

DHS AT 20: AN AGENDA FOR REFORM

Stronger Rules Against Bias

A Proposal for a New DHS Nondiscrimination Policy

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The Department of Homeland Security (DHS) has a problem with discriminatory profiling. Too often, it relies on religious, ethnic, or racial stereotypes in carrying out its expansive counterterrorism mandate, as well as its other functions. DHS agents question Muslim travelers about their religious views when they enter the United States and single out Latino communities for detention and deportation.¹ They detain Americans at the border simply based on their country of birth.² Officers charged with identifying potentially risky travelers by looking for suspicious behaviors have said that the scientifically discredited program they used amounted to a back door for racial profiling.³ The administration has disavowed anti-extremism programs that wrongly assumed that Muslims are predisposed to terrorism, and yet DHS continues to fund similar initiatives.⁴

President Joe Biden has made a strong commitment to ending discriminatory profiling.⁵ Recognizing the need for a “systematic approach to embedding fairness in decision-making processes,” he issued an executive order on his first day in office calling for a sweeping review of federal policies to align them with the principle of equity.⁶ Secretary of Homeland Security Alejandro Mayorkas has taken important steps toward implementing this directive and curbing profiling. In September 2021, Mayorkas

issued guidelines for immigration enforcement, declaring that “race, religion, gender, sexual orientation or gender identity, [and] national origin . . . shall *never* be factors” when making decisions about whom to apprehend and deport.⁷ These guidelines incorporate critical protections to ensure compliance, such as audits of individual enforcement decisions to ensure consistency, the collection of comprehensive data on enforcement actions to facilitate systemic accountability, and a process for obtaining review of individual decisions.

But these measures are not enough. The administration must address biased practices across all DHS activities, including by shoring up the rules against discriminatory profiling that apply to the execution of the agency’s counterterrorism mandate. DHS’s current department-wide guidance on discriminatory profiling fails to cover religion, even as targeting of Muslims has been at the center of concerns about discriminatory profiling. That same guidance gives frontline agents discretion to inappropriately consider race, ethnicity, religion, national origin, and nationality. And it prescribes no means for measuring compliance, much less ensuring it. Another set of nondiscrimination rules, issued in 2014 by the Department of Justice (DOJ) — and which DHS claims to follow — exempts large swaths of DHS’s activities and effectively permits profiling in many situations.

DHS must strengthen its nondiscrimination rules, ensure that those rules cover all its activities, and develop effective accountability mechanisms. Building on our recommendations in *A Course Correction for Homeland Security: Curbing Counterterrorism Abuses*, this report proposes a model policy that would close current gaps.⁸ The secretary of homeland security has the authority to adopt such a policy and should waste no time in doing so.

Glaring Gaps in Current Guidance

In principle, DHS rejects discriminatory racial and ethnic profiling — which it defines as decision-making that relies on the unfounded assumption that a person is more likely to engage in wrongdoing because of his or her race or ethnicity — as a practice that is unfair, ineffective, and inconsistent with American values.

The rules related to discriminatory profiling that apply to DHS, which are memorialized across several overlapping documents, are intended to reflect this principle. The key publicly available policies are:

- **DHS's 2013 Commitment to Nondiscriminatory Law Enforcement and Screening Activities.**⁹ This document, hereinafter referred to as the DHS Guidance, sets out the department's overarching rules on nondiscrimination. It purports to cover DHS's law enforcement, investigation, and screening activities. However, it does not mention the department's intelligence functions, some of which are covered by the Intelligence Oversight Guidelines, discussed below.¹⁰ The DHS Guidance also does not cover certain traits (e.g., religion); affords too much discretion for the department's agents to consider other traits (e.g., race, ethnicity, or national origin); and has no means for ensuring compliance.
- **The Justice Department's rules on discriminatory profiling.**¹¹ DOJ initially issued rules against discriminatory profiling by federal law enforcement in 2003.¹² These rules did not include protections for national origin or religion and exempted activities in which discriminatory profiling frequently occurs, including those involving national security and border protection. In 2014, DOJ issued a revised version of these rules, which now covers traits such as religion, gender and gender identity, and sexual orientation. The DHS Guidance explicitly incorporates the 2003 rules, and DHS has said that it follows the 2014 revision.¹³ However, the DOJ rules exempt most DHS functions (e.g., the

screening and inspection of travelers and immigrants, intelligence collection, and border security) and thus permit its officials, in the course of carrying out these functions, to consider traits that the policy claims to protect.¹⁴ As a result, the practical effect of DHS's commitment to the 2014 DOJ rules is unclear. In May 2022, President Biden, responding to continued calls to strengthen the DOJ rules, ordered the attorney general and the secretary of homeland security to review their implementation and effects and consider whether they should be updated.¹⁵

- **Intelligence Oversight Guidelines.**¹⁶ These rules govern DHS's Office of Intelligence and Analysis (I&A), which carries out domestic surveillance and serves as a conduit for information between federal agencies and their state and local counterparts. The Intelligence Oversight Guidelines bar "intelligence activities based *solely* on an individual's or group's race, ethnicity, gender, religion, sexual orientation, gender identity, country of birth, or nationality," allowing I&A to conduct surveillance based in part — or even primarily — on such factors. Indeed, the Intelligence Oversight Guidelines explicitly permit intelligence activities on the basis of a "reasonable belief" that considering a trait (e.g., being Muslim or Chinese) in conjunction with any other information (e.g., that ISIS recruits Muslims or that China is a U.S. adversary) serves a legally authorized purpose, such as identifying terrorist threats.¹⁷ Consequently, these rules together effectively sanction discriminatory profiling.
- **National Counterterrorism Center Watchlisting Guidance.**¹⁸ This guidance, which applies to DHS, suffers from the same defect as the Intelligence Oversight Guidelines, stating that decisions to flag a person for inclusion on a federal terrorism watch list "shall not be based *solely* on race, ethnicity, national origin, or religious affiliation."¹⁹
- **Customs and Border Protection (CBP) directive.**²⁰ As the DHS component charged with managing U.S. ports of entry, CBP has implemented the DHS Guidance with a directive that underscores the discretion that frontline personnel have to consider nationality. Unlike the DHS Guidance, the CBP directive does not address national origin.

Considering the shortcomings of this patchwork of policies, the department needs a clear, overarching policy — a revised version of the DHS Guidance — that comprehensively prohibits discriminatory profiling. The following sections detail further shortcomings with the existing rules.

Omission of Religion as a Protected Trait

The DHS Guidance fails to cover several personal traits that can be the basis of biased decision-making: religion, gender and gender identity, and sexual orientation. The omission of religion is especially striking given the department's repeated reliance on policies, programs, and practices that traffic in stereotypes — in particular, casting Muslims as terrorists and subjecting them to surveillance, suspicion, and sometimes even detention. While DHS may need to consider an individual's religion in certain cases (e.g., as part of an asylum application), it should not exercise unfettered discretion to consider religion in other ways (e.g., as a proxy for a propensity to break the law or commit violence).

It is well documented, for instance, that Muslims are significantly overrepresented relative to their share of the population on the main federal terrorism watch list, to which DHS nominates people and may consider religion in doing so. One court filing from 2013 offers a telling example: even as Muslims made up just over 1 percent of the overall U.S. population, Dearborn, Michigan — with a population of 100,000 that is roughly 40 percent Arab and Muslim — had the second-most residents on the watch list, behind only New York City (population 8.5 million).²¹ Legal challenges against discriminatory watch-listing have overwhelmingly been filed by American Muslims, who have presented evidence that their religion was a reason for their inclusion.²² The consequences of being placed on a federal terrorism watch list can be severe, ranging from the denial of immigration status or employment credentials to being detained, interrogated, and subjected to invasive searches and questioning at the border.²³

Race and Ethnicity Loopholes

The DHS Guidance formally limits consideration of an individual's race or ethnicity in law enforcement and screening activities to “all but the most exceptional instances.”²⁴ But it does not meaningfully constrain agents from considering those traits in practice and has no system for checking agents' judgment.

According to the DHS Guidance, race and ethnicity may be used “only when a compelling governmental interest is present, and only in a way narrowly tailored to meet that compelling interest.”²⁵ This methodology corresponds to constitutional protections and should, if faithfully applied, bar the biased use of race or ethnicity.²⁶ National security is, however, the epitome of a compelling governmental

interest, and protecting it is the stated purpose of a range of DHS counterterrorism programs and policies. Further, national security is a broad and elastic term that is too easily invoked to override constitutional rights. Even courts, which are supposed to be guardians of these rights, often defer to government agencies when national security is deployed as a policy justification.²⁷ Given their mission, DHS officials may be disposed to take an expansive view of national security as well.

The constitutional standard requires that if a compelling governmental interest is established, a policy must be narrowly tailored — that is, it must promote that interest without affecting more people than is necessary to achieve it. To determine whether a policy is narrowly tailored, courts generally look into whether it is overinclusive (covering more people than necessary) or underinclusive (covering fewer people than necessary), and whether it is the least restrictive way of achieving the goal in question.²⁸ For example, a policy that explicitly denied all Latinos entry into the United States for supposed national security reasons would clearly not meet this standard. Latinos overwhelmingly do not pose a security threat (making it overinclusive), while other people who could pose a threat would not be identified by the program (making it underinclusive). Moreover, less restrictive means, such as additional security screening based on objective threat indicators, could achieve the stated goal.

Leaving these difficult decisions — which even courts struggle with — in the hands of officials without even basic quality control checks can result in widespread bias in decision-making. For example, in apparent violation of the “exceptional instance” standard articulated in the DHS Guidance, Border Patrol has used markers such as speaking Spanish or a “Hispanic” appearance as grounds to investigate longtime Michigan residents for violations of immigration laws.²⁹ Although the DHS Guidance seems to prohibit the use of these stereotypes, the practice persists and Border Patrol agents are not held accountable for violating it.

Finally, the DHS Guidance provides that “race- or ethnicity-based information that is specific to particular suspects or incidents, or ongoing criminal activities, schemes or enterprises, may be considered, as stated in the DOJ Guidance.”³⁰ Using race or ethnicity to identify a particular individual who is suspected of criminal activity is not considered profiling because it does not involve the use of a protected characteristic to broadly make assumptions about the criminality of a group. But the DHS Guidance combined with the Justice Department rules are more permissive than the typical “suspect description” rule used by police. First, the DHS Guidance permits the use of race and ethnicity for “ongoing criminal activities, schemes or enterprises,”³¹ a broad category that the current DOJ rules expand even further to “threats to national or homeland security, violations of Federal immigration law, or authorized intelligence activities.”³² Second, the Justice

Department rules also allow consideration of race and ethnicity in scenarios that need only be specific in time or location, which opens the door to an expansive use of protected characteristics in ways that far exceed the traditional suspect description exception.

National Origin and Nationality Loopholes

The DHS Guidance places even fewer restrictions on the use of national origin (i.e., country of birth) and nationality (i.e., country of citizenship). It provides:

[T]ools, policies, directives, and rules in law enforcement and security settings that consider, as an investigative or screening criterion, an individual's simple connection to a particular country, by birth or citizenship, should be reserved for situations in which such consideration is based on an assessment of intelligence and risk, and in which alternatives do not meet security needs, and such consideration should remain in place only as long as necessary.³³

In other words, the guidance allows DHS to treat people as security risks based on where they were born or hold citizenship, including U.S. citizens who have been naturalized or are also citizens of other countries.

While the guidance requires such treatment to be “based on an assessment of intelligence and risk,” DHS’s risk assessment tools for identifying travelers who may be security threats or in violation of customs laws, for example, are opaque and unverifiable. There is no publicly available information about whether or how these rules account for bias in the underlying intelligence informing an assessment. But there is reason to question their accuracy: according to a former high-level DHS official, risk assessments that rely solely on travel history and demographic factors (e.g., national origin or nationality) yield a false positive rate of at least 97 percent.³⁴ Of course, both national origin and nationality are easily used, in both policy and propaganda, as a stand-in for race, religion, and ethnicity. For example, President Donald Trump was able to accomplish a ban on travel and immigration by millions of Muslims by targeting countries with predominantly Muslim populations.³⁵

National origin and nationality, whether on their own terms or as proxies for other traits, can also be used at the operational level to improperly flag individuals as high-risk. In January 2020, CBP’s Seattle field office instructed its agents to conduct heightened vetting on and inquire about the faith and ideologies of individuals who were born in, had traveled to, or held citizenship in Iran, Lebanon, or

Palestine. The directive, which was subsequently disclosed, showed that the additional vetting was ordered in response to the U.S. drone strike that killed the Iranian general Qasem Soleimani. It appeared to be premised in part on the unfounded notion that people who were born in or were citizens of certain Muslim-majority countries — and especially those who belonged to the Shia sect of Islam — might retaliate for the killing. As a consequence, some 200 Iranian and Iranian American travelers were held for questioning about their “political views and allegiances” when crossing the border between Canada and Washington State.³⁶

DHS is authorized to consider nationality to administer several statutes, regulations, and executive orders, such as to determine a person’s legal immigration or travel authorization status.³⁷ But it should not allow its agents to use nationality as a stand-in for a trait such as religion or ethnicity or as a proxy for the risk level a person poses.

Lack of Safeguards

DHS has not developed sufficient safeguards to constrain its agents’ broad discretion to consider protected traits. The DHS Guidance instructs department components to incorporate the document into their manuals and policies, train staff to follow its directives, and work with DHS’s Office for Civil Rights and Civil Liberties (CRCL) to develop “component-specific policy and procedures” for its implementation. It further directs components to ensure that staff are “held accountable” for meeting these standards.³⁸ But aside from the complaint procedure run by CRCL — which is notoriously ineffective — DHS leadership has not instituted any meaningful accountability mechanisms.³⁹

Indeed, the department does not even measure whether its activities result in members of certain groups being disproportionately singled out relative to baseline demographic expectations. It is therefore unsurprising that DHS programs continue to be dogged by allegations of racial and ethnic profiling, even as the department formally condemns and bars such practices.

Conclusion

DHS has often stumbled in handling its counterterrorism portfolio and undertaken programs that by design or in effect target people based on assumptions about their race, religion, and ethnicity. This status quo both undermines constitutional values and makes us all less safe by letting prejudice rather than facts drive policy. A stronger nondiscrimination policy coupled with robust enforcement will help reorient the department and enable it to fulfill its stated commitment to equity. Below, we propose model guidance that would accomplish these objectives.

Model DHS Guidance on Discriminatory Profiling

This Guidance supersedes all of the Department of Homeland Security's current guidance on the use of race, ethnicity, religion, national origin, nationality, gender or gender identity, or sexual orientation in Department operations, including Secretary Napolitano's 2013 memorandum, "The Department of Homeland Security's Commitment to Nondiscriminatory Law Enforcement and Screening Activities."

The Department is fully committed to ensuring that all of its activities are conducted in an unbiased manner. Biased practices, as the Department and the Federal government have long recognized, are unfair, perpetuate negative and harmful stereotypes, and promote mistrust of authorities tasked with enforcing the laws and protecting homeland security. Moreover, practices based on bias are ineffective. By contrast, practices free from inappropriate considerations strengthen trust in our Department and help keep the Nation safe.

To ensure that we meet the highest standards across all of the Department's activities, this Guidance defines the limited circumstances in which our agents may consider a person's race, ethnicity, religion, national origin, nationality, gender or gender identity, or sexual orientation. This Guidance also establishes training and accountability requirements to ensure that its contents are fully understood and implemented.

This Guidance is intended to address *invidious profiling* — that is, the illegitimate consideration of a protected trait as part of an assessment that may adversely affect a person. Invidious profiling would include, for example, a determination that a person poses a potential security threat and should be subjected to additional inspection, targeted for investigation, or denied a benefit that the Department administers based on consideration of a protected trait. The Department may consider protected traits when explicitly within its legal mandate to do so — for example, when checking passports at the border to verify a person's country of citizenship or reviewing asylum claims based on religious persecution.

Definitions

>> Vetting, screening, benefit adjudication, and inspection. DHS assessments and vetting of individuals seeking to travel to the United States; its screening, inspection, and questioning of domestic and international travelers (e.g., at airports and ports of entry); reviews of applications relating to immigration status; and substantively similar activities.

>> Intelligence. The activity of accessing, collecting, retaining, analyzing, or disseminating information by any component of DHS (regardless of U.S. Intelligence Community membership) to inform any operational, policy, or strategic decision not directly connected to a predicated criminal investigation, including for purposes such as situational awareness (e.g., to identify and keep abreast of breaking events, including emerging crises); threat detection (e.g., to identify potential threats of violence and terrorism, including by specific individuals); generating tips and leads; and substantively similar purposes. Intelligence also means the products of these activities.

>> Watch-listing. DHS nominations of individuals to a federal terrorism watch list (whether administered by DHS

or another agency); transmission of information to any agency or entity to inform the decision on whether to place an individual on a watch list; and administration of the redress process for individuals who have been improperly placed on a watch list.

>> Investigation. DHS scrutiny of a particular person or group for potential violations of criminal or civil laws, including for counterterrorism purposes.

>> Enforcement. DHS decisions to apply the law in a manner that affects a person's legal or custodial status. For example, granting or denying a statutory benefit, arresting or apprehending a person, or initiating a prosecution or removal proceeding.

>> Stops and searches. Discretionary and checkpoint stops and searches by DHS agents that are undertaken outside of airports or ports of entry where a person is required to pass through a screening or inspection bottleneck. For example, this category includes immigration enforcement stops conducted by Border Patrol agents within U.S. territory.

A. Overview

DHS prohibits the consideration of an individual's actual or perceived race, ethnicity, religion, national origin, nationality, gender or gender identity, or sexual orientation ("protected traits") in its vetting, screening, benefit adjudication, inspection, intelligence gathering, watch-listing, investigation, and enforcement activities, as well as in stops and searches, and in any other activities with the potential to generate adverse consequences for an individual, family, or entity subject to those activities ("covered activities"), whether automated or human-driven.

B. Exceptions

There are two narrow exceptions to this general prohibition:

1. A protected trait may be considered in the course of carrying out a covered activity when there is trustworthy information, specific and limited in time and location, that links persons possessing a covered trait to the description of individuals suspected of criminal activity. Protected traits may only be considered in conjunction with information not based on protected traits, and may themselves never form a basis for initiating a covered activity.

- **Example of permissible consideration:** Homeland Security Investigations (HSI) has corroborated intelligence from a trusted informant that three people wanted for human trafficking offenses — two of whom are white males and one of whom is a South Asian male — will visit a university campus together in Boston during the afternoon hours of a particular day. HSI agents may visit the campus to find and investigate groups of individuals matching this description on that date. This scenario meets the above requirement because: 1) the information is trustworthy (i.e., HSI has corroborated the informant's reporting against another credible source); 2) it is specific and limited in time and location (i.e., the information specifies a particular university campus at a particular time); and 3) it involves a description of three specific suspects who are alleged to have been involved in criminal conduct (i.e., identified suspects).
- **Example of impermissible consideration:** The Department receives raw intelligence from the Central Intelligence Agency alleging that terrorist group X has said it intends to target the United States in 2022 by sending so-called "holy warriors" from Jakarta to ports of entry in the United States to smuggle illegal materials for explosives. In response, the Department creates a rule that sends people arriving from Jakarta to secondary inspection and subjects them to further questioning at the discretion of local agents about their religious practices, background, and schooling to explore whether they have a connection with the terrorist group. This Guidance bars this consideration of protected traits because: 1) the intelligence is not confirmed to be trustworthy (i.e., it is unevaluated raw intelligence that has not been corroborated or analyzed); and 2) it is not specific in time (i.e., it covers all of 2022) or location (i.e., it covers numerous ports of entry). Further, the protected traits form a basis of the investigative and intelligence activities of the Department, rather than merely describing in part an already-known subject.

2. A protected trait may be considered in the course of carrying out a covered activity if expressly required by a statute, regulation, or executive order, and if such consideration is narrowly tailored to fulfill the applicable legal requirement.

The Department implements and enforces statutes that require consideration of an individual's protected traits, and in particular nationality — such as eligibility for the Visa Waiver Program, sanctions laws, unlawful entry provisions, and many more. Officials may establish an individual's protected trait in the course of conducting covered activities connected to such laws. They may not, however, rely on a protected trait as a proxy for a propensity to engage in misconduct or to break the law, or any other inference outside of what the statute, regulation, or executive order strictly authorizes. For example, the Department may establish whether an individual is eligible for the Visa Waiver Program based on whether they are a national of a country that participates in the program. But the Department shall not create or operationalize connected risk assessments that consider a person's nationality as a factor bearing on the risk they may pose, as this consideration is not explicitly authorized in statute.

- **Example of permissible consideration:** An applicant for asylum must establish that “race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant” (8 U.S.C. 1158). Under the standard articulated here, “narrow tailoring” means considering the relevance of the protected trait only to the extent necessary to determine whether an individual meets the legal criteria at issue. Thus, an official adjudicating an asylum claim based on religion may consider evidence establishing the applicant’s religion and its relevance to a claim that they will face persecution in their home country based on their religious identity.
- **Example of impermissible consideration:** In the case described above, the official shall not look to an applicant’s religious beliefs or practices to determine whether they pose a security risk or would “fit” culturally in the United States, or to address other questions outside the scope of the defined inquiry.

C. Transparency

Within 180 days of the issuance of this Guidance, the Department’s General Counsel shall publish on the Department’s publicly accessible website a list of all laws, regulations, and executive orders that require it to consider a protected trait, which shall be updated annually, and shall include for each entry examples of permitted and prohibited considerations of the applicable protected trait.

D. Implementation by Components

All Department Components shall include this Guidance in all manuals, policies, directives, and guidelines regarding any activity in which the use of protected traits may arise in connection with covered activities. In addition:

- Within one year of the issuance of this Guidance, each Component, in coordination with and with the approval of the Department’s General Counsel and the DHS Office for Civil Rights and Civil Liberties (CRCL), shall implement specific policy and procedures to implement this Guidance, which shall be filed with CRCL and made available to the public.
- Each Component head shall ensure that all employees of the Component, including supervisors and managers, are trained on an annual basis to the standards set forth in this Guidance, and are held accountable for meeting those standards, including through termination of employment for serious or recurring violations. Each Component head shall disclose what accountability measures they have implemented as part of the policies and procedures filed with CRCL and made public as directed above. Components shall report identified violations to CRCL, which shall conduct a yearly audit to ensure compliance with this obligation. The results of this audit shall be included in CRCL’s reports to Congress, as described in the section below.
- Each Component head shall further, upon request, provide to CRCL any documentation relevant to evaluating compliance with this Guidance within 90 days of such request.

E. Ensuring Compliance

A Compliance Committee is hereby established, which shall be chaired by the Officer for CRCL and composed of the Department’s General Counsel; Chief Information Officer; Under Secretary for Strategy, Policy, and Plans; Under Secretary for Science and Technology; and Chief Privacy Officer.

Within one year of the date of the issuance of this Guidance, the Compliance Committee shall develop a plan to measure overall compliance with the Department’s policies against discriminatory profiling, including by identifying any disparate impacts that Department activities may generate. The Committee shall share the plan with the House and Senate Homeland Security Committees when it is finalized.

All Components shall assist the Committee by providing requested information and data within 90 days of such a request, which shall only be used for effectuating this Guidance, except to the extent otherwise required by law or policy.

In order to formulate the compliance plan, the Committee shall:

1. Develop a list of all Department programs and practices that qualify as covered activities under this Guidance. For example, a particular risk assessment to identify travelers coming to the U.S. who may pose a threat would qualify as a covered activity and would be listed as a relevant program or practice.

2. Develop a list of decision-making criteria or rules applicable to each of the Department programs and practices on the list of covered activities, noting any that explicitly consider protected traits or close proxies. For example, any rules — even if described categorically (e.g., a rule looking for travel patterns flagged as suspicious by intelligence sources) rather than as applied (e.g., a rule looking for a pattern of travel from Mecca, a likely close proxy for religion) — underlying the given risk assessment initiative would qualify as decision-making criteria. The Committee shall evaluate each of these against the standards articulated in this Guidance and issue recommendations to the Secretary to address any criteria or rules that do not comply, along with any other potential risks of bias.
3. Identify data inputs used to inform such decisions that explicitly reveal a protected trait (e.g., the ethnicity and race field on the N-400 Application for Naturalization) and issue a report to the Secretary evaluating whether and how the collection, retention, or dissemination of this data as currently practiced by the Department generates a risk of noncompliance with this Guidance.
4. Establish a panel of independent experts to provide advice on whether the data inputs identified by the Committee are sufficient to evaluate whether covered activities are producing disparate impacts on the basis of race, ethnicity, religion, national origin, nationality, and religion. In cases where sufficient data is available, the panel shall consider whether a particular covered activity disproportionately impacts individuals based on a protected trait relative to relevant demographic benchmarks, as determined by the panel of experts. To the degree that disparate impacts are identified in connection with covered activities, CRCL, in conjunction with Component heads, shall propose and implement a nondiscriminatory alternative within one year of such finding.

The Committee shall annually update its findings on the matters assessed in (1)–(3) above, at which time the disparate impact analyses described in (4), along with any appropriate follow-up actions, shall be conducted for any new covered activities.

F. Reporting

Not later than two years after the issuance of this Guidance, and annually thereafter, CRCL shall provide a written report on the implementation of and compliance with this Guidance to the Secretary of Homeland Security and the House and Senate Homeland Security Committees. The report shall be unclassified, and any redactions shall be accompanied by a published legal justification for withholding. The report may contain a classified annex only as necessary to protect legitimately classified information, and it shall provide an unclassified summary of any materials addressed in the classified annex. CRCL shall publish the report on the DHS website.

Endnotes

- 1 Kariye v. Mayorkas, No. 2:22-cv-01916 (C.D. Cal., filed Mar. 24, 2022); the Mexican American Legal Defense and Educational Fund, the National Day Laborer Organizing Network, and the National Hispanic Leadership Agenda, *Detention, Deportation, and Devastation: The Disproportionate Effect of Deportations on the Latino Community*, May 2014, https://www.maldef.org/assets/pdf/DDD_050614.pdf.
- 2 Mahita Gajanan, “CBP Commissioner: U.S. Border Officers ‘Overzealous’ in Detaining Iranian Nationals, Iranian-American Citizens,” *TIME*, February 12, 2020, <https://time.com/5782835/iranian-nationals-detained-canada-border>; and Customs and Border Protection (hereinafter CBP), “Iranian Supreme Leader Vows Forceful Revenge After US Kills Maj. General Qassim Suleimani in Baghdad — Threat Alert High,” Department of Homeland Security (hereinafter DHS), <https://www.documentcloud.org/documents/6746395-Seattle-Field-Office-Memo.html>.
- 3 Michael S. Schmidt and Eric Lichtblau, “Racial Profiling Rife at Airport, U.S. Officers Say,” *New York Times*, August 11, 2012, <https://www.nytimes.com/2012/08/12/us/racial-profiling-at-boston-airport-officials-say.html>.
- 4 See Faiza Patel and Meghan Koushik, *Countering Violent Extremism*, Brennan Center for Justice, March 16, 2017, https://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20CVE%20Report_0.pdf; and Rupa Shenoy, “Critics Say Biden’s Plan to Combat Domestic Extremism Repeats Past Mistakes,” *World*, July 1, 2021, <https://theworld.org/stories/2021-07-01/critics-say-biden-s-plan-combat-domestic-extremism-repeats-past-mistakes>.
- 5 See, e.g., White House, “Remarks by President Biden in Address to a Joint Session of Congress,” April 28, 2021, <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/29/remarks-by-president-biden-in-address-to-a-joint-session-of-congress>; and Muslim Advocates, “Biden Day One Immigration Bill Includes NO BAN Act,” January 20, 2021, <https://muslimadvocates.org/2021/01/biden-day-one-immigration-bill-includes-no-ban-act>.
- 6 Exec. Order No. 13,985, “Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,” 86 Fed. Reg. 7,009 (January 20, 2021), <https://www.federalregister.gov/documents/2021/01/25/2021-01753/advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government>.
- 7 DHS, “Guidelines for the Enforcement of Civil Immigration Law,” memorandum from Alejandro N. Mayorkas, secretary of homeland security, September 30, 2021, 5, <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf> (emphasis added). The guidelines are not currently in effect; they have been vacated by a federal court for reasons unrelated to the rules they contain against discriminatory profiling. The Fifth and Sixth Circuits have split on the question of these guidelines’ legality, and the Supreme Court has granted certiorari to resolve the issue. *Texas v. United States*, 40 F.4th 205 (5th Cir. 2022); *Arizona v. Biden*, 31 F.4th 469 (6th Cir. 2022); and Application for a Stay of the Judgment Entered by the United States District Court for the Southern District of Texas, U.S. et al. v. State of Tex. and State of La., No. 22A17, <https://s3.documentcloud.org/documents/22082659/22a17.pdf> (cert. granted: https://www.supremecourt.gov/orders/courtorders/072122zr_7k47.pdf).
- 8 Faiza Patel, Rachel Levinson-Waldman, and Harsha Panduranga, *A Course Correction for Homeland Security: Curbing Counterterrorism Abuses*, Brennan Center for Justice, April 20, 2022, <https://www.brennancenter.org/our-work/research-reports/course-correction-homeland-security>.
- 9 DHS, “The Department of Homeland Security’s Commitment to Nondiscriminatory Law Enforcement and Screening Activities,” memorandum from Janet Napolitano, secretary of homeland security, April 26, 2013 (hereinafter Napolitano, “DHS’s Commitment to Nondiscriminatory Law Enforcement”), https://www.dhs.gov/sites/default/files/publications/secretary-memo-race-neutrality-2013_0_1.pdf.
- 10 Within DHS, only the Office of Intelligence and Analysis (hereinafter I&A) and the “intelligence elements” of the U.S. Coast Guard are part of the U.S. intelligence community. See 50 U.S.C. § 3003(4); Exec. Order No. 12,333, “United States Intelligence Activities,” 46 Fed. Reg. 59,941 (December 4, 1981), <https://www.archives.gov/federal-register/codification/executive-order/12333.html>, as amended by Exec. Order No. 13,355, “Strengthened Management of the Intelligence Community,” 69 Fed. Reg. 53,593 (August 27, 2004), <https://www.federalregister.gov/documents/2004/09/01/04-20051/strengthened-management-of-the-intelligence-community>; and Exec. Order No. 13,470, “Further Amendments to Executive Order 12333, United States Intelligence Activities,” 73 Fed. Reg. 45,325 (July 30, 2008), <https://www.federalregister.gov/documents/2008/08/04/E8-17940/further-amendments-to-executive-order-12333-united-states-intelligence-activities>. These elements are subject to Attorney General–approved Intelligence Oversight Guidelines for the handling of information about U.S. citizens, lawful permanent residents, and other U.S. persons. Regardless, these procedures are often a weak protection — for reasons discussed here as related to profiling — and do not apply to the many similar activities executed by DHS components not subject to intelligence community guidelines. Two examples include the National Operations Center, which operates an around-the-clock social media monitoring program, and the Counter Network Division at CBP.
- 11 Department of Justice (hereinafter DOJ), “Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity,” December 2014, https://www.dhs.gov/sites/default/files/publications/use-of-race-policy_0.pdf (hereinafter 2014 DOJ Guidance).
- 12 DOJ, “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies,” June 2003, https://www.governmentattic.org/38docs/DOJcrdRaceByFLE_2003.pdf.
- 13 Napolitano, “DHS’s Commitment to Nondiscriminatory Law Enforcement,” 1; and DHS, “Fact Sheet: U.S. Department of Justice Racial Profiling Guidance,” December 8, 2014, <https://www.dhs.gov/news/2014/12/08/fact-sheet-us-department-justice-racial-profiling-guidance>.
- 14 See, e.g., Faiza Patel, “Recreating Old Loopholes: Thoughts on the Revised Guidance for Federal Law Enforcement,” *Lawfare*, December 23, 2014, <https://www.lawfareblog.com/recreating-old-loopholes-thoughts-revised-guidance-federal-law-enforcement>; and Leadership Conference on Civil and Human Rights et al. to President Barack Obama, “Concerns with the U.S. Department of Justice Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity,” February 24, 2015, <http://civilrightsdocs.info/pdf/Sign-On-Letter-Re-DOJ-Guidance-Revisions.pdf>. Notably, the 2014 DOJ Guidance does formally cover authorized intelligence activities when conducted by federal law enforcement (e.g., CBP) rather than intelligence (e.g., I&A) personnel. But it imposes few practical limitations on the ability of law enforcement to consider protected traits for this purpose, and the degree to which the guidance has been implemented at relevant DHS components is unclear.
- 15 Exec. Order 14,074, “Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety,” 87 Fed. Reg. 32,945 (May 25, 2022), <https://www.federalregister.gov/documents/2022/05/31/2022-11810/advancing-effective-accountable-policing-and-criminal-justice-practices-to-enhance-public-trust-and>.

- 16 I&A, *Office of Intelligence and Analysis Intelligence Oversight Program and Guidelines*, DHS, January 19, 2017, <https://www.dhs.gov/sites/default/files/publications/office-of-intelligence-and-analysis-intelligence-oversight-program-and-guidelines.pdf>.
- 17 I&A, *Office of Intelligence and Analysis Intelligence Oversight Program and Guidelines*, 2–4 (emphasis added).
- 18 National Counterterrorism Center (hereinafter NCTC), *Watchlisting Guidance*, Office of the Director of National Intelligence, March 2013, https://www.aclu.org/sites/default/files/field_document/March%202013%20Watchlist%20Guidance.pdf.
- 19 NCTC, *Watchlisting Guidance*, 11 (emphasis added).
- 20 CBP, “CBP Policy on Nondiscrimination in Law Enforcement Activities and All Other Administered Programs,” DHS, last modified May 24, 2022, <https://www.cbp.gov/about/eeo-diversity/policies/nondiscrimination-law-enforcement-activities-and-all-other-administered>.
- 21 *El Ali et al. v. Sessions*, No. 8:18-cv-02415, at 46–50 (D. Md., Aug. 8, 2018), <https://www.clearinghouse.net/chDocs/public/NS-MD-0002-0001.pdf> (describing how “Watchlist Practices Target and Disproportionately Harm American Muslims”). See also Jeremy Scahill and Ryan Devereaux, “Watch Commander: Barack Obama’s Secret Terrorist-Tracking System, by the Numbers,” *Intercept*, August 5, 2014, <https://theintercept.com/2014/08/05/watch-commander>.
- 22 *El Ali*, No. 8:18-cv-02415, at 48, <https://www.clearinghouse.net/chDocs/public/NS-MD-0002-0001.pdf> (noting that “almost all — if not, all — legal challenges regarding designations on the federal terrorist watchlist have been filed by Muslims nationwide,” and listing examples of such lawsuits).
- 23 See Brief of Amicus Curiae Council on American-Islamic Relations in Support of Petitioner at 2–3, *Ams. for Prosperity Found. v. Bonta*, 594 U.S. ____ (2021) (no. 19-251).
- 24 Napolitano, “DHS’s Commitment to Nondiscriminatory Law Enforcement,” 1.
- 25 Napolitano, “DHS’s Commitment to Nondiscriminatory Law Enforcement,” 1.
- 26 The constitutional standard described in the DHS Guidance is strict scrutiny. “[T]he purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” *Adarand Constructors v. Peña*, 515 U.S. 200, 226 (1995) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)) (internal quotation marks omitted).
- 27 Courts tend to defer to the judgment of the executive branch about whether a policy is justified by national security, often under the theory that they are ill-equipped to second-guess such judgments. See, e.g., Shirin Sinnar, “Courts Have Been Hiding Behind National Security for Too Long,” Brennan Center for Justice, August 11, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/courts-have-been-hiding-behind-national-security-too-long>.
- 28 See Danielle Stefanucci, “Shedding Tiers: A New Framework for Equal Protection Jurisprudence,” *St. John’s Law Review* 93, no. 4 (2019): 1251, <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=7148&context=lawreview> (citing *Fisher v. University of Texas at Austin*, 579 U.S. 365, 376 (2016); *United States v. Virginia et al.*, 518 U.S. 515, 533 (1996); and *Romer v. Evans*, 517 U.S. 620, 631 (1996)).
- 29 Monica Andrade-Fannon and Geoff Boyce, *The Border’s Long Shadow: How Border Patrol Uses Racial Profiling and Local and State Police to Target and Instill Fear in Michigan’s Immigrant Communities*, ACLU of Michigan, March 25, 2021, 5, https://www.aclumich.org/sites/default/files/field_documents/100_mile_zone_report-updated.pdf; and Allyson Waller, “U.S. Border Agency Settles with 2 Americans Detained for Speaking Spanish,” *New York Times*, November 26, 2020, <https://www.nytimes.com/2020/11/26/us/montana-spanish-border-patrol.html>.
- 30 Napolitano, “DHS’s Commitment to Nondiscriminatory Law Enforcement,” 1.
- 31 Napolitano, “DHS’s Commitment to Nondiscriminatory Law Enforcement,” 1.
- 32 2014 DOJ Guidance, 4.
- 33 Napolitano, “DHS’s Commitment to Nondiscriminatory Law Enforcement,” 1–2.
- 34 Chappell Lawson, Alan Bersin, and Juliette N. Kayyem, *Beyond 9/11: Homeland Security for the Twenty-First Century* (Cambridge: MIT Press, 2020), 113.
- 35 See Harsha Panduranga, Faiza Patel, and Michael Price, *Extreme Vetting and the Muslim Ban*, Brennan Center for Justice, October 2, 2017, <https://www.brennancenter.org/our-work/research-reports/extreme-vetting-and-muslim-ban>. To justify the Muslim ban, the Trump administration issued a report highlighting international terrorism cases involving Muslim Americans born overseas. A clear implication of the report was that Muslim Americans presented a greater threat than other Americans. Brennan Center for Justice, “Brennan Center, Protect Democracy, and Lawfare Request Corrections to DOJ-DHS Section 11 Report on Terrorism Data,” February 12, 2018, <https://www.brennancenter.org/our-work/research-reports/brennan-center-protect-democracy-and-lawfare-request-corrections-doj-dhs>; and Faiza Patel, “Trump Administration’s Fuzzy Math on Terrorist Origins Is More than Misleading — It’s Dishonest,” *Just Security*, January 16, 2018, <https://www.justsecurity.org/51084/trump-administrations-fuzzy-math-terrorist-origins-misleading-its-dishonest>.
- 36 Gajanan, “CBP Commissioner: U.S. Border Officers ‘Overzealous’”; and CBP, “Iranian Supreme Leader Vows Forceful Revenge.”
- 37 For example, CBP determines whether an individual is eligible for visa-free travel to the U.S. under the Visa Waiver Program (VWP), which is open to citizens of 40 countries. CBP therefore must consider a person’s nationality to determine whether they are eligible to travel to the U.S. under the VWP. CBP, “Visa Waiver Program,” DHS, last modified June 9, 2022, <https://www.cbp.gov/travel/international-visitors/visa-waiver-program>. Applicants for asylum must establish that they are refugees by verifying that their race, religion, nationality, membership in a particular social group, or political opinion has caused them to be persecuted. 8 U.S.C. §§ 1158 (b)(1)(A)-(B).
- 38 Napolitano, “DHS’s Commitment to Nondiscriminatory Law Enforcement,” 2.
- 39 See Scott Shuchart, *Building Meaningful Civil Rights and Liberties Oversight at the U.S. Department of Homeland Security*, Center for American Progress, April 2, 2019, <https://www.americanprogress.org/article/building-meaningful-civil-rights-liberties-oversight-u-s-department-homeland-security>.

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ACKNOWLEDGMENTS

The Brennan Center gratefully acknowledges the Bauman Foundation, CS Fund/Warsh-Mott Legacy, and Media Democracy Fund for their generous support of our work. This is an independent Brennan Center publication; the opinions expressed are those of the authors and do not necessarily reflect the views of our supporters.

The authors would like to express their gratitude to Rachel Levinson-Waldman for her drafting contributions and expert input, Alia Shahzad, Priyam Madhukar, José Gutiérrez, Kaylana Mueller-Hsia, Apratim Vidyarthi, and Olivia Choi for their invaluable research and cite-checking support, and Michael German, Spencer Reynolds, and John Kowal for their support and guidance. We also gratefully acknowledge the Brennan Center’s Lisa Benenson, Julian Brookes, Matthew Harwood, Zachary Laub, Alexandra Ringe, Janet Romero-Bahari, and Alden Wallace for their editing and communications assistance. The authors are also deeply grateful to the outside experts who generously shared their time and expertise, including Hina Shamsi, Ashley Gorski, Shoba Wadhia, Jack Glaser, Jeramie Scott, and Edward Hasbrouck.

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