

## ARAB AMERICAN INSTITUTE

### SURVEILLANCE

#### Background

Securitization refers to the simultaneous oversimplification and exaggeration of complex national security-related policy concerns. In recent decades, the U.S. government has exploited sociopolitical anxieties to justify a disproportionate response to terrorism at home and abroad. As a securitized community, Arab Americans face discriminatory national security policies and inordinate threats to important constitutional protections, particularly in regard to First and Fourth Amendment rights.

Excessive surveillance of targeted communities, including Arab Americans and American Muslims, is one example of securitization in the domestic sphere. While the U.S. government has justified serious transgressions of constitutional rights in defense of national security throughout its history,<sup>1</sup> this dynamic has only intensified since the tragic terror attacks on 9/11. In regard to surveillance, national security frameworks advanced under the Bush and Obama administrations—and now under President Trump—have each posed distinct challenges to the civil rights and civil liberties of securitized communities.

#### Surveillance under the Bush Administration

Under the Bush Administration and in the aftermath of 9/11, Congress passed national security legislation empowering the executive branch to conduct mass surveillance of American citizens and lawful permanent residents. Prior to 9/11, the Intelligence Community's surveillance capabilities were limited, though not sufficiently, under two legal authorities: the Foreign Intelligence Surveillance Act (FISA) of 1978<sup>2</sup>; and Executive Order 12333, which President Reagan signed in 1981.<sup>3</sup> Both the USA PATRIOT Act of 2001 and the FISA Amendments Act (FAA) of 2008, which added Section 702 to the foreign surveillance law, authorized further incursions into Americans' privacy.

In accordance with FISA, the Foreign Intelligence Surveillance Court (FISA Court) reviews individual requests from the U.S. government to conduct surveillance relating to "foreign intelligence" within the United States.<sup>4</sup> Section 215 of the Patriot Act expanded FISA Court-authorized surveillance to include "bulk collection" of Americans' communications and other data.<sup>5</sup> Section 702 of the FAA likewise increased the U.S. government's surveillance capabilities, removing the longstanding requirement that it obtain a warrant to monitor communications between U.S. persons and suspected foreign targets.<sup>6</sup> This form of warrantless surveillance resulted in the "incidental collection" of innocent Americans' communications.<sup>7</sup>

The Homeland Security Act of 2002 established the Department of Homeland Security (DHS) to advance a coordinated national strategy—at the federal, state, and local level—for combating terrorism and other public safety concerns.<sup>8</sup> A central component of this strategy is the development of fusion centers, which form a decentralized network of state, local, and regional institutions designed for intelligence sharing between: the Intelligence Community; federal, state, and local law enforcement; and the private sector.<sup>9</sup> Dozens of fusion centers were established under the Bush Administration, each with limited accountability and oversight. While publicly available information is limited, reports suggest fusion centers gathered intelligence on constitutionally protected speech and activities, targeting American Muslim organizations and communities for no ostensible reason.<sup>10</sup>

#### Surveillance under the Obama Administration

Mass surveillance conducted under the Bush Administration did not cease with the inauguration of President Obama in 2009. Revelations of government overreach, however, inspired calls for

accountability and, in some cases, reform. In 2013, the whistleblower Edward Snowden disclosed the National Security Agency's (NSA) bulk collection of Americans' call records, or telephone metadata, under Section 215 of the Patriot Act.<sup>11</sup> The USA Freedom Act of 2015 prohibited this form of bulk collection, requiring increased accountability and transparency of U.S. government surveillance activities, while extending certain provisions of the Patriot Act to December 2019.<sup>12</sup> President Bush permanently reauthorized most of the law's provisions in 2006.<sup>13</sup>

To complement the traditional surveillance architecture advanced under the Bush Administration, the U.S. government under President Obama launched a community-level component to its national security strategy. Known as Countering Violent Extremism (CVE), this flawed, damaging program targets securitized communities through: community intervention; deeper engagement from law enforcement and government; and counter-messaging.<sup>14</sup> A product of sociopolitical anxieties relating to the emergence of the self-proclaimed Islamic State of Iraq and the Levant (ISIL), online proliferation of terrorist propaganda, and threat of "self-radicalization," CVE is designed to prevent Americans deemed at risk of "radicalization" from resorting to "violent extremism." CVE programs have disproportionately targeted Arab Americans and American Muslims, damaging communities and wasting government resources in the process. In this respect, CVE threatens basic constitutional rights and perpetuates cultural and religious biases on the basis of flawed theoretical assumptions.<sup>15</sup>

The national security frameworks advanced under the Bush and Obama Administrations pose distinct challenges to the civil rights and civil liberties of Arab Americans and other securitized communities. Limited Obama-era reforms partially curtailed the post-9/11 mass surveillance architecture established during the Bush Administration. Under FISA Section 702 and EO 12333, however, warrantless surveillance of American citizens and lawful permanent residents persists, with limited oversight and significant implications for First and Fourth Amendment rights.<sup>16</sup> The continued proliferation of fusion centers—a component of DHS's coordinated national security strategy—warrants similar concerns surrounding government accountability and transparency.<sup>17</sup> Established under President Obama, CVE produced a new dimension of securitization and surveillance that disproportionately targets Arab Americans and American Muslims. Empirical research demonstrates that CVE not only threatens basic constitutional rights and perpetuates damaging stereotypes, but is also ineffective, as it creates fear and distrust of government and diverts resources from proven counterterrorism strategies.<sup>18</sup>

### **Surveillance under the Trump Administration**

Signs indicate the Trump Administration will advance the most damaging elements of its predecessors' national security frameworks. In January 2018, Congress passed the FISA Amendments Reauthorization Act, which extends Section 702 authorities to December 2023 without significant privacy reforms.<sup>19</sup> Citing the need for an "integrated approach to use data held across national security components," President Trump signed a memorandum establishing the National Vetting Center (NVC) the following month.<sup>20</sup> When considered alongside contemporaneous developments across federal agencies, the memorandum reveals the president's intention to centralize, enhance, and deregulate the nation's intelligence sharing infrastructure. In recent months, the Trump Administration has published reports promoting severe infractions of constitutional and human rights. These publications, which include an interagency DOJ/DHS report on terrorism and a leaked DHS Customs and Border Protection (CBP) draft report promoting sustained, targeted evaluation of "persons of interest," i.e. Sunni Muslims in the United States,<sup>21</sup> reveal the same xenophobic, anti-Muslim agenda demonstrated in the president's Muslim bans.<sup>22</sup> In this respect, President Trump's demands for "extreme vetting" require both draconian border security policies and continuous, automated surveillance of certain communities inside the United States, particularly Arab Americans and American Muslims.

The Trump Administration has proposed various incursive policies relating to communications and social media that would enable this form of automated surveillance. Through the Visa Lifecycle Vetting Initiative (VLVI), formerly known as the Extreme Vetting Initiative, DHS's

Immigration and Customs Enforcement (ICE) is developing a software that would “determine and evaluate [via automation] an applicant’s probability of becoming a positively contributing member of society” through a procedure known as social media exploitation, or scraping.<sup>23</sup> According to ICE, scraping would facilitate continuous vetting, improving the agency’s “ability to identify emerging risks, such as radicalization, that may occur after an individual arrives in the United States.”<sup>24</sup> These proposed vetting initiatives would perpetuate flawed theoretical assumptions of radicalization inherent to CVE under the veneer of automation, which is assumed to be unbiased and objective. The Trump Administration has engaged the technology sector on multiple fronts: to develop artificial intelligence (AI) and machine learning techniques for automated mass surveillance<sup>25</sup>; and to implement a new digital CVE paradigm, in which public-private partnerships would facilitate “online to offline interventions” in securitized communities.<sup>26</sup> This online approach would have offline effects consistent with those of traditional CVE programs and threaten constitutional rights.

### Key Recommendations

The Trump Administration’s national security strategy incorporates the most damaging aspects of prior administrations’ respective surveillance frameworks. Additional layers of government surveillance of Arab Americans and securitized communities warrant scrutiny, including at the state and local levels.

1. At the local level, law enforcement agencies must demonstrate greater transparency, with respect to investigative techniques, and counteract biased policing and profiling. Historically, major police departments have conducted suspicion-less surveillance of American Muslim communities.<sup>27</sup> Advocates must demand oversight and improved religious and cultural diversity trainings to discourage invasive, discriminatory policing.
2. At the state level, state legislatures must:
  - Prevent the development of state, local, and regional fusion centers and mandate increased oversight and accountability;
  - Enact legislation requiring mandatory religious and cultural diversity trainings for law enforcement certification.
3. At the national level, advocates must:
  - Demand the Trump Administration affords due process to Americans placed on government watch lists without apparent justification. Subject to congressional oversight, the Office of the Director of National Intelligence (ODNI) must review watch listing procedures and outcomes that implicate U.S. persons;
  - Require sufficient congressional oversight, and heightened public attention, regarding the administration’s vetting proposals, including the Visa Lifecycle Vetting Initiative, the National Vetting Center, and other programs and materials pursuant to Executive Orders 13769 and 13780, and Presidential Proclamation 9645<sup>28</sup>;
  - Renounce U.S. government partnerships with the technology sector to advance invasive, discriminatory automated mass surveillance, which would pose inordinate threats to important constitutional protections and target Arab Americans and other securitized communities.

- <sup>1</sup> See *Korematsu v. United States*, 323 U.S. 214 (1944), available at <https://www.law.cornell.edu/supremecourt/text/323/214>. See also Nadine Frederique, COINTELPRO, Encyclopedia Britannica (Jul. 21, 2016), available at <https://www.britannica.com/topic/COINTELPRO>.
- <sup>2</sup> U.S. Department of Justice, Office of Justice Programs, The Foreign Intelligence Surveillance Act of 1978 (FISA) (last revised Sept. 9, 2013), available at <https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1286>.
- <sup>3</sup> Mark Jaycox, A Primer on Executive Order 12333: The Mass Surveillance Starlet, Electronic Frontier Foundation (Jun. 2, 2014), available at <https://www.eff.org/deeplinks/2014/06/primer-executive-order-12333-mass-surveillance-starlet>. See also, *Executive Order 12333*, Electronic Privacy Information Center, available at <https://epic.org/privacy/surveillance/12333>.
- <sup>4</sup> For a comprehensive review of the FISA Court, see Elizabeth Goitein and Fiza Patel, Brennan Center for Justice, *What Went Wrong with the FISA Court* (Mar. 18, 2015) available at [https://www.brennancenter.org/sites/default/files/analysis/What\\_Went\\_%20Wrong\\_With\\_The\\_FISA\\_Court.pdf](https://www.brennancenter.org/sites/default/files/analysis/What_Went_%20Wrong_With_The_FISA_Court.pdf).
- <sup>5</sup> Brennan Center for Justice, Foreign Intelligence Surveillance (FISA Section 702, Executive Order 12333, and Section 215 of the Patriot Act): A Resource Page (last revised Sept. 28, 2017), <https://www.brennancenter.org/analysis/foreign-intelligence-surveillance-fisa-section-702-executive-order-12333-and-section-215#section%20702>. See also, *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (Patriot) Act*, Pub. L. No. 107-56, 115 Stat. 272 (2001), available at <https://www.congress.gov/bill/107th-congress/house-bill/3162>.
- <sup>6</sup> As defined in 22 U.S. Code § 6010, the term “U.S. persons” refers to American citizens, lawful permanent residents, and “any corporation, partnership, or other organization organized under the laws of the United States.” See also Letter from Brennan Center for Justice to members of the Privacy and Civil Liberties Board (Apr. 11, 2014), available at <http://www.brennancenter.org/sites/default/files/analysis/BCJ-PCLOBComments04.11.14.pdf>.
- <sup>7</sup> For up-to-date information and analysis related to Section 702, see Lawfare, *FISA: Section 702 Collection* (last visited Apr. 21, 2018), available at <https://www.lawfareblog.com/topic/fisa-702-collection>.
- <sup>8</sup> Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002), available at [https://www.dhs.gov/sites/default/files/publications/hr\\_5005\\_enr.pdf](https://www.dhs.gov/sites/default/files/publications/hr_5005_enr.pdf).
- <sup>9</sup> Michael German and Jay Stanley, American Civil Liberties Union, *What’s Wrong with Fusion Centers?* (Dec. 2007), available at [https://www.aclu.org/files/pdfs/privacy/fusioncenter\\_20071212.pdf](https://www.aclu.org/files/pdfs/privacy/fusioncenter_20071212.pdf). See also, U.S. Department of Homeland Security, Office of Intelligence and Analysis, *State & Major Urban Area Fusion Centers* (last revised Jun. 26, 2017), available at <https://www.dhs.gov/state-and-major-urban-area-fusion-centers>.
- <sup>10</sup> Faiza Patel, Brennan Center for Justice, *Rethinking Radicalization* (Mar. 8, 2011), available at <http://www.brennancenter.org/sites/default/files/legacy/RethinkingRadicalization.pdf>. See also, Press Release, American Civil Liberties Union of Virginia, *Governor Orders Investigation of Virginia Fusion Center* (Apr. 29, 2008), available at <https://www.acluva.org/en/press-releases/governor-orders-investigation-virginia-fusion-center>.
- <sup>11</sup> The term metadata refers to non-content-based communications information. See Center for Strategic and International Studies, *Fact Sheet: Section 215 of the USA PATRIOT Act* (last revised Feb. 27, 2014), available at <https://www.csis.org/analysis/fact-sheet-section-215-usa-patriot-act>.
- <sup>12</sup> Cindy Cohn and Randy Reitman, *USA Freedom Act Passes: What we celebrate, what we mourn, and where we go from here*, Electronic Frontier Foundation (Jun. 2, 2015), <https://www.eff.org/deeplinks/2015/05/usa-freedom-act-passes-what-we-celebrate-what-we-mourn-and-where-we-go-here>. See also, Kate Tummarello, *Debunking the Patriot Act as it Turns 15*, EFF (Oct. 26, 2016), <https://www.eff.org/deeplinks/2016/10/debunking-patriot-act-it-turns-15>.
- <sup>13</sup> David Stout, *Bush Signs Bill Renewing Patriot Act*, New York Times (Mar. 9, 2006), <https://www.nytimes.com/2006/03/09/politics/bush-signs-bill-renewing-patriot-act.html>.
- <sup>14</sup> Executive Office of the President, *Strategic Implementation Plan for Empowering Local Partners to Prevent Violent Extremism in the United States* (Dec. 2011), available at <https://obamawhitehouse.archives.gov/sites/default/files/sip-final.pdf>.
- <sup>15</sup> Faiza Patel and Megan Koushik, Brennan Center for Justice, *Countering Violent Extremism* (March 16, 2017), available at [https://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20CVE%20Report\\_0.pdf](https://www.brennancenter.org/sites/default/files/publications/Brennan%20Center%20CVE%20Report_0.pdf). See also, Faiza Patel, Brennan Center for Justice, *Rethinking Radicalization* (Mar. 8, 2011), available at <http://www.brennancenter.org/sites/default/files/legacy/RethinkingRadicalization.pdf>.
- <sup>16</sup> Faiza Patel, *Bulk Collection under Section 215 has Ended . . . What’s Next?*, Just Security (Nov. 30, 2015), available at <https://www.justsecurity.org/27996/bulk-collection-ended-whats-next>. See also, Human Rights Watch, *US: New Evidence Suggests Monitoring of Americans* (Oct. 25, 2017), available at <https://www.hrw.org/news/2017/10/25/us-new-evidence-suggests-monitoring-americans>.
- <sup>17</sup> U.S. Department of Homeland Security, Office of Intelligence and Analysis, *Fusion Center Locations and Contact Information* (last revised Apr. 12, 2018), <https://www.dhs.gov/fusion-center-locations-and-contact-information>.
- <sup>18</sup> Patel and Koushik, *Countering Violent Extremism*, *supra* note 15, at 9.

- <sup>19</sup> Elizabeth Goitein and Robert Litt, *A Way Forward on Section 702 Queries*, Lawfare (Feb. 20, 2018), available at <https://www.lawfareblog.com/way-forward-section-702-queries>. See also, Emma Kohse, *Summary: The FISA Amendments Reauthorization Act of 2017*, Lawfare (Jan. 18, 2018), available at <https://www.lawfareblog.com/summary-fisa-amendments-reauthorization-act-2017>.
- <sup>20</sup> Memorandum on Optimizing the Use of Federal Government Information in Support of the National Vetting Enterprise, National Security Presidential Memorandum/NSPM-9, DCPD No. 201800078 (Feb. 6, 2018), available at <https://www.govinfo.gov/content/pkg/DCPD-201800078/pdf/DCPD-201800078.pdf>.
- <sup>21</sup> US. Departments of Homeland Security and Justice, Executive Order 13780: *Protecting the Nation from Foreign Terrorist Entry into the United States* Initial Section 11 Report (Jan. 2018), available at <https://www.justice.gov/opa/press-release/file/1026436/download>. For leaked CBP draft report, see George Joseph, *Draft DHS Report Called for Long-term Surveillance of Sunni Muslim Immigrants*, Foreign Policy (Feb. 5, 2018), <http://foreignpolicy.com/2018/02/05/draft-dhs-report-surveillance-of-muslim-immigrants>.
- <sup>22</sup> See Muslim Advocates, *A Total and Complete Shutdown: How the Trump Administration is Working to Ban Muslims from the United States* (Apr. 2018), available at <https://www.muslimadvocates.org/totalandcompleteshutdown>.
- <sup>23</sup> See Q&A July 19 2017 Industry Day, U.S. Immigration and Customs Enforcement Office, Presolicitation Notice, Solicitation No. HSCEMD-17-R-00010, ICE-HIS - Data Analysis Service Amendment (Jun. 12, 2017), [https://www.fbo.gov/?s=opportunity&mode=form&tab=core&id=ee93bcc8a389d539fd9b927ec53dd2be&\\_cvview=0](https://www.fbo.gov/?s=opportunity&mode=form&tab=core&id=ee93bcc8a389d539fd9b927ec53dd2be&_cvview=0).
- <sup>24</sup> See Attachment 1: Statement of Objectives, *supra* note 23.
- <sup>25</sup> See Letter from Technology Experts to the Honorable Elaine C. Duke, Acting Secretary of Homeland Security (Nov. 16, 2017), available at <https://www.brennancenter.org/sites/default/files/Technology%20Experts%20Letter%20to%20DHS%20Opposing%20the%20Extreme%20Vetting%20Initiative%20-%202011.15.17.pdf>. See also, Letter from Coalition of Nonprofit Organizations to the Honorable Elaine C. Duke, Acting Secretary of Homeland Security (Nov. 16, 2017), available at <https://www.brennancenter.org/sites/default/files/Coalition%20Letter%20to%20DHS%20Opposing%20the%20Extreme%20Vetting%20Initiative%20-%202011.15.17.pdf>.
- <sup>26</sup> U.S. Department of Homeland Security, *Digital Forum on Terrorism Prevention: A Report on Trends and Insights* (Jan. 3, 2018), available at <https://www.hsdl.org/?view&did=806547>.
- <sup>27</sup> American Civil Liberties Union, *Factsheet: The NYPD Muslim Surveillance Program*, <https://www.aclu.org/other/factsheet-nypd-muslim-surveillance-program>. See also, Moustafa Bayoumi, *Spied on for Being Muslim*, *The Nation* (Jul. 10, 2014), <https://www.thenation.com/article/spied-being-muslim>.
- <sup>28</sup> See Michael Price et al., *Brennan Center for Justice, Liberty & National Security: An Election Agenda for Candidates, Activists, and Legislators* (Apr. 23, 2018), available at <http://www.brennancenter.org/sites/default/files/publications/Liberty%20%26%20National%20Security%20An%20Election%20Agenda.pdf>.