting speech under the magnifying glass, surveillance impairs not only political speech in the American Muslim community but also the transmission of language and culture.

3. Student Speech on Campus

The stifling and self-censorship of both routine and political speech have especially dire consequences for college students as political activism, student organizing and academic pursuits are being derailed during the most formative years of a young person's life. Students have found themselves unable to organize effectively or even to respond to news of surveillance. As Section Five will describe in more detail, surveillance presents intimidating challenges for the development of young leaders and citizens, limiting communities' social, political and economic potential for generations to come.

³³ Interview with Hamza, owner of a business mapped by the Demographics Unit.

³⁴ Interview with Ayman*, 20, Brooklyn College.



A sign in the Muslim Students Association (MSA) room at Hunter College, New York City encapsulates the climate that reigns within student groups following news of sprawling NYPD surveillance. “Read this” pointed to a print-out of a press article by reporter Len Levitt, among the first to unveil the NYPD’s surveillance program.

SECTION THREE: SOWING SUSPICION

1. “Everybody’s an informant”

I don’t want any new friends. If I don’t know you and your family, or know that you have a family that I can check you back to, I don’t want to know you.

- Faisal Hashmi, activist, Queens.

You look at your closest friends and ask: are they informants?

- Amira*, 20, Sunday school teacher.

One of the most corrosive effects that interviewees noted is the suspicion that has become entrenched in American Muslim communities. This stems in part from the realization that other Muslims – or individuals posing as Muslims – are taking notes, listening in on conversations, and acting as agents provocateurs. This notion has proven particularly devastating to any sense of community, trust and openness.

I was very naive at one point. I converted to Islam. At first I thought all Muslims were great people and you could trust them all. And then someone said hey, you should know about all these things...(referring to informants) - Hassan*, 20, board member of a CUNY MSA.

According to court documents and other publicly available information, informants or undercovers have exhibited certain tendencies – for example, seeming particularly interested in befriending certain individuals, discussing violent or politically controversial subjects, often in non-sequiturs, or seeming overly generous without having a clear source of income. But, of course, there is no sure-fire way of identifying an informant or an undercover.

As a result, our research showed that American Muslims are often suspicious of other Muslims. Many interviewees felt that routine events were now a cause for suspicion. As one businessman whose business was listed in the leaked intelligence units documents stated:

Every other store on this street could be an informant. You start wondering about each one: how did this person get his liquor license so quickly? Or how come the cops aren't saying anything about this guy who is well known to be selling alcohol under the table, or to minors. Or I know that this person was in jail for some months, and suddenly I see them back in the store, even though you think they had some charges that could stick. - Hamza*, owner of a business mapped by the Demographics Unit.

Nearly all interviewees thought they knew someone who was an informant or an undercover officer. The reasons provided were diverse and contradictory, reflecting the widespread internal suspicion that surveillance has triggered within the American Muslim community. Someone viewed as overly religious was suspect, while another who frequented the mosque without seeming particularly religious was equally suspect. Individuals who regularly attended MSA events were deemed suspicious, as were those who only came once in a while.

Two interviewees recalled incidents where they falsely accused someone of being an informant, leading to potentially devastating reputational consequences for the accused. One of the students who was on a whitewater rafting trip that was attended by an undercover officer thought he could tell who that undercover was through a process of elimination. When invited to do so during a press interview on national television, he ventured a guess. He was wrong. In his interview, he still expressed remorse: "I have to give him a call and apologize."³⁵

A second interviewee recalled with regret how he was suspicious about a new member of the mosque whom he noticed suddenly became very involved and active in his mosque's administration. He discussed his concerns with others at the mosque. Later on, he found out that the man had recently lost his job and had time on his hands. He described his feelings of guilt when he noticed that his warnings had led others to be wary of this man.³⁶

All interviewees had concerns about inter-communal mistrust and bemoaned the wariness that has become pervasive. Many believed that suspicion of their Muslim peers went against their nature, their religious beliefs, or their desire to be active and supportive members of their community.

³⁵ Interview with Jawad Rasul, 25, CUNY student.

³⁶ Interview with Mahmood*, 37, Staten Island.

**PREYING ON THE MOST VULNERABLE:
THE NYPD'S AGGRESSIVE RECRUITMENT OF INFORMANTS.**

A college student recalled a visit he received from two NYPD detectives, shortly after he and his family had emigrated from Malaysia. The detectives pressured him to work for them as an informant – they wanted him to surf the internet and monitor certain websites. He remembers them asking him what he thought were odd questions: “What do you think of the Shi’a? Do you think they are real Muslims? What would you do if a white American girl came to you and asked for intercourse?” After he repeatedly refused to meet with them, they eventually left him alone – until several months later, when he enrolled at a CUNY school:

This time, they offered me 400 or 500 dollars a month, they said ‘all your work would require would be sitting in front of your computer and look at what people are doing.’ ... Within four meetings I moved from being a suspect to someone they wanted to pay. - Jamal*, 23, CUNY student.

Another woman recounted how one day when she was sixteen, she got a call from the principal’s office at her public school. The principal told her that the NYPD had asked her to come in for questioning. She first thought that it was about a young boy she had complained about for following her. Once there, she quickly realized that they were more interested in her online activities and her friends. A few weeks later, the same NYPD officers came to her home while her parents were away, searched through her belongings and her computer, and ultimately offered her work as an informant. At the time, she was young, broke, and living with her parents:

[The detective] said the department can provide you with a place, a job if that’s what you’re looking for, an apartment, we can give you your freedom. - Grace*, 23, Queens resident.

These incidents – not infrequent in certain communities – have led many to realize that others, possibly their own peers, may not be as able to resist the pressures of working as informants:

Everyone is being asked to spy, and I know it myself they must have been threatened or bribed to spy. Nobody would just do it voluntarily. And they probably get people in trouble. I know this because they tried to bribe me. - Grace*, 23, Queens resident.

The worst thing you can do is start to doubt other people and their intentions. I don't even think about that aspect. We don't want to distrust each other or cause animosity. - Ayman*, 20, Brooklyn College.

This NYPD thing was put out to make everyone scrutinize everybody. It's created a real suspicious atmosphere, wondering if everyone is what they say they are. - Yousuf Abdul Lateef, Long Island Resident.

Such widescale disruption of community life and the social fabric are evocative of divisive tactics used by the authorities in other contexts, sometimes purposefully. One such context – the control of populations under military rule – is similarly marked by the deployment of agent provocateurs, informants, “demographic” research and surveillance apparatuses. In fact, NYPD officials have commented that the program was modeled in part on Israeli military tactics employed in the Occupied Palestinian Territories.³⁷ Such parallels highlight that the NYPD treats entire American Muslim communities as foreign and suspect, despite the acknowledged absence of any concrete indications of criminal conduct.

2. Self-Stigmatization: Ex-communicating Those Likely to Be Recruited as Informants.

“If they're likely to be scrutinized, don't hang out with them.” - Asma, 19, CUNY student.*

The widespread practice of so-called “voluntary interviews” by law enforcement is well-known in American Muslim communities. In these interrogations, agents will approach individuals based on their associations, protected speech, appearance, or sometimes simply their country of origin. CLEAR has represented clients who have been visited by NYPD officers and interrogated about their online activities, about their countries or villages of origin, their acquaintances or their community activities. NYPD approaches people for this purpose at their homes, workplaces, or in public places. While it is difficult to quantify the frequency of this practice due to an absence of reported statistics, nearly every individual we interviewed described being approached personally by law enforcement or knows someone who has.³⁸ Despite their frequency, such “visits” by law enforcement carry significant stigma. Many interviewees noted that they were uncomfortable associating with community members whom they thought were likely to be approached.

Ironically, those who have been approached by the NYPD become objects of suspicion among their own peers. Interviewees who had been contacted for questioning by the FBI or by the NYPD were worried that others in their community might find out, resulting in their being viewed by their peers and neighbors with either fear or mistrust. One young man whom NYPD detectives visited at home, questioning him in front of his neighbors, describes his subsequent social marginalization:

Nobody will trust you with things that they did trust you with before. . . . Trust is gone. My own neighbor – he doesn't say it, obviously no one says it. But I feel like it's on their faces. They know something's not right because they were there when the NYPD visited us. I assume he figured out it was just a fishing expedition, but I generally feel that they don't want to deal with us. - Ahsan Samad, 26, Brooklyn.

³⁷ AP Aug. 23, 2011 Article.

³⁸ The FBI engages in very similar practices of widescale questioning of Muslim individuals. Often, individuals who are approached cannot differentiate the various local or federal agencies that are approaching them. For background on such federal policies, see Shirin Sinnar, Questioning Law Enforcement: The First Amendment and Counterterrorism Interviews, 7 BROOKLYN L. REV. 41 (2011).

PARTICULAR VULNERABILITIES OF IMMIGRANT COMMUNITIES

Immigrant and lower income communities have been particularly targeted, and affected, by NYPD spying. Though interviewees across the socio-economic spectrum expressed the chilling effects of surveillance, new immigrants are especially vulnerable. Whether they are undocumented or green card holders, new immigrants felt strongly that constitutional protections of speech and association were not applicable to them. They also associated law enforcement attention with immigration enforcement and worried that if they caught the attention of the NYPD they might be susceptible to deportation or delays in the processing of their immigration relief.

[My mother tells me] if anyone comes knocking on the door asking for you, she says the first thing she'll do is that she'll send me to Yemen because she doesn't want me to go to prison. She tells me to just go to school, finish my education, don't worry about these [political] things, these have been happening forever. She wants me to stay away from trouble. - Sireen*, 23, student at Hunter College

Campuses in the public City University of New York system, with higher proportions of working-class and immigrant students, were more likely to be targets for infiltration by NYPD informants than private schools and Ivy League colleges, which appear to have been targeted mostly with cyber-monitoring. Of our interviewees, as well as our clients, those who are recruited to work as informants or who have been questioned about their political beliefs are all first generation immigrants whose immigration statuses - or those of their family members - were frequently used by their interrogators as an additional form of pressure.

Similarly, because individuals who are prominent in the American Muslim community, or who are perceived to be leaders, are often primary candidates for such interviews, there is also an assumption that community leaders are compromised.

I don't trust a lot of our leadership within Islamic organizations in New York City. I think many of them have already been contacted by NYPD or the FBI. - Fareeda*, 21, Brooklyn College student

3. Stigmatized: Mainstream perceptions of American Muslims.

They say "don't you go to Queens College? Isn't that where all the terrorists are?" They saw it on the news that they were spying on us.

- Sameera*, 19, CUNY student.

American Muslims are concerned that the surveillance programs have stigmatized them in the eyes of non-Muslims. They fear that their colleagues, neighbors, classmates or customers will view them with suspicion because law enforcement has branded them a population "of concern" that is prone to dangerous behavior. Such public, state-propagated notions can lead to alienation of American Muslims from their political allies, their colleagues, or on campus, and contribute to an overall public discourse that is hostile towards Muslims.

- **Enabling hate crimes.** Recent years have seen a high number of hate crimes against Muslims in New York City,³⁹ mirroring a national trend.⁴⁰ Some racial justice organizations have connected this to the fact that discriminatory law enforcement policies, like the NYPD surveillance program, perpetuate notions of Muslim “dangerousness.” The perception is reinforced when public officials voice unconditional support for the program.⁴¹ In this way, the NYPD and public officials contribute to the creation of a permissive environment where not only bias but also hostile acts against Muslims are deemed acceptable. That environment might also signal to some – even if inaccurately – that hate crimes against this population would not be aggressively investigated or prosecuted.⁴²

When our own government, our own police, our own institutions, and our own media continue to engage in racial profiling or painting our communities as suspect, we cannot expect the results to be any different than these tragic cases of racial violence. - Shahina Parveen, Leader, Desis Rising Up and Moving (DRUM).

- **Impeding interfaith collaborations.** Mosques and Muslim community organizations have invested significant resources in reaching out to other faith-based communities, particularly after the September 11, 2001 attacks, in order to forge alliances. Several interviewees raised concerns about their institutions’ strained relationships with their former interfaith networks

[The revelation that the NYPD had sent an undercover informant into our mosque] resulted in our alienation from other communities. Not only because we now know that we had an informant, but also because everybody else knew, including non-Muslims. The NYPD went to the press and said that they’ve been surveilling a mosque in our community. This mosque they were surveilling had positioned itself as the interfaith mosque, opened its door to folks. Next thing we knew our allies dropped off. There was supposed to be a meeting with an interfaith group and they said they’d rather not have it at our mosque. - Linda Sarsour, community organizer.

- **Stigma in the workplace.** Several young, educated professionals we spoke with expressed concern that the public discourse about radicalization within Muslim communities, further propagated by the NYPD’s surveillance program, would affect their colleagues’ impressions of them. They were concerned that their colleagues, without more background and engagement in the issues, might either be suspicious of Muslims, or become wary of associating them for fear of “controversy.” One interviewee noted that she hides her religious identity in the workplace,⁴³ while another wondered whether she should “water down” her “Muslimsness” on

³⁹ Some recent examples that have been reported in the press include: David Ariosto, *Woman Accused of Murder as a Hate Crime in NYC Subway Push Death*. CNN (Dec. 30, 2012); Rocco Parascondola, *Queens man, 70, Beaten by Pair After Being Asked if He Was Hindu or Muslim*, NY DAILY NEWS (Nov. 30, 2012); Vera Chinese, *Muslim Hate Crime Victim Who Was Stabbed Six Times in The Back Says he Harbors no Ill Will Against Attacker*, NY DAILY NEWS (Nov. 19, 2012); N.R. Kleinfeld, *Rider Asks if Cabbie Is Muslim, Then Stabs Him*, N.Y. TIMES (Aug. 25, 2010).

⁴⁰ Mark Potok, *FBI Reports Dramatic Spice in Anti-Muslim Hate Violence*, HUFFINGTON POST (Nov. 14, 2011), available at http://www.huffingtonpost.com/mark-potok/fbi-reports-dramatic-spik_b_1092996.html.

⁴¹ Rebecca Henley, *Jax Hgts rallies for subway hate crime victim* (Jan 12, 2012) available at http://www.timesledger.com/stories/2013/2/racialviolence_at_2013_01_10_q.html.

⁴² The NYPD has in fact issued strong statements of condemnation of such acts, and apprehended several of the offenders.

⁴³ Samar*, 32, Corporate Lawyer.

STIGMA

The United States Supreme Court has noted that government policies that discriminate against a group can result in harmful social and political consequences to that group. This is called “stigma.” In *Brown v. Board of Education*,^A the Supreme Court invalidated racial segregation in public schools. The Court noted that state-sanctioned discrimination has a more harmful impact than private discrimination. By singling out Muslims as potentially dangerous, as meriting close law enforcement attention, and by not applying the same standards as for other New Yorkers, the NYPD communicates, and perpetuates, negative stereotypes about all American Muslims. As a result, American Muslims are less able to participate fully in society, as equals.

Many of the experiences relayed by our interviewees show evidence of the stigmatization of American Muslims. Whether it involves an individual’s or institution’s damaged relationships with law enforcement and other public entities, or a hesitation to engage in public conversations about current events, be it in a classroom setting or engaging in civic advocacy, the fear of being publicly associated with religious Muslims and the self-censorship that results all point to reduced opportunities for social and political participation that are essential in a democratic society.

^A 347 U.S. 483 (1954).

her resume.⁴⁴ Two other interviewees, both young attorneys working at corporate law firms, felt that they could not engage in pro bono work on issues relating to Muslim civil rights and Muslim immigrants generally because the firm does not want to get entangled (even indirectly) in these controversial issues.

- **Stigma on campus.** Muslim students expressed concerns about being ostracized by their peers, Muslim and non-Muslim alike. One of the major components of the mission of any Muslim Student Association is to engage non-Muslims on their campus, and to increase the Muslim community’s visibility.⁴⁵ Students worried that wide press coverage announcing that the NYPD had infiltrated Muslim student groups with the hope of finding radicals or criminals would damage their outreach efforts.⁴⁶ Several interviewees noted feeling that many on campus did not want to associate with the MSA, or its active members.⁴⁷ A professor at Baruch College described how some Muslim students told her in a class discussion that joining the MSA could lead to being considered “extremist” and to law enforcement scrutiny.⁴⁸

⁴⁴ Interview with Samia*, 21, CUNY student.

⁴⁵ Interviews with Niveen*, 22, CUNY alumna; Inas*, 20, CUNY student; Jamal*, 23, CUNY student and Jawad Rasul, 25, CUNY student.

⁴⁶ Interview with Jamal*, 23, CUNY student.

⁴⁷ Interviews with Inas*, 20, CUNY student and Samia*, 21, CUNY student.

⁴⁸ Interview with Carla Bellamy, Professor, Baruch College.

SECTION FOUR: SEVERING TRUST IN LAW ENFORCEMENT

I don't trust them at all, nor do I believe they are protecting us. They are stripping us of our rights and violating our privacy. I don't know how non-Muslims feel safe either because if they do it to us, they can do it to anybody.

- Inas*, 20, CUNY student.

If police really wanted to do something for protection, there are so many obvious opportunities: drugs are all over this neighborhood, the fights, other crimes. But instead, they're writing down whether I'm screening Al-Jazeera in my restaurant! That's a waste of resources.

- Hamza, owner of a business mapped by the Demographics Unit.

One theme that emerged across interviews is an entrenched, deep mistrust of the NYPD. Individuals did not view the NYPD as a protective force, or as a resource for those in need of assistance – rather, the police are increasingly regarded as threatening and untrustworthy. As a result, Muslim organizations, mosques and community leaders have reevaluated their relationships with the NYPD.

1. An anti-Muslim culture at the NYPD

A lot of the [NYPD] documents deliberately attack Islam, the ideology of Islam. I used to never want to believe that you're being targeted because you're Muslim. I was one of those people that was fine with talking to law enforcement because I knew I wasn't doing anything wrong. But now it's not about what you're doing wrong, it's about what their goal is. If they're being trained and taught to be suspicious of Islam, then that's scary. And that's changed my approach to them.

- Tahanie Aboushi, lawyer.

Another recurring theme was apprehension about NYPD's anti-Muslim culture – both within the Intelligence Division and outside of it. Even before the Associated Press reports shed light on surveillance, documents and statements made by the NYPD reflected a deep misunderstanding of Islam, a conflation of Islam with terrorism, and an alarming level of indifference by NYPD leadership to overt anti-Muslim actions and statements within the Department's ranks.

A notorious example of the anti-Muslim culture at the NYPD that left many of our interviewees – and New Yorkers in general – ill at ease was the widely-publicized screening of a virulently anti-Muslim film, "The Third Jihad," on continuous loop during the NYPD's cadet training program from October to December 2010. The film presents a montage of images of terrorist attacks, beheadings and dead bodies, while a narrator suggests that American Muslims aim to "infiltrate and dominate" America,⁴⁹ and that they are engaging in a "cultural Jihad" aimed at infiltrating and undermining American society.⁵⁰ The screenings at police trainings were made public through NYPD documents obtained by the Brennan Center for Justice, sparking a public outcry.⁵¹ Adding to the community's frustrations was the fact that Police Commissioner Ray Kelly and NYPD Spokesman Paul Brown had participated in the film's production and that the NYPD never did a review of its police cadet training protocols.

⁴⁹ Michael Powell, *In Police Training, a Dark Film on U.S. Muslims*. N.Y. TIMES (Jan. 23, 2012).

⁵⁰ From the film's website, http://www.thethirdjihad.com/about_new.php (last visited Jan. 3, 2012).

⁵¹ Michael Powell, *In Police Training, a Dark Film on U.S. Muslims*. N.Y. TIMES (Jan. 23, 2012).

Criticism of the NYPD Intelligence Division's work has also come from within its own ranks. A lawsuit filed in 2006 by a former American Muslim officer described in great detail a culture of systematic discrimination, with hundreds of anti-Muslim and anti-Arab email briefings sent to the unit over the course of two years.⁵² The majority of the emails were sent by Counter-Terrorism and Intelligence advisor to the NYPD Bruce Tefft, but the complaint also made it clear that supervisors and ranking officers within the intelligence unit either turned a blind eye or worse, participated. For instance, Muslim officers were made to leave the room when certain briefings occurred.⁵³ Among the e-mails that were circulated to the unit was a commentary to a news headline that "[o]ne in four hold anti-Muslim views." The email noted: "Then 1 in 4 is informed."⁵⁴ Or "Burning the hate-filled Koran should be viewed as a public service at the least."⁵⁵ The officer had repeatedly complained to four different supervisors, but his complaints were all ignored.

One interviewee, a former intelligence unit officer of Arab origin who also left the division, reflected that in his time within the unit – over five years – he frequently felt the need to go beyond the scope of his duty in order to explain the basic tenets of Islam when he felt that his colleagues were attributing bad intentions to benign Muslim religious behavior. For example,

I would see emails from people in the NYPD, saying "I saw ten people get together at 10 PM outside the mosque." So I told them about our culture, that [congregation] is normal Muslim behavior. - Yousuf*, former Intelligence Division officer

The same former Intelligence Division employee went on pilgrimage to Mecca. When he returned, he felt ostracized, that he was no longer trusted, which ultimately led him to request re-assignment.⁵⁷

In practice, ignorance or misperceptions about Muslim traditions, beliefs, and people can turn a regular law enforcement interaction into a potential counter-terrorism investigation. In CLEAR and AALDEF's experience with clients, Muslim individuals who filed a complaint about identity theft were shocked to find themselves being questioned by counter-terrorism units. "Muslim-looking" individuals filming tourist locations in New York have also been stopped, searched, and detained. The former Intelligence Division officer we interviewed reported similar problems:

People were arrested for having . . . something with words about God, or a folded Koran in his pocket, or for having [paper with] Bismillah or Allah in their pockets, for protection during travel! They would arrest him, and then call the Intelligence Division to investigate. Sometimes I went and signed off on their release. - Yousuf*, former Intelligence Division officer.

2. Mistrust of Law Enforcement

Muslims aren't respected by the police. - Inas*, 20, CUNY student.

Many interviewees viewed all of their interactions with the NYPD to be driven by discriminatory intent. As has been widely documented in other communities of color, mistrust of police discourages community members from reporting hate crimes, domestic abuse, and other crimes or from seeking

⁵² Complaint, *John Doe v. Tefft*, No. 06CV13738 (S.D.N.Y., Filed Dec. 5, 2006).

⁵³ *Id.* at 17.

⁵⁴ *Id.* at 10.

⁵⁵ *Id.* at 12.

⁵⁶ Interview with Yousuf*, a former Intelligence Division officer.

assistance in emergency situations. People are much more likely to want to maintain contacts with police when they think they will be treated in a fair, respectful and impartial manner.⁵⁷ A large number of interviewees noted that they do not believe that NYPD officers would protect them if they had concerns about their safety.

[I]f there was a hate crime, and someone came to my house, and you have an officer who has been trained with all of these videos, what is he going to do? Or think about me? Can you trust you're in good hands? - Tahanie Aboushi, lawyer.

I don't think I'd want to ask [a police officer] for directions? - Fareeda*, 21, Brooklyn College student.

When I heard they showed that video to all the cops, now if there is an altercation or a fight I wouldn't feel comfortable going up to cops.... - Sameera*, 19, CUNY student.

If I'm being robbed, then, yes, I would expect them to come. But if I feel like someone is discriminating against me in the street, I wouldn't expect them to do anything to help me. I would say that a lot of the cops in the streets have this idea of all Muslims as potential terrorists. And you also know that they feel that way about Blacks and Latinos. Knowing your rights isn't so important. I know that the NYPD doesn't follow the rules so it's not like I can throw my rights at the NYPD. I can't expect them to cower when I say I don't consent to this. - Lana*, 29, Brooklyn Resident.

The covert and sprawling nature of the NYPD's program has made it difficult for many American Muslims to distinguish between counterterrorism surveillance practices and other types of police work. When asked whether someone has ever had any concerns about surveillance, interviewees often responded by narrating seemingly unrelated interactions with law enforcement, including traffic stops,⁵⁸ or a campus police service offering to help track your phone in case it gets stolen.⁵⁹ Similarly, presence of police on street corners,

I walk around wondering what the NYPD is doing on this corner, or that corner when I see an officer. I find myself thinking it's "too coincidental" when I'm going somewhere and the NYPD happens to be there. - Fareeda*, 21, Brooklyn College student.

I feel really conflicted: I know the NYPD does some great things. They do provide security when we need it. At one point I had this icky feeling. I always respected cops. And then when I heard about the reports of surveillance, I thought "wait, are all these cops in on this?" I didn't understand the internal structure of it, I now know there's a unit for each thing and that I have to separate them out. But that's a lot to ask. - Sireen*, 23, student at Hunter College.

NYPD were on campus with tables registering student phones. One officer says, "would you like us to register your phone so that we can track ... uhhh *find* your phone in case it gets lost." I didn't give him my phone. - Soheeb Amin, 22, former President of a CUNY MSA.

A couple of weeks ago, I witnessed a phone snatching a few blocks from my house. I called the police to report the incident, and stayed with the shaken young lady until the cops came to help

⁵⁷ Tom R. Tyler, Stephen Schulhofer, Aziz Z. Huq, *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365, 366 (2010).

⁵⁸ Interviews with Mahmood*, 37, Staten Island and Fatima*, 19, CUNY student.

⁵⁹ Interview with Soheeb Amin, 22, former President of a CUNY MSA.

THE FBI AND THE NYPD: SAME, BUT DIFFERENT.

While the FBI has distanced itself from the NYPD surveillance program in several public statements, the FBI's own counterterrorism policies have in fact relied on many of the same assumptions. Before the NYPD, the FBI published [RK: published?] its own "radicalization theory." The FBI engages in a national program of questioning Muslims, undertakes its own mapping efforts, and employs its own informants. In other words, Muslim communities in New York City are doubly-victimised, as the NYPD adds an aggressive layer to the parallel national federal policies targeting and mapping Muslim communities. Yet, interviewees noted that the realization that local law enforcement – the ones associated in the New Yorker's mind with traffic stops, emergency assistance and old fashioned crime-fighting – are involved in surveillance has served an additional blow to American Muslims' sense of security.

Now that it's the NYPD it's a lot closer to home. It's more local. You don't know how to differentiate between the two... Usually, police officers, you ask them for directions, they're around on campus. Now, how am I supposed to differentiate between the NYPD and the FBI? People don't understand how different it is that a local law enforcement agency is doing this. - Fareeda*, 21, Brooklyn College student.

her out. The NYPD later called my cell phone to follow up on details; the officer asked for my name, assuring me that it was strictly for confirmation purposes. I declined to give it to him, for fear of what they might do with my obviously Arabic, Muslim name. - Omar*, 28, Manhattan.

Interviewees described as discriminatory police activities that may be unrelated to the strictly "counterterrorism" or surveillance context and which may have a lawful, non-discriminatory impetus. For example, one Arab, Muslim owner of an Astoria, Queens business that was featured in the Demographic Unit's documents thought that the NYPD was deliberately abusive and discriminatory in its ticketing practices on his street, where traffic was predominantly Arab and Muslim. He also believed that the enforcement of the citywide ban on hookahs was directed at Muslim businesses and fueled by bias.⁶⁰

3. Severed Relationships with Muslim Institutions and leadership

Your job is to protect us. If we are now afraid of you, the community will pull together and cut themselves off from law enforcement.

- Tahanie Aboushi, lawyer.

All of the community leaders that we spoke with described a feeling of betrayal and deep apprehension. Many of them had worked tirelessly to strengthen relationships with police after September 11.

It has set back an entire community with the recent confirmations of the AP. [It has] put into question everything we were working towards, which was a seat at the table. - Sabreen*, 30, community activist.

⁶⁰ Hamza, owner of a business mapped by the Demographics Unit.

The NYPD has invested significant resources in building bridges with the Muslim and Arab communities of New York City, with community outreach being integral to what Police Commissioner Ray Kelly calls the “Three C’s of policing: Crime fighting, Counterterrorism, and Community Relations.” As part of these programs of outreach to the Muslim community, the NYPD has promoted a soccer league and a cricket league aimed at connecting with Muslim youth. It also boasts a Muslim Liaison Program, and a separate Clergy Program. While meaningful outreach efforts are needed, the NYPD’s approach appears to be counterproductive. Indeed, various NYPD officials have openly said that efforts to engage American Muslim communities are fueled by a desire to “de-radicalize” those communities. As former NYPD Assistant Commissioner Larry Sanchez unabashedly put it: “The New York Police Department believes part of its mission is to protect New York City citizens from turning into terrorists.”⁶¹

Another major concern is the NYPD’s use of its community outreach branch as another intelligence-gathering tool. The leaked NYPD Demographics Unit documents note that among the unit’s duties is to “Participate in social activities, i.e. cricket matches.” In other Demographics Unit documents, the unit is instructed to “utilize precinct personnel to gain a better understanding of the Shi’a communities within their command.”⁶² Similarly, Community Affairs Deputy Inspector Amin Kosseim, a prominent Arab-American NYPD officer, has publicly stated that among the benefits of community policing are “to solve a crime, to make an arrest, or to get intelligence on a protest.”⁶³

NYPD officials have themselves acknowledged the damage that aggressive intelligence gathering can do to community outreach efforts. Richard Falkenrath, the former director of the NYPD’s counterterrorism division, explained:

[T]he counterterrorism deputy commissioner and the intelligence deputy commissioner are not responsible for community outreach. In part, we don’t want to stigmatize the interaction with these communities, and if the counterterrorism or intelligence deputy commissioner goes to a community meeting or a mosque, it sort of sends the message that the reason we’re here is we think there’s a threat. And that’s not the message we want to send, because the vast majority of the people from these communities -- the vast, vast majority -- are no threat at all and simply want to live in peace and enjoy everything the city has to offer, which is a lot. But our community affairs bureau does have this responsibility, and we’re blessed in the NYPD with incredible ethnic and linguistic diversity..⁶⁴

Mosques and community organizations depend on maintaining good relationships with their local precincts to facilitate their members’ access to police services, to call them for protection, and to work together to reduce crime in the community. The consequences of these broken ties are serious: organizations cannot offer a safe space for their community members and are unable to advocate for improved law enforcement practices within their community.

⁶¹ Lawrence S. Sanchez, Assistant Commissioner, New York City Police Department, Testimony before the U.S. Senate Committee on Homeland Security and Governmental Affairs, Oct. 30, 2007.

⁶² N.Y. POLICE DEP’T, INTELLIGENCE STRATEGY REPORT, at 4 (May 15, 2006), *available at* <https://www.documentcloud.org/documents/288719-nypd-iranian-intel.html?key=9a9ba0d2ea8a33e7dce6>.

⁶³ Interview with Amin Kosseim, Bridging the gap between the police and the community at N.Y.P.D., *available at* <http://www.chds.us/?player&id=2545>.

⁶⁴ Richard Falkenrath speech at the Washington Institute For Near East Policy: Defending the City: The NYPD’s Counterterrorism Operations (June 23, 2009), *available at* <http://www.washingtoninstitute.org/html/pdf/falkenrath20090623.pdf>.

Many mosques value the relationships they have with precincts and top brass. When mosques receive hate mail or encounter other law enforcement problems, they call up the local sergeant. When news of the surveillance broke, some mosques were caught between a rock and a hard place because they were unpleasantly surprised by the news but didn't want to offer public condemnation and threaten those relationships. - Asim Rehman, Muslim Bar Association of New York.

Muslim leaders and organizations have invested significant energies in engaging with the NYPD in order to combat their community's alienation from law enforcement. Those efforts have been hampered, if not completely negated as these leaders feel forced to pull back in order to safeguard their community's wellbeing.

Community relationships have been significantly harmed. Gradually. It didn't start with the NYPD radicalization report. It started one year when we went to a pre-Ramadan breakfast... That year, they show us a presentation. [They flashed a] red screen and then black letters: 'Faces of Terrorism.' ... By the 7th picture, a lot of us walked out. ... That was 2006. ... Many of our leaders boycotted the breakfast for years after that. Then, [the revelation that the NYPD had been screening the "Third Jihad"] a year ago was what really did the relationship in. - Linda Sarsour, community organizer.

In a post-9/11 world with the backlash and targeting, we feel that we need to do work to build bridges, and provide in-depth, relationship building opportunities. You don't want them to surveil mosques, but you want them to visit it, you want them to know what happens in it, you want them to know what a religious space is like, and how it's like for religious communities who experience that... For many years we've been trying to get something with the NYPD to train their officers. We've had a difficult time to break through that wall. [My organization's work is] to build bridges between religious communities and city government agencies – that's our methodology. Of course, reports [about the NYPD's surveillance] make our work even harder, because the community feels like they can't trust city agencies for whatever reason. - Assia*, interfaith community organizer.

Today, communities are engaging in a fraught conversation over how to respond to the NYPD's ongoing surveillance practices. Muslim leadership have found themselves in a quandary: inviting law enforcement into the community and continuing relationship-building despite well-publicized surveillance not only risks enabling surveillance, but also sends a disempowering message to their membership. On the other hand, the community benefits from open channels of communication with law enforcement. Linda Sarsour, a community organizer and director of the Arab American Association of New York, outlines the difficult considerations her organization faced:

I don't mind having a regular NYPD car in front of our mosque, but only if it is protecting our mosque. Not gathering intelligence. But I'm sorry, I'm not going to have you do workshops in our community anymore. I'm not going to have Commissioner Kelly come for Ramadan and do iftar. We can't bring the NYPD leadership to our space. It will confuse the community. We always tell people to call law enforcement in case of an emergency but we will not encourage our youth to play soccer in NYPD League anymore. - Linda Sarsour, community organizer.

Similarly, an activist and a mother describes the difficulty of inculcating a positive attitude towards law enforcement or even city agencies in her teenage son, while also ensuring that he is not naively trusting:

It's hard for him to process: what does it mean that a police department treats my community like this, how do I view or interact with an agency like that. It's a challenge for young people, and I imagine it's true for African American youth or Latino youth in the same way as it is for Muslims. Am I supposed to see a police department as an enemy or do I continue to work with them? Why should I trust them? It's particularly difficult for young men. - Assia*, interfaith community organizer.

Many mosque leaders described finding themselves in a thorny predicament. While several of them were assured that their local precincts had no knowledge of or role in the surveillance programs,⁶⁵ the press reports and NYPD documents suggest otherwise. Police precinct personnel are mined for their local knowledge of communities; arrests or routine traffic stops of Muslims may trigger an Intelligence Division "debriefing,"⁶⁶ and Demographics Unit officers were even instructed to participate in community outreach sporting events.⁶⁷

One day someone from community relations at the precinct came [to our mosque's youth group] and he asked us "what do you guys think about the NYPD." I, the big mouth, told the officer "we don't feel comfortable with you guys." He asked why? I said because you're spying. That's when he explained that their precinct isn't in cahoots with the spying, and they're the little guys and they don't have any control over the department. People are upset. Really angry about the NYPD. Even leaders that had a good relationship with the NYPD. Even one of our biggest leaders has been changed by this. That's saying a lot. - Grace*, 23, Queens resident.

[Our community organization] has a strong relationship with the local precinct, since the center opened in 2001. I'm disappointed because NYPD generally does the right thing. For the mayor to endorse this is the wrong thing, to send people into mosques. It's not like we're a drug team. These are 501(c)(3) mosques and centers trying to do good. To use that as a place to target is unacceptable. - Akbar*, mosque outreach coordinator

Our masjid [mosque] cleaned this neighborhood from the drugs. The police knows that. Since the [AP] reports came out, I'll get calls from the community affairs guys, but we don't want anything to do with them, ... We would interact with the Community Affairs before, all the time. But I don't call those community affairs guys anymore. - Sheikh Mustapha*, Imam, Brooklyn

Severing relationships with a police department, unlike with other agencies, means that a community is potentially compromising police protection and drawing even more suspicion. Ali Naquvi, an activist in the Shi'a Muslim community, approached many of the institutions listed in the NYPD documents as targets of surveillance and encouraged their leaders to speak out – but found many of them were hesitant to do so.

Part of the reasons stated were that they didn't want to ruin their relationship with law enforcement, they needed it for things ... But a lot of it also seems to be fear, they don't want to be targeted for more surveillance. - Ali Naquvi, community organizer

⁶⁵ Interviews with Akbar, mosque outreach coordinator; Grace*, 23, Queens resident, and Linda Sarsour, Community Organizer.

⁶⁶ See footnote 21, *supra*.

⁶⁷ N.Y. POLICE DEP'T, THE DEMOGRAPHICS UNIT (2006), *available at* <http://wid.ap.org/documents/nypd-demo.pdf>.

SECTION FIVE: IN FOCUS - CAMPUS LIFE

If they were[n't] already monitoring me, now that I'm in the MSA at Queens College, I'm definitely monitored.

- Sameera*, 19, CUNY student.

Muslim Student Associations (MSA) on campuses across New York City exhibit many of the same trends as other nodes of Muslim community life such as mosques or community centers, but also provide a unique lens on the impact that surveillance has on younger people within the targeted communities. The documents obtained by the Associated Press revealed that through online and in-person monitoring of Muslims students, the NYPD had for years crept into academic spaces. Students who already face surveillance in their neighborhoods, in their home setting, and in their mosques, are also vulnerable to spying on campus. The repercussions of surveillance on student life are significant: students we have spoken with showed that awareness of surveillance affected the sorts of events that they host, the discussions they have, the spaces they occupy, their academic development, civic engagement, and even leadership choices.

MSAs have been an integral part of many American Muslim students' college life.

The Stony Brook MSA for me was a diverse community of friends with whom I broke fast during Ramadan, debated hot topics about politics and Islam, and camped out in the library during finals period. I still keep in touch with most of my MSA friends to this day, and I'm really grateful to have had the experience. - Rubina Madni, Stony Brook Class of 2005.

SECRET

Muslim Student Associations of Concern



Yet, the NYPD Intelligence Division identified 31 MSAs in New York. It focused on at least seven that it listed as “of concern:” Baruch College, Hunter College, La Guardia Community College, City College, Brooklyn College, St. John’s University, Queens College – all but one of which were public universities that are part of the City University of New York system.

Among the reasons listed for targeting these particular MSAs were their choice of speakers, organizing “militant paintball trips,” or simply that students were “politically active” or trying to revive an MSA that had gone dormant.⁶⁸ Cyber-monitoring of students on their Yahoo groups, e-mail listservs, and blogs was done “as a daily routine.”⁶⁹ It also went significantly beyond New York City’s borders, reaching as far afield as MSAs at the University of Pennsylvania, Rutgers, Yale and Syracuse.⁷¹ The officer noted which speakers the students were inviting and, in many instances, recorded the speakers’ backgrounds, countries of origins, political beliefs, and even the names of students who posted events online.

The Intelligence Division also sent undercover police officers into MSAs,⁷¹ even dispatching one undercover to attend a whitewater rafting trip with students, where he noted that the students prayed at least four times a day. Over a year after the public outcry resulting from the AP’s uncovering of the surveillance program, the NYPD continued to send informants into MSAs. One such informant, Shamiur Rahman, a 19 year old who was initially recruited by the NYPD Intelligence Division after he was caught on a marijuana possession charge, “outed” himself on Facebook, to the surprise of students on whom he was spying.⁷²

I met him (the informant) through the MSA’s Facebook connections. He had told me he wanted to become a better person and to strengthen his faith. So I took him in, introduced him to all of my friends, got him involved in our extracurricular activities. I would wake him up for prayer every morning. He even slept over at my house, and I let him in even though he smelled of marijuana but I tried to look past it because I knew he was new to Islam. When I was texted the news (that he was an informant), the shock caused me to drop my phone. It took me 24 hours to get myself together and to respond, everyone on Facebook was waiting to hear what I would say, because I’m the one who introduced him to them. - Asad Dandia, 19, CUNY student.

For college students, typically aged between 17 and 22, the prospect of dealing with surveillance by a police department, infiltration of events and extracurricular activities by informants, and the potentially devastating academic, professional, and personal repercussions can be overwhelming. This section discusses some of the ways in which Muslim students’ lives have been affected on campuses and how Muslim students’ college experience – and education – is significantly different from their non-Muslim peers’ as a result of NYPD surveillance. We found that the NYPD’s surveillance of students chilled First Amendment activity in what is perhaps the single most important formative and expressive space for any American youth: the college campus.

⁶⁸ N.Y. POLICE DEP’T, STRATEGIC POSTURE 2006, on file with authors.

⁶⁹ N.Y. POLICE DEP’T, WEEKLY MSA REPORT (2006), available at <http://hosted.ap.org/specials/interactives/documents/nypd-msa-report.pdf>.

⁷⁰ *Id.*

⁷¹ Chris Hawley, *NYPD Monitored Muslim students all over Northeast*, ASSOCIATED PRESS (Feb. 18, 2012).

⁷² Matt Apuzzo & Eileen Sullivan, *Informant: The NYPD Paid Me To “Bait” Muslims*, ASSOCIATED PRESS (Oct 23, 2012).

1. Responding to the News

Muslim students' growing silence impoverishes our intellectual community; we are less able to learn from one another when we do not share our candid thoughts and ideas. A number of Muslim students are unwilling even to show their anger over the NYPD's discriminatory spying or to protest it, because they fear being seen as somehow disloyal, too angry, or otherwise suspect.
- Elizabeth Dann, law student at New York University.⁷³

With the first round of press reports unveiling the NYPD's infiltration of seven MSAs in the City University of New York (CUNY) system, MSA leaders were hesitant to speak out.⁷⁴ Tensions were high on the various campuses, as young college students deliberated how to respond to the national headlines publicizing that law enforcement, and the various public officials supporting the NYPD, consider them to be potentially dangerous. Students, and MSA leaders in particular, described a tension they felt between ensuring their memberships' safety and the organization's continued relevance.

On the one hand you don't want people to be afraid, while on the other hand you don't want them to be too naïve. - Soheeb Amin, 22, former President of a CUNY MSA.

Many MSAs limited their response to inviting local attorneys and organizations such as CLEAR to facilitate "Know Your Rights" workshops. Yet even holding these events was sometimes viewed as controversial.⁷⁵ On one campus, for example, the group did not record these events despite its normal policy of doing so – a measure that was deemed necessary to protect the students.⁷⁶ Several students noted a general hesitance to address surveillance on their campus. Interviewees also noted that, as a matter of policy, many MSA boards refrained from hosting "political" conversations and events. As the photograph in Section One displays, some student groups instituted a ban on political discussion in the MSA's spaces. They reasoned that where their group was already under surveillance, such conversations would be recorded and misconstrued, and, if their group was not under surveillance, political conversations by a Muslim group would trigger surveillance or have the group identified as "extremist." Student groups were cognizant of the unwarranted attention controversial discussions may attract from peers.⁷⁷

The [NYPD's] MSA documents say we are becoming more political, we want to avoid that. - Jamal*, 23, CUNY student.

At the Muslim Student Organization it's a given that you don't touch a sensitive topic. - Jawad Rasul, 25, CUNY student.

We don't bring up politics aside from humanitarian causes like natural disasters, and then we just remind others to pray for others. - Samia*, 21, CUNY student.

⁷³ Elizabeth Dann, *Singling Us Out: NYPD's Spying on Muslim Americans Creates Fear and Distrust*, AMERICAN CIVIL LIBERTIES UNION (Apr. 19, 2012), available at <http://www.aclu.org/blog/racial-justice-national-security-religion-belief/singling-us-out-nypds-spying-muslim-americans>.

⁷⁴ Interview with Soheeb Amin, former president of a CUNY MSA.

⁷⁵ Interviews with Soheeb Amin, 22, former president of a CUNY MSA, Jamal*, 23, CUNY student and Fareeda*, 21, Brooklyn College student.

⁷⁶ Interview with Jamal*, 23, CUNY student.

⁷⁷ Interviews with Niveen*, 22, CUNY alumna; Sireen*, 23, student at Hunter College and Sameera*, 19, CUNY student.

The chilling effect of surveillance on speech is particularly stark for students from immigrant or low-income families, whose youth and social status make them wary of speaking out. CUNY campuses - which the NYPD actually infiltrated, unlike private schools – tend to attract students from lower income and immigrant backgrounds, who are often the first in their families to go to college. As one long-time CUNY faculty member reflected:

CUNY students are so grateful to be in CUNY in the first place. They don't want to rock the boat. The last thing they want to do is anything that would endanger their chances of getting an education. - Glenn Petersen, Professor, Baruch College.

2. Poisoned College Experiences

Like places of worship elsewhere in the community, MSA offices and prayer rooms are intended to be safe spaces for Muslim students to come together, support each other, and talk freely about issues affecting their community. This need is especially important on CUNY campuses with large student bodies spread out over urban campuses. Infiltration of MSAs by undercover police officers and informants is a blow to the groups' core function. On some campuses, interviewees noted drops in attendance at MSA events in the immediate aftermath of the Associated Press reports.⁷⁸

[The upperclassmen] told us we encourage you to have free speech and political conversations, just not inside the MSA room. Because we don't want an informant to be here to catch one of your lines or crazy rants and you would get in trouble. I don't want to go to the MSA room because I'm worried that someone will report what I'm saying... The MSA felt more awkward for everyone. No one was talking about it but we knew there was a problem, we were just scared to say something. - Fatima*, 19, CUNY student.

At Brooklyn College, the college paper reported that following the Associated Press stories about on-campus surveillance, the annual "Islam Awareness Week" events were significantly less well-attended than the previous year, and that speakers requested not to be identified by name or have their photographs taken. The article also noted that students were hesitant to actively participate in the event.⁷⁹

Though the feelings of suspicion towards others are corrosive to any community, students' youth and the fragility of their nascent social ties make it particularly destructive in the college setting. College is a place where students typically forge life-long friendships, and explore social, religious and political identities and groups. Students we spoke with were ever-cognizant that an undercover officer or informant may be amongst them. Several students noted that either a sudden surge or a sudden drop in someone's MSA activity would make them suspicious of that person.⁸⁰

It made me feel hostile to other MSA members. I didn't know who to trust anymore. - Fatima*, 19, CUNY student.

⁷⁸ Interview with Amin*, Chaplain for a New York City Muslim Students' Association.

⁷⁹ *Islam Awareness Week Quieter This Year: NYPD Investigation casts shadow on ISO's annual event*, THE BROOKLYN COLLEGE KINGSMAN (Mar. 26, 2012) available at <http://thekingsmanpaper.com/2012/03/islam-awareness-week-quieter-this-year/>

⁸⁰ Interviews with Inas*, 20, CUNY student and Samia*, 21, CUNY student.

THE NYPD GOES TO HIGH SCHOOL, TOO.

Students far younger than college-age are also being warned about surveillance by their parents or teachers. Indeed, the Intelligence Division has listed Islamic Schools as “of interest,” thus taking interest in the playground banter of children under 16. A teacher at a Sunday school described her response:

I will sometimes say to the students in the Arabic school -- don't say “Osama Bin Laden.” I tell them you're not supposed to say that. Saying it is like a crime. The kids are kids. We know they're playing around. But we know that those who are spying on us will take that into account. We tell them they have to be careful, even though they think it's funny. Sometimes they get into trouble, they're going out to college they have to be more careful. - Amira*, 22, Sunday school teacher.

CLEAR has been asked to facilitate Know-Your-Rights workshops to children as young as 11. Educators who have spoken to high-school age students have found that they, too, were worried about being spied on:

I spoke to high school juniors and seniors and [the issue of surveillance] came up. I asked them what they've been paying attention to politically. One of the kids said “NYPD spying.” Another asked me do I think they're spying on us in school? I didn't want to freak the kids out but the NYPD (via NYPD School Safety Agents) has access to surveillance cameras installed by the DOE within the last several years inside middle and high school buildings. Live footage can be viewed from DOE Borough Centers. - Debbie Almontaser, educator and community organizer.

Our students are convinced that there must be spies or undercover agents We have a huge student body, it's impossible to know everyone. They also note that many students have financial concerns, and are thus likely to be pressured to become informants. - Jamal*, 23, CUNY student.

Because of this atmosphere, students observed that their MSA is not able to fulfill its role as a support group, or a safe space to discuss the very issues that are silencing them. One interviewee was a young man who had the NYPD come to his home to question him about his political opinions and who had, as a result, withdrawn from all public events. He described the atmosphere when he finally mustered the courage to attend an MSA event after a long absence. He noticed that “people were looking at [him] funny because they hadn't seen [him] before” and may have thought he was an informant.⁸¹

Opportunities for wider networking and organizing were also declined. When trusting one's own membership was difficult enough, linking with other students from other campuses was viewed as a non-starter.

Even to bring all the MSAs in one room, we're not going to trust them. From one MSA to another, you'll need to establish trust. Where do you start doing that? A CUNY-wide Know-Your-Rights event would be great, but because of the lack of trust anything more than that would be

⁸¹ Interview with Ahsan Samad, 23, Brooklyn.

difficult. We would be wondering who is writing what down, what meaning would be imposed on the words, who would come and knock on their doors next. - Samia*, 21, CUNY student.

I don't want to be sitting at a roundtable, I'll just be wondering whether someone will be secretly taking notes and sending it God knows where. They would write "that girl thinks this." - then whose door are they going to knock on? - Inas*, 20, CUNY student.

3. Chilled Academic Expression

I think Muslim students are getting an inferior education because of this, and that's not fair.
- Jeanne Theoharis, Professor, Brooklyn College.

Police monitoring of Muslims' political opinions has devastating effects on classroom dynamics and stunts students' personal and academic growth. Open discussion, intellectual exchanges and even political and theoretical experimentation, role-playing and posturing are crucial aspects of an educational environment. Several of the students we interviewed described self-censoring classroom comments not only because of a fear of law enforcement scrutiny, but also because of concern that other classmates or professors would misinterpret their views, given the ambient discourse on young, overtly political Muslims.

I personally ask [Council on American-Islamic Relations Civil Rights Manager] Cyrus about papers I write, and whether I say this or that. Even if I know that I shouldn't be worried about it, it's hard to not worry about it. Anything that has to do with criticizing the Iraq war, Hamas, I've been thinking about writing about the [National Defense Authorization Act] - I wonder whether I should even do it. Cyrus said write about it, but then if the teachers were ever asked, they'll have to produce that document. And you don't know what's going to be cut and pasted from that. - Fareeda*, 21, Brooklyn College student.

Professor Theoharis, at Brooklyn College, recounts some of the concerns she hears about from students:

I've certainly had lots of students coming to me about tough issues like speaking in class or in public. They have concerns about what their professors and other students think about them.
- Jeanne Theoharis, Professor, Brooklyn College.

Professor Bellamy, at Hunter College, noted the tense atmosphere whenever certain topics are raised in class:

Israel/Palestine and Muslim youth culture are the two topics where you feel the air goes out of the room. Students get anxious. The conversation is uncomfortable, the atmosphere changes in the room. - Carla Bellamy, Professor, Baruch College.

Jawad Rasul, one of the students on a whitewater rafting trip that was infiltrated by an NYPD undercover, reflected on his and his peers' experience:

Colleges are a place where these discussions are supposed to happen so people can learn from each other. We're losing out. - Jawad Rasul, 25, CUNY student.

The stifling of class discussion is an overall loss, not just for Muslim students, but also to their peers and teachers, who are no longer exposed to a diverse set of views. As Jeanne Theoharis, a professor who works closely with many Muslim students, explained:

College is a place where you try ideas out. It's the first time you get to choose your classes, think for yourself. Part of that process has to be about trying out ideas, and kind of seeing how ideas work. If you don't have a comfortable place *in class* and with other students to say or try ideas out, say what might be considered "radical" things, to draw parallels comfortably, and to get inside of ideas, you've lost one of the most important aspects of colleges. That's devastating. Both in terms of Muslim students being able to think through things, but also devastating because the range of discussion in class is diminished. I also think it's going to tend towards the extremes, if you don't have a space to work this out. Most people end up not being very political. But I also think that it's also the landscape where extreme ideas grow, because there's not enough space to think about things together, to have a sounding board. If you don't take your political idea with you to school, they don't get refined and thoughtful enough. I think 18 year olds are very gutsy, but they're not always mature. So I would rather have them taking their political ideas to school and try to articulate them and refine them so we can think about them all together. - Jeanne Theoharis, Professor, Brooklyn College.

With a general understanding that dealing with "politics" is controversial, Muslim students find themselves steering away from those majors, classes, or extracurricular activities. Two students, both active members of their MSAs, reported switching their majors from political science to more conventional majors after becoming concerned about law enforcement scrutiny of "political" young Muslim males.⁸²

In largely immigrant communities where social and familial pressures are to direct oneself towards professional degrees – business administration, accounting, engineering or medical schools – a secondary concentration or extracurricular activities have always been a way for students to explore their passions or their interests in other directions. Professor Theoharis observed a retreat from those majors at least at Brooklyn College.

You get this climate, and the parents feel even more emboldened to say "just be an engineer, just go to med school. Why do you have to do all this other stuff?" - Jeanne Theoharis, Professor, Brooklyn College.

While the longer-term impacts of NYPD surveillance are yet to be fully understood, the prominence of surveillance for Muslim students on campuses raises serious concerns, as a generation of American Muslim youth adjust how they go about their studies, partake in extracurricular activities, choose their professions, and develop their social roles and relationships. The isolationism that comes with being a member of a "spied on" community means that Muslim students are getting a fundamentally different, and less rewarding college experience compared to their non-Muslim peers.

⁸² Interviews with Sari,* 19, Brooklyn College, Ayman,* 20, Brooklyn College, Ismail,* 22, Brooklyn College, and Tarek,* 19, Brooklyn College.

PART THREE: Responses to the NYPD Program

1. Community Response

We are unapologetically Muslim and uncompromisingly American.

- Imam Al-Hajj Talib Abdur-Rashid, speech at a rally at Foley Square.

Community organizations, civil liberties groups and policymakers collectively criticized the NYPD's surveillance program. While many individuals were hesitant to attend rallies or to publicly criticize the NYPD, community leaders and organizers nevertheless capitalized on the public attention brought by the Associated Press reports to mount pressure on the NYPD to cease its practices. Communities organized rallies, press conferences, boycotts and other media campaigns to demand a stop to NYPD suspicionless surveillance practices, and for greater accountability. Notably, organizations and coalitions focused on American Muslim civil liberties and policing linked their efforts up with broader police accountability movements, drawing connections between police profiling in the American Muslim community and the broader issues of policing in communities of color.

American Muslim groups joined organizers in the anti-Stop-and-Frisk movement including Communities United for Police Reform (CPR), a broad-based coalition of community members, lawyers, activists and researchers aiming to change a range of the NYPD's discriminatory practices.⁸³ Together with their allies and endorsing organizations, CPR has introduced a legislative package that takes a multifaceted approach to NYPD accountability. This package includes, among other things, a proposal to establish an NYPD Inspector General, and other measures that protect New Yorkers against discriminatory profiling by the NYPD.

The coming together of communities and organizations affected by both Stop-and-Frisk and by surveillance not only builds bridges between Black, Latino, Muslim, and other communities, it also recognizes that these policies affect our communities and society as a whole. Directly affected community members protesting, testifying in City Council, or lobbying together for police oversight and accountability solidifies those relationships for the long term. - Fahd Ahmed, organizer with Desis Rising Up and Moving (DRUM).

Other responses included a boycott by Muslim leadership of the Mayor's annual interfaith breakfast, protesting Mayor Bloomberg's support of the NYPD's policies. AALDEF and the New York Civil Liberties Union (NYCLU) launched campaigns encouraging individuals to request their records from the NYPD under New York's Freedom of Information Law (FOIL). Advocacy organizations have also filed broader FOIL requests, requesting that the NYPD release records related to the depth and breadth of their surveillance practices and tactics.⁸⁴ Finally, nearly every Muslim Students Association in New York city hosted "Know Your Rights" workshops, and mosques and other community centers invited attorneys to speak to their congregants about surveillance practices and how they might protect themselves.

The NYPD has continued to defend the program. Initially, the NYPD insisted that it lawfully follows leads in terrorist-related investigations, and claimed that it was falsely accused of wholesale spying on

⁸³ See the Communities United for Police Reform (CPR) website, <http://changethenypd.org>.

⁸⁴ Press Release, Brennan Center, Muslim Advocates, Asian American Legal Defense and Education Fund Request NYPD Intelligence Records (Sept. 21, 2011) *available at* http://www.brennancenter.org/content/resource/brennan_center_muslim_advocates_aaldef_request_nypd_intelligence_records/.



photo by HANZA GIRON

communities.⁸⁵ Police Commissioner Ray Kelly denied that the NYPD was singling out any particular group. Mayor Bloomberg supported this claim, stating that the NYPD does not “stop to think about the religion.”⁸⁶ As the Associated Press continued to publish leaked police documents proving otherwise, NYPD leadership changed its approach and defended the program by claiming credit for foiling “14 attempted plots in the past ten years.”⁸⁷ This claim, too, has been largely debunked.⁸⁸

2. Constitutional Challenges

Many, including religious figures, legal professionals, academics and community organizers, have questioned the constitutionality of the NYPD surveillance program. Muslim Advocates, a national Muslim civil liberties group, filed a civil rights lawsuit in a New Jersey federal court on behalf of a range of Muslim individual and organizational plaintiffs seeking an injunction prohibiting the NYPD from targeting them for unconstitutional surveillance, expungement of all records made pursuant to past unlawful spying, and a judicial declaration that the NYPD’s practices are unconstitutional. The lawsuit, *Hassan et al. v. City of New York*, is pending before the court at the time of writing.⁸⁹

⁸⁵ Kate Taylor, *14 Muslim Leaders Plan Boycott of Breakfast With Mayor*, N.Y. TIMES (Dec. 28, 2011), available at <http://www.nytimes.com/2011/12/29/nyregion/14-muslim-leaders-plan-boycott-of-bloomberg-interfaith-breakfast.html>.

⁸⁶ Jill Colvin & Ben Fractenberg, *Mayor Bloomberg Defends NYPD’s Controversial Counter-Terrorism Efforts*, DNAINFO.COM (Aug. 25, 2011), available at <http://www.dnainfo.com/new-york/20110825/manhattan/mayor-bloomberg-defends-nypds-controversial-counterterrorism-efforts>.

⁸⁷ Hunter Walker, *Ray Kelly Defends NYPD On Stop & Frisk and Muslim Surveillance at Heated Council Hearing*, POLITICKER.COM (March 15, 2012) available at <http://politicker.com/2012/03/ray-kelly-defends-nypd/>.

⁸⁸ See above, texbox p 45.

⁸⁹ Complaint, *Hassan v. City of New York*, No. 12CV03401 (D.N.J. filed June 6, 2012), available at http://www.muslimadvocates.org/documents/10_FIRST_AMENDED_COMPLAINT.pdf.

Some of the main issues raised by legal critics, including the plaintiffs in the *Hassan* case, have centered around fundamental constitutional rights:

The First Amendment of the United States Constitution

prohibits the government from impeding the free exercise of religion, abridging the freedom of speech and interfering with the right to assemble. Our research has shown that the NYPD’s surveillance directly impacts First Amendment rights: American Muslims are fearful of discussing politics and current events, deterred from going to their mosques, and chilled from associating with political, civic and spiritual groups for fear of increased law enforcement attention and surveillance. The First Amendment exists to protect precisely these forms of belief and expression. Even though the NYPD does not directly prohibit American Muslims from practicing their religion or expressing political and civic opinions, NYPD policies, which characterize such expression as suspect, ultimately stifle and deter expression. Such a “chilling effect” can be a violation of the First Amendment.

The Fourteenth Amendment’s Equal Protection Clause

prohibits the government from discriminating against any group or individual on the basis of race, national origin, or religion. A government, law or policy that discriminates among religions – for instance, by singling out Muslims for particular law enforcement attention – should be closely scrutinized by courts.⁹⁰ As the *Hassan* lawsuit alleges, the NYPD program is not “neutral” with regards to religion, and intentionally singles out individuals based on their religion. This likely constitutes a deprivation of rights under the Equal Protection Clause.

3. A Handschu Challenge

The 1960s and 1970s were a time of social activism and political upheaval, with the civil rights and anti-war movements protesting U.S. policies at home and overseas. The NYPD responded to these movements with pervasive surveillance tactics, including the use of informants, infiltration, interrogation, and electronic surveillance—all to investigate and subdue political activity. In the case of *Handschu v. Special Services Division*, a group of political activists responded by suing the NYPD, claiming the violation of their constitutional rights. After fourteen years of litigation, the parties entered into a negotiated settlement resulting in a consent decree. This consent decree – binding on the NYPD –

...THE CONSTITUTION WAS DESIGNED TO KEEP THE GOVERNMENT OFF THE BACKS OF THE PEOPLE. THE BILL OF RIGHTS WAS ADDED TO KEEP THE PRECINCTS OF BELIEF AND EXPRESSION, OF THE PRESS, OF THE POLITICAL AND SOCIAL ACTIVITIES FREE FROM SURVEILLANCE. THE BILL OF RIGHTS WAS DESIGNED TO KEEP AGENTS OF GOVERNMENT AND OFFICIAL EAVESDROPPERS AWAY FROM ASSEMBLIES OF PEOPLE...THERE CAN BE NO INFLUENCE MORE PARALYZING OF THAT OBJECTIVE THAN ARMY SURVEILLANCE...

Justice Douglas, *Laird v. Tatum*, 408 U.S. 1 (1972)

⁹⁰ *Corporation of the President Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327, 339 (1987).

became known as the “Handschu Guidelines,” a set of rules governing the NYPD’s investigation of political activity. These Guidelines required that such investigations only be based on information of *criminal* activity. They also required a process for approving such investigations by an oversight body that also reviewed the NYPD’s compliance with the new rules.

The *Handschu* Guidelines remained in place until 2002. A year after the September 11 attacks, the NYPD went back to court, arguing that changed circumstances required greater latitude in its ability to monitor *lawful* political activities, which it argued preceded violent attacks.⁹¹

The Court granted the modification. The new, modified guidelines diminished the role of the *Handschu* oversight body, eliminating the pre-screening of each investigation. The change also allowed police to visit public places “for the purpose of detecting or preventing terrorist activities.”⁹² Importantly, though, even under the modified Guidelines, the NYPD cannot *maintain* records that do not pertain to potential unlawful activity.

In response to the documents released by the AP, the group of lawyers who had filed the initial *Handschu* lawsuit went back to court. They argued that the newly released evidence strongly suggested that the NYPD was violating its obligations under *Handschu*, and asked the court to order the NYPD to open its surveillance files to allow the court to make that determination. As a result of this motion, the lawyers were able to depose commanding officer of the NYPD Intelligence Division Thomas Galati. In that testimony, Chief Galati acknowledged that, to his knowledge, intelligence collection by the Demographic Unit had not led to a single criminal investigation in the six years he was at his post. At the time of writing, the *Handschu* lawyers have argued that based upon documents and information they have obtained, the NYPD is in fact in violation of the Guidelines, and they have filed a motion requesting that the court appoint an independent monitor to review the NYPD’s counterterrorism efforts.⁹³

⁹¹ *Handschu v. Special Servs. Div.*, No. 71CIV.2203, Decl. David Cohen (Dec. 30, 2002).

⁹² *Handschu v. Special Servs. Div.* 288 F. Supp. 2d 411, 420 (S.D.N.Y. 2003).

⁹³ Joseph Goldstein, *Lawyers Say NYPD Surveillance of Muslims Flouts Accord*, N.Y. TIMES (Feb. 04, 2013).

PART FOUR: Recommendations

Our interviews have shown that NYPD surveillance has impacted every facet of American Muslim life. The American Muslim students we interviewed are hesitant to discuss politics, religion and community mobilization. They wonder if informants sit in their classrooms and visit their student organizations. Many of our interviewees—professionals with U.S. citizenship and new immigrants alike—described how they tread carefully in their sacred spaces, suspicious of informants. Community organizations and mosques report declining participation. Finally, many of our interviewees expressed mistrust of and alienation from law enforcement as they learned that the same law enforcement officers with whom they had built relationships were tasked with investigating and monitoring their communities. Such grave findings necessitate urgent action by policymakers and grassroots activists alike. The list below encompasses legislative, advocacy and community empowerment recommendations that aim to dismantle the surveillance program, enable a more trusting relationship with the NYPD, and mitigate the program’s harmful impacts.

For Policymakers:

1. To the New York City Police Department

- End the blanket surveillance of the Muslim population of New York City and its environs, dismantle the Demographics Unit and its successors, and limit the Intelligence Division’s activities to following leads only when there is a concrete indication of criminal activity.
- Expunge records generated by past surveillance of political and religious activities.
- Engage affected communities, through a meaningful and transparent process, on how best to reform the NYPD’s counterterrorism work and to address surveillance’s harmful effects.
- Draft, implement and enforce a program, in consultation with local community organizations, to re-train police officers.
- Investigate violations of the Handschu guidelines, and any other Police Department guidelines, committed since 2002.

2. To the City Council

- Conduct hearings on the activities of the NYPD’s intelligence division.
- Pass currently pending legislation to bring oversight and accountability to the NYPD:
 - Intro 800, prohibiting bias-based profiling by law enforcement officers.
 - Intro 801, requiring officers to identify themselves to the public and explain their reasons for stopping individuals.
 - Intro 799, requiring law enforcement officers to provide notice and obtain proof of consent to search individuals.
 - Intro 881, establishing an office of the inspector general for the NYPD.

3. To New York State Legislature

- Pass legislation prohibiting the use of State funds by the NYPD for racial profiling.
- Pass (S6407A/Parker), establishing independent inspector general for the NYPD.
- Pass (S7309A/Parker), prohibiting biased-based profiling by state and local law enforcement.
- Pass (S6643/Adams) establishing a legislative intelligence committee to provide oversight, review, approval, and audits of appropriations and expenditures of counterterrorism agencies.
- Pass (S7361/Parker), establishing an office of data protection and privacy for New York State fusion centers and other intelligence data centers.

- Ensure that New York State funds are used in compliance with state and federal anti-discrimination laws.
4. To New York State Comptroller Thomas DiNapoli
 - Conduct audit to determine whether the NYPD Intelligence Division used monies improperly or unlawfully for domestic and foreign operations.
 5. To New York State Attorney General Eric Schneiderman
 - Thoroughly investigate whether the NYPD Intelligence Division violated state law, and make findings public.
 6. To U.S. Attorney General Eric Holder and the U.S. Department of Justice
 - Investigate the NYPD surveillance and religious profiling of Muslims pursuant to 42 USC § 14141, and make findings public.
 7. To Secretary Janet Napolitano and the U.S. Department of Homeland Security
 - Investigate the use of DHS grants provided to the NYPD.
 8. To the Central Intelligence Agency (CIA)
 - Make public the CIA inspector general's report of its investigation into the legality of the Agency's collaboration with the NYPD.

For Communities:

1. Hold community-wide discussions about surveillance in order to generate initiatives and mobilize constituents to respond to NYPD policies and to contain their negative impacts.
2. Continue to organize Know-Your-Rights workshops and other rights-awareness campaigns at your local mosques, Muslim Students' Associations, or other community centers.⁹⁵
3. To mosques, imams, and community leaders:
 - a. Announce to your congregations or membership that informants are not tolerated in your communities, and make the mosque or organization's leadership available to address members' concerns about informants and surveillance.
 - b. Call on the NYPD to undertake meaningful engagement with representative members of New York's American Muslim communities, so that they may convey their experiences with and concerns about NYPD intelligence gathering directly to the policy-makers.⁹⁴
4. Write to your representatives:
 - a. Urge your City Councilmember to pass the Community Safety Act.
 - b. Urge your State Senator and Assemblymember to call for transparency and accountability.
 - c. Urge your U.S. Senator and Member of Congress to call for Department of Justice investigations into the NYPD surveillance program.

⁹⁴ MACLC and other community organizations have issued formal invitations to NYPD Commissioner Ray Kelly to attend townhall meetings where he can speak directly with Muslim New Yorkers. Commissioner Kelly has refused these invitations, and has instead opted to meet with a few, hand-selected individuals in non-transparent settings that do not offer any meaningful opportunity for community input.



photo by HAMZA GIRON

**IT'S AS IF THE LAW SAYS: THE MORE MUSLIM YOU
ARE, THE MORE TROUBLE YOU CAN BE, SO DECREASE
YOUR ISLAM.**

– Sari*, 19, Brooklyn College.

Since 2001, the New York City Police Department (NYPD) has established a secret surveillance program that has mapped, monitored and analyzed American Muslim daily life throughout New York City and surrounding cities and states. Through extensive, in-depth interviews around the New York metropolitan area we found that surveillance of Muslims' quotidian activities has created a pervasive climate of fear and suspicion that encroaches upon every aspect of individual and community life. Additionally, we have found that surveillance severs the essential relationship of trust that should exist between law enforcement agencies and the communities they are charged with protecting.

Our interviews indicate that many American Muslims associate new faces at their mosque with potential undercover informants and avoid appearing overtly "Muslim"; that they avoid attending mosques that the NYPD is likely to monitor; and that they choose their classes by considering which subject matters would not arouse law enforcement attention. Many of our interviewees are scared to talk about politics, religion and world events. Social spaces are quieter as ethnic television programming is banned and political debate, discussion and even humor are suppressed. Students wonder if informants sit in their classrooms and visit their student organizations or whether they, in turn, will be targeted for recruitment as informants or questioned about their beliefs at every interaction with the NYPD. As American Muslims click through their smart phones and chat with friends, they do so knowing they are being watched, heard and recorded.

Proponents of the sprawling surveillance enterprise have argued that, regardless of its inefficacy, mere spying on a community is harmless. Our findings, based on an unprecedented number of candid interviews with American Muslim community members, paint a radically different picture.

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