

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ABDULRAHMAN CHERRI,
WISSAM CHARAFEDDINE,
ALI SULEIMAN ALI, and,
KHEIREDDINE BOUZID,

Plaintiffs,

v.

ROBERT S. MUELLER, III, in his official
capacity as Director of the Federal Bureau
of Investigation;

DAVID V. AGUILAR, in his official capacity
as Acting Commissioner of the United States
Customs and Border Protection;

JANET NAPOLITANO, in her official capacity
as Secretary of the United States Department
of Homeland Security;

ROBERT B. THOMPSON, in his individual
capacity;

JEFF SOKOLOWSKI, in his individual
capacity;

UNIDENTIFIED FBI AGENTS, in their
individual capacities;

UNIDENTIFIED CBP AGENTS, in their
individual capacities; and,

Defendants.

Case No. 12-cv-11656
Hon. Avern Cohn
Magistrate: Laurie J. Michaelson

SECOND AMENDED COMPLAINT (INDIVIDUAL-CAPACITY DEFENDANTS)

Plaintiffs, ABDULRAHMAN CHERRI, WISSAM CHARAFEDDINE, ALI SULEIMAN ALI,
and KHEIREDDINE BOUZID, through their undersigned counsel, state as follows:

Parties

1. Plaintiff Abdulrahman Cherri is a United States Citizen and a Muslim residing in Wayne County, Michigan, within this district.

2. Plaintiff Wissam Charafeddine is a United States Citizen and a Muslim residing in Wayne County, Michigan, within this district.

3. Plaintiff Ali Suleiman Ali is a United States Citizen and a Muslim residing Wayne County, Michigan, within this district.

4. Plaintiff Kheireddine Bouzid is a United States Citizen and a Muslim of residing in Washtenaw County, Michigan, within this district.

5. Defendant Robert B. Thompson is an agent employed by the FBI and is being sued in his individual capacity, only.

6. Defendant Jeff Sokolowski is an agent employed by the FBI and is being sued in his individual capacity, only.

7. Defendants Unidentified FBI Agents and Unidentified CBP Agents are employed by their respective agencies and are being sued in their individual capacities, only.

Jurisdiction and Venue

8. Under U.S. Const. Art. III §2, this Court has jurisdiction because the rights sought to be protected herein are secured by the United States Constitution. Jurisdiction is proper pursuant to 28 U.S.C. § 1331, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*, and federal common law.

9. This action also seeks declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § § 2201-02, Rules 57 and 65 of the Federal Rules of Civil Procedure, and pursuant to the general, legal, and equitable powers of this Court.

10. A substantial part of the unlawful acts alleged herein were committed within the jurisdiction of the United States District Court for the Eastern District of Michigan.

11. Venue is proper under 42 U.S.C. § 1391(e) as to all Defendants because Defendants are officers or employees of agencies of the United States sued under color of legal authority and because this judicial district is where all Plaintiffs reside and where a substantial part of the events or omissions giving rise to the claims occurred.

Factual Background

Abdulrahman Cherri

12. On or about March, 2010, Plaintiff Abdulrahman Cherri (“Cherri”) crossed the United States-Canada border for the purposes of reentering the United States.

13. On or about that same day, Unidentified CBP Agents subjected Cherri to an invasive body search and a prolonged detention lasting several hours whereby he was subjected to prolonged questioning about his Islamic beliefs and practices.

14. After that day in March, 2010, Cherri crossed the United States-Canada border more than six times, and each time he crossed, Unidentified CBP Agents repeatedly subjected Cherri to invasive body searches, fingerprinted, detained for several hours, and invasive questioning regarding his Islamic beliefs and practices.

15. During all detentions at the United States-Canada border, Unidentified CBP Agents and/or Unidentified FBI Agents asked Cherri substantially similar questions

regarding his place of worship, the locations at which he worships, and how frequently he attends his primary place of worship.

16. Cherri was subjected to substantially similar treatment and questioning by one or more Unidentified CBP Agents and/or Unidentified FBI Agents every time he crossed the United States-Canada border since March, 2010.

17. On or about May, 2011, two FBI Agents, Defendants Thompson and Sokolowski, questioned Cherri at his home. Defendants Thompson and Sokolowski advised Cherri that they were aware Cherri was being subjected to repeated detentions and religious questioning at the United States – Canada border.

18. Defendants Thompson and Sokolowski advised Cherri that if he answers certain questions, they would try to find out the reasons why Cherri was being repeatedly detained and questioned at the border and correct the problem so that he no longer detained and subjected to religious questioning at the border.

19. Defendants Thompson and Sokolowski asked Cherri substantially similar questions as those asked by Unidentified CBP Agents and/or Unidentified FBI Agents during his detentions at the United States – Canada border, including, but not limited to, his Islamic beliefs and practices, his primary place of worship, the locations at which he worships, how frequently he attends his primary place of worship, and which sect of Islam he follows.

20. Cherri continues to be subjected to the same prolonged detentions and religious questioning by Unidentified CBP Agents and/or Unidentified FBI Agents each time he crosses the United States-Canada border.

21. As of the date of this filing, Defendant Thompson, Defendant Sokolowski, Unidentified CBP Agents and/or Unidentified FBI Agents have not provided Cherri with a reason for being subjected to the above treatment.

22. Cherri no longer crosses the United States – Canada border in order to avoid being subjected to the above treatment.

Wissam Charafeddine

23. On or about November, 2008, Plaintiff Wissam Charafeddine (“Charafeddine”) crossed the United States-Canada border for the purposes of reentering the United States.

24. On that day, Charafeddine’s vehicle was surrounded by armed Unidentified CBP Agents. The Unidentified CBP Agents handcuffed Charafeddine, subjected him to an invasive body search, and a prolonged detention lasting several hours whereby he was subjected to invasive questioning about his Islamic beliefs and practices.

25. After that day in November, 2008, Charafeddine crossed the United States-Canada border more than six times, including as recent as December, 2010.

26. Each time Charafeddine crossed the United States-Canada border, his vehicle was surrounded by armed Unidentified CBP Agents. The Unidentified CBP Agents handcuffed him, subjected him to an invasive body search, fingerprinted him, and detained him for several hours.

27. During all six detentions at the United States-Canada border, Charafeddine was questioned by one or more Unidentified CBP Agents and/or Unidentified FBI Agents about his Islamic beliefs and practices.

28. Charafeddine continues to be subjected to the same prolonged detentions and religious questioning by Unidentified CBP Agents and/or Unidentified FBI Agents each time he crosses the United States – Canada border.

29. Due to Charafeddine's repeated detentions and religious questioning, Charafeddine has suffered loss of business interests and income in Canada.

30. As of the date of this filing, the Unidentified CBP Agents and/or Unidentified FBI Agents have not provided Charafeddine with a reason for being subjected to the above treatment.

31. Charafeddine no longer crosses the United States – Canada border in order to avoid being subjected to the above treatment.

Ali Suleiman Ali

32. Plaintiff Ali Suleiman Ali ("Ali") crossed the United States-Canada border and multiple United States international air ports of entry for the purposes of reentering the United States.

33. At both the United States-Canada border and multiple United States international air ports of entry, Unidentified CBP Agents handcuffed Ali, subjected him to prolonged detentions lasting several hours, and subjected him to prolonged invasive questioning by one or more Unidentified CBP Agents and/or Unidentified FBI Agents about his Islamic religious philosophy and Islamic views, Islamic practices, and the locations at which he worships.

34. Ali continues to be subjected to the same prolonged detentions and prolonged religious questioning by Unidentified CBP Agents and/or Unidentified FBI Agents when he

crosses the United States-Canada border and United States international ports of entry, including as recent as December, 2011.

35. As of the date of this filing, the Unidentified CBP Agents and/or Unidentified FBI Agents have not provided Ali with a reason for being subjected to the above treatment.

Kheireddine Bouzid

36. On or about August 24, 2008, Plaintiff Kheireddine Bouzid ("Bouzid") crossed the United States-Canada border for the purposes of reentering the United States.

37. On that day on or about August 24, 2008, Bouzid's vehicle was surrounded by armed Unidentified CBP Agents with their guns drawn. The Unidentified CBP Agents handcuffed Bouzid, subjected him to an invasive body search, and a prolonged detention lasting several hours. The Unidentified CBP Agents and/or Unidentified FBI Agents subjected Bouzid to invasive questioning about his Islamic beliefs and practices.

38. After that day on or about August 24, 2008, Bouzid crossed the United States-Canada border more than four times, including as recent as July, 2010, and each time he crossed the United States-Canada border, Unidentified CBP Agents surrounded Bouzid's vehicle with their guns drawn, and handcuffed him, subjected him to an invasive body search, fingerprinted him, detained him for several hours, and questioned him about his Islamic beliefs and practices.

39. During all detentions at the United States-Canada border, one or more Unidentified CBP Agents and/or Unidentified FBI Agents questioned Bouzid regarding his place of worship, whether he prays five times a day, which Islamic sect he follows, and whether he prays his early morning prayer at his primary place of worship.

40. Unidentified CBP Agents continue to subject Bouzid to the same prolonged detentions and religious questioning each time he crosses the United States-Canada border.

41. As of the date of this filing, the Unidentified CBP Agents and/or Unidentified FBI Agents have not provided Bouzid with a reason for being subjected to the above treatment.

42. Bouzid no longer crosses the United States – Canada border in order to avoid being subjected to the above treatment.

Defendants' Questioning of Religious Practices

43. CBP Agents are responsible for screening travelers who present themselves at ports of entry in order to enter the United States.

44. CBP Agents sometimes pull travelers aside and subject them to additional questioning, searches of their persons, or searches of their property and vehicles before allowing them to enter the United States.

45. FBI Agents sometimes subject travelers to additional questioning at ports of entry before allowing them to enter the United States.

46. Upon information and belief, whether due to a policy implemented by Defendant Aguilar and Napolitano's respective agencies, or due to a course of conduct or pattern of practice that was permitted, encouraged, or tolerated by Defendant Aguilar and Napolitano's respective agencies, CBP Agents refer Muslim American travelers more frequently than American travelers of other faiths for secondary inspection.

47. Upon information and belief, Defendants Mueller, Aguilar, and Napolitano, through their respective agencies, either began implementing a policy or encouraged, permitted, or tolerated a course of conduct or pattern of practice under which CBP Agents

and FBI Agents ask Muslim American travelers attempting to re-enter the United States through the United States-Canada border and at multiple international ports of entry detailed questions about their specific Islamic beliefs and practices.

48. Upon information and belief, Defendants Mueller, Aguilar, and Napolitano, through their respective agencies, have not implemented a policy or encouraged, permitted, or tolerated a course of conduct or pattern of practice whereby CBP Agents and FBI Agents ask American travelers of other faiths questions about their specific religious beliefs and religious practices.

49. Defendants Mueller, Aguilar, and Napolitano, through their respective agencies, were aware of and implemented a policy or encouraged, permitted, or tolerated a course of conduct or pattern of practice by CBP Agents and FBI Agents, which includes asking Muslim American travelers a substantially similar set of questions about their Islamic beliefs and practices, that typically include, but are not limited to the following:

- a. Which mosque do you go to?
- b. How many times a day do you pray?
- c. Who is your religious leader?
- d. Do you perform your morning prayer at the mosque?

50. The questioning and treatment described above targets, discriminates against, humiliates, substantially burdens, and creates a chilling effect upon Muslim American travelers, including Plaintiffs, and wrongfully stigmatizes them as violent threats based solely on a subjective assessment of their Islamic beliefs and practices.

51. On October 1, 2010, a Senior Advisor for the Office of Civil Rights and Civil Liberties, DHS, wrote a Legal Memorandum to Ms. Margo Schlanger, Officer for Civil Rights

and Civil Liberties, DHS (“DHS CRCL”) that examined a policy of religious questioning and religious profiling by law enforcement both at the border and within the United States (the “Legal Memorandum”). The Legal Memorandum is referenced as an Exhibit to this Complaint.

52. Both prior to and subsequent to the date of the Legal Memorandum, Defendant Napolitano and Defendant Aguilar’s respective agencies received and/or were made aware of a number of complaints from similarly situated Muslim American travelers throughout the United States that, similar to Plaintiffs, were subjected to detailed questions about their Islamic beliefs and practices by CBP and/or FBI Agents while attempting to re-enter the United States through the United States-Canada border or at multiple international ports of entry.

53. On March 24, 2011, the Council on American-Islamic Relations, Michigan (“CAIR-MI”) filed a complaint with DHS CRCL on behalf of the Plaintiffs and several other similarly situated Muslim Americans that reported similar treatment and questioning related to their Islamic beliefs and practices by CBP and/or FBI Agents.

54. In a letter dated May 3, 2011 written in response to the complaint filed on March 24, 2011, Ms. Schlanger, Officer for DHS CRCL, stated that “Under 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1, our complaint process does not provide individuals with legal or procedural rights or remedies. Accordingly, this Office is not able to obtain any legal remedies or damages on your behalf or that of the above complainants” (the “DHS CRCL Letter”). The DHS CRCL Letter is referenced as an Exhibit to this Complaint.

55. In the DHS CRCL Letter, Ms. Schlanger further stated that she was aware of other Muslim American travelers similarly situated that were subjected to substantially

similar invasive questioning about their religious beliefs and practices by CBP Agents at ports of entry: “[DHS] CRCL has received a number of complaints like yours, alleging that U.S. Customs and Border Protection (CBP) officers have engaged in inappropriate questioning about religious affiliation and practices during border screening.”

56. On May 3, 2011, pursuant to a Memorandum addressed to former CBP Commissioner Alan Bersin from Ms. Schlanger, Defendant Napolitano and Defendant Aguilar’s respective agencies were aware of at least twenty-two other Muslim American travelers throughout the United States that filed similar complaints regarding invasive religious questioning by both CBP and FBI Agents about their Islamic beliefs and practices with DHS (the “CBP Memorandum”). The CBP Memorandum is referenced as an Exhibit to this Complaint.

57. The CBP Memorandum stated that FBI and CBP Agents were “repeatedly question[ing] [Muslim travelers] and other members of their communities about their religious practices or other First Amendment protected activities, in violation of their civil rights or civil liberties.”

58. The CBP Memorandum included the following examples of Muslim travelers similarly situated to Plaintiffs that were subjected to similar invasive questioning about their Islamic beliefs and practices by FBI and CBP Agents at ports of entry: (1) On November 17, 2009, CBP Agents asked a Muslim traveler at Logan International Airport in Boston, Massachusetts “how often he prays and what mosque he attends;” (2) In August 2009, CBP Agents asked a Muslim traveler “what mosque he attends and how often he prays;” (3) On February 21, 2010, CBP Agents asked a Muslim traveler “When did you convert? When did you become a Muslim? Which mosques do you attend? and “How often do you attend the

mosque?” (4) On August 6, 2009, in Champlain, New York, CBP Agents asked a Muslim traveler “Do you go the mosque? Why? How often? What Mosque? Are you an Imam at the mosque? And “Are you Shi’a or Sunni?” (5) In January, 2010, in Buffalo, New York, CBP Agents asked a Muslim traveler “Are you a Muslim? and “Do you pray five times a day, in the mosque?” (6) On July 8, 2010, in Seattle, Washington, an FBI Agent asked a Muslim traveler at the United States – Canada border “What mosque do you attend? How often do you attend the mosque? So you don’t consider yourself a religious person?” (7) In Port Huron, Michigan, an FBI agent asked a Muslim traveler crossing the border “about his place of worship and how many times he attended per week” (8) In Atlanta, Georgia, a Muslim traveler was asked by CBP Agents “about protected beliefs, practices and associations,” and, (9) On February 26, 2010, a Muslim traveler was asked by a CBP Agent “whether he was Sunni or Shi’ite,” and was told that he should expect to face similar questioning again.

59. The policies, course of conduct, or pattern of practice, described above, of Defendant Mueller, Aguilar, and Napolitano’s respective agencies, do not further any valid or legitimate law enforcement purpose, or other public purpose, nor do they further any compelling government interest.

COUNT I
VIOLATION OF THE FIRST AMENDMENT
TO THE UNITED STATES CONSTITUTION
(Free Exercise of Religion)¹

¹ Count I was dismissed by the Court in its June 11, 2013 Order. Dkt. 44. Also, the Court issued an Order of Bifurcation requiring the filing of two second amended complaints, one to be filed as Second Amended Complaint (Official – Capacity Defendants), and the second as, Second Amended Complaint (Individual-Capacity Defendants) (DKT#45). For both Orders, Plaintiff agrees as to form only.

COUNT II
**VIOLATION OF THE FIRST AMENDMENT
TO THE UNITED STATES CONSTITUTION
(Establishment Clause)²**

COUNT III
**VIOLATION OF THE FIRST AMENDMENT
TO THE UNITED STATES CONSTITUTION
(Retaliation)³**

COUNT IV
**VIOLATION OF THE FIFTH AMENDMENT
TO THE UNITED STATES CONSTITUTION
(Equal Protection)**

60. Plaintiffs hereby reallege and incorporate by reference the foregoing paragraphs of this Complaint as if fully set forth herein.

61. All Plaintiffs have been subjected to a substantially similar line of questioning about their religious beliefs and religious practices as other Muslim Americans travelers by Defendants at the United States-Canada border and other international ports of entry.

62. Defendants' unlawful repeated targeting of Plaintiffs for a line of religious questioning based solely on their religious beliefs and religious practices violates their rights to equal protection guaranteed by the Fifth Amendment to the United States Constitution because persons of other faiths similarly situated as Plaintiffs are not repeatedly asked similar questions about their religion and religious practices.

² Count II was dismissed by the Court in its June 11, 2013 Order. Dkt. 44. Also, the Court issued an Order of Bifurcation requiring the filing of two second amended complaints, one to be filed as Second Amended Complaint (Official –Capacity Defendants), and the second as, Second Amended Complaint (Individual-Capacity Defendants) (DKT#45). For both Orders, Plaintiff agrees as to form only.

³ Count III was dismissed by the Court in its June 11, 2013 Order. Dkt. 44. Also, the Court issued an Order of Bifurcation requiring the filing of two second amended complaints, one to be filed as Second Amended Complaint (Official –Capacity Defendants), and the second as, Second Amended Complaint (Individual-Capacity Defendants) (DKT#45). For both Orders, Plaintiff agrees as to form only.

63. Defendants' above-described actions, taken pursuant to the policies, course of conduct, or pattern of practice that mandate or permit the above-described treatment of Plaintiffs are discriminatory and constitute an action that targets religious conduct for distinctive treatment.

64. Defendants' above-described actions, taken pursuant to the policies, course of conduct, or pattern of practice that mandate or permit the above-described treatment have had a discriminatory effect upon and have disparately impacted Muslim American travelers, and not travelers of other faiths.

65. Defendants' above-described actions constitute an adverse action against Plaintiffs motivated by Plaintiffs' religious beliefs and practices.

66. Defendants' repeated and invasive questioning of Plaintiffs about their religion and religious practices does not serve a compelling state interest or a legitimate or public purpose.

67. Even assuming the Defendants' actions does further a compelling government interest, repeatedly discriminating against Plaintiffs by targeting and detaining them for the purpose of questioning them about their Islamic beliefs and religious practices is not narrowly tailored to achieve any such interest.

WHEREFORE, Plaintiffs request this Honorable Court grant compensatory and punitive damages against the individual defendants, plus all such other relief this Court deems just and proper including costs and attorneys' fees incurred in this action.

COUNT V
VIOLATION OF THE RELIGIOUS FREEDOM RESTORATION ACT
(42 U.S.C. § 2000bb, *et seq.*)⁴

WHEREFORE, Plaintiffs respectfully request:

1. An award of compensatory and punitive damages against the individual defendants;
2. An award of attorneys' fees, costs, and expenses of all litigation, pursuant to 28 U.S.C. § 2412;
3. Injunctive relief barring Defendants from questioning Plaintiffs about their religious practices; and,
4. Such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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⁴ Count V was dismissed by the Court in its June 11, 2013 Order. Dkt. 44. Also, the Court issued an Order of Bifurcation requiring the filing of two second amended complaints, one to be filed as Second Amended Complaint (Official –Capacity Defendants), and the second as, Second Amended Complaint (Individual-Capacity Defendants) (DKT#45). For both Orders, Plaintiff agrees as to form only.

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Dated: June 17, 2013

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October 1, 2010

Homeland
SecurityMEMORANDUM

MEMORANDUM FOR: Margo Schlanger,
Officer for Civil Rights and Civil Liberties

FROM: (b) (6)
Senior Advisor, Office for Civil Rights and Civil Liberties

SUBJECT: Law enforcement questioning regarding religion

You asked me to examine case law regarding the permissible bounds of law-enforcement questioning of individuals regarding their religion, both at the border and within the United States. The query would encompass border inspections as well as consensual and custodial police interrogation, and law on religious profiling would also be relevant. But there is much less law in this area than one would expect. So, notwithstanding the fact that religious questioning and religious profiling implicate First Amendment considerations that questioning or profiling on ethnicity or race do not, there is relatively little to say, other than that courts presume the same limitations on religion-based police activity as on race-cognizant policing.

At the Border

Unlike race, ethnicity, and specific national origin, U.S. immigration laws do not, and historically have not, called for border personnel to track religious identity or practices. There are two, limited exceptions applicable when persons seek an immigration or customs benefit by virtue of religion: special immigration rules for religious workers, and special customs rules for controlled substances used in religious ceremonies. While one Court of Appeals judge recently suggested that First Amendment rights at the border may attenuate along with Fourth Amendment ones, no court has so held, and there is some law to the contrary.

Acquisition of Religion Information at the Border

For most of the early history of the United States, arriving aliens were not inspected at all, and there were essentially no grounds for exclusion. *See generally* Richard D. Steel, *Steel on Immigration Law* § 1:1 (2d ed. supp. 2010). The first statutory requirement that data be collected on all aliens seeking admission called for recordation of sex, race, marital status, occupation, literacy, and nationality, but not religion. Act of March 3, 1903, ch. 1012, § 12, 32 Stat. 1213, 1216. When Congress added a limited literacy test for admission in 1917, it curiously styled the requirement as an exclusion of “[a]ll aliens over sixteen years of age, physically capable of reading, who can not read the English language, or some other language or dialect, *including Hebrew or Yiddish*.” Pub. L. No. 64-301, § 3, 39 Stat. at 877 (emphasis added).

The early immigration laws also prohibited, in varying terms, entry by polygamists or those promoting polygamy. No distinction was drawn between religious and secular advocates of

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polygamy. *See, e.g.*, Pub. L. No. 64-301, § 3, 39 Stat. at 875 (excluding “polygamists, or persons who practice polygamy or believe in or advocate the practice of polygamy”).

The Immigration and Naturalization Act of 1952 and its multiple amendments have not sought religious information or used religion as grounds for exclusion, apart from the special rules for certain ministers and religious workers, discussed below. Religious persecution has, of course, been incorporated as possible grounds for refugee status. 8 U.S.C. § 1101(a)(42). Aliens attempting to establish refugee status at the time of admission may, accordingly, face questioning about religion by an asylum officer.

Ministers and other religious workers

When Congress began to create grounds for exclusion in the late 19th century, a general exception from the ban on contract labor was made for “ministers of any religious denomination,” among other skilled professionals, Act of March 3, 1891, ch. 551, § 5, 26 Stat. 1084, 1085, an exception that may be constitutionally compelled. *See Holy Trinity Church v. United States*, 143 U.S. 457 (1892). Later law expanded the ministerial exception to “ministers or religious teachers.” Pub. L. No. 64-301, § 3, 39 Stat. 874, 876 (1917). Those rules have been expanded, contracted, and refined over time, such that several advantages are available to noncitizen ministers and religious workers relative to other aliens. *See* 8 U.S.C. § 1101(a)(15)(R) & (a)(27)(C); § 1324(a)(1)(C); § 1428 (2010). None of these provisions differentiate among religious denominations.¹

Passenger Name Record information

CBP could potentially come into possession of religion information through the automated acquisition of passenger name record (PNR) data from airlines. Some airline PNR systems contain special meal requests, which would at least suggest, for some individuals, a religious affiliation. It appears, however, that CBP’s use, at least of PNR information obtained from European airlines, is scrubbed of all religion information before being ingested into the CBP database; that meal data fields are not ingested; and that free-text fields, while partially ingested, would not routinely convey meal information to the CBP system. *See* Undertakings of the Department of Homeland Security Bureau of Customs and Border Protection Regarding the Handling of Passenger Name Record Data, 69 Fed. Reg. 41,543 (July 9, 2004), *superseded in part by* Agreement Between the United States of America and the European Union on the Processing and Transfer of Passenger Name Record (PNR) Data by Air Carriers to the United States Department of Homeland Security (DHS) (July 26, 2007), *available at* www.dhs.gov/xlibrary/assets/pnr-2007agreement-usversion.pdf.

¹ It is not immediately clear what immigration officials have historically accepted as proof that an entrant presenting for inspection is a religious worker. Current law indicates the alien holds the burden of proof “to the satisfaction of the Attorney General” in this area. *See, e.g.*, 8 U.S.C. § 1428 (allowing certain immigrant religious workers temporary absence from the United States, but requiring, upon return, “pro[of] to the satisfaction of the Attorney General that his absence from the United States has been solely for the purpose of performing the ministerial or priestly functions of such religious denomination, or of serving as a missionary, brother, nun, or sister”).

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Sacramental controlled substances

Under the Religious Freedom Restoration Act, religious organizations may be exempted from the Controlled Substances Act for importation of certain controlled substances for religious purposes. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006).² Any similar RFRA importation claim (or perhaps immigration claim, as by a polygamist claiming a RFRA right to adjust status for more than one spouse) could require affirmative disclosure of religious information when persons or goods are brought across the border.

Case law

It is beyond the scope of this memo to consider what constitutional standards would control efforts to determine the religious affiliation or practice of aliens seeking admission. It is well established that privacy expectations are diminished at the border, and that a balance between those diminished expectations and government interests is struck at a point more favorable to the government than in most other contexts. *See United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (describing the “qualitatively different” Fourth Amendment analysis that obtains at the border). It is also clear that conduct and communications that would be shielded by First Amendment, as well as Fourth Amendment, protections inside the United States may be subject to state intrusion at the border. *United States v. Ramsey*, 431 U.S. 606 (1977) (approving warrantless inspection of arriving international airmail). And the Supreme Court has strongly suggested, if not precisely held, that the exclusionary rule is not applicable to immigration adjudications, apart perhaps from “egregious” constitutional violations rendering a proceeding “fundamentally unfair,” *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050-51 (1984), which would suggest that intrusive border questioning even on sensitive or First Amendment-protected areas is liable to be countenanced by reviewing courts. *See also Reno v. American-Arab Anti-Discrim. Comm.*, 525 U.S. 471 (1999) (noting high bar to selective-prosecution claim in immigration context, requiring “outrageous” improper discrimination to quash enforcement).

It is also clear that nationality and citizenship are legitimate bases for discriminations at the border. *Kandamar v. Gonzales*, 464 F.3d 65, 72 (1st Cir. 2006). Few contemporary claims of discrimination on the grounds of religion are, in the immigration or border context, wholly separable from discrimination concerning nationality.³ *See Rajah v. Mukasey*, 544 F.3d 427, 439 (2d Cir. 2008). Thus, for example, challenges to the NSEERS program – on the grounds that it amounts to singling out nationals of predominantly Muslim countries – have been uniformly rejected by courts recognizing that the basis for the program is a permissible differentiation among countries, rather than a discrimination on the basis of the religion of the nationals of those

² *O Centro* recognized that RFRA created a statutory right (against federal entities) substantially stronger than the limited First Amendment right to religious exemptions to laws of general applicability recognized by *Employment Division v. Smith*, 494 U.S. 872 (1990).

³ *Kwai Fun Wong v. United States*, 373 F.3d 952 (9th Cir. 2004), which concerned an alien minister, may be one such exception: Petitioner’s claims of religious and national origin discrimination apparently concerned her race, not her country of citizenship.

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countries. *Rajah v. Mukasey*, 544 F.3d 427, 439 (2d Cir. 2008) (collecting cases upholding NSEERS against equal protection challenges).

The closest a court has come to considering these issues directly is *Tabba v. Chertoff*, 509 F.3d 89 (2d Cir. 2007), a case challenging a CBP program requiring secondary inspection of all persons (including U.S. persons) returning from an Islamic conference in Toronto. Plaintiffs argued that their inspection – which lasted four to six hours, and involved some use of force – went beyond the routine searches that are allowed without individualized suspicion at the border. The Second Circuit approved the program as a routine search, permitted without individualized suspicion, in light of CBP’s intelligence suggesting the presence of terrorism-related individuals at the conference in Canada.

The program applied to all persons who had attended the conference – not to all Muslims arriving from Canada, but to non-Muslims (if any) who had attended – and so was not actually a religious classification. Accordingly, the court applied the intermediate scrutiny standard applicable to associational freedom claims under *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), rather than a strict scrutiny analysis that could have followed from a true religious classification claim. Hence while the secondary screening constituted a significant burden on the plaintiffs’ associational freedom, the compelling state interest established by the intelligence about the Toronto conference outweighed that burden.

Speaking only for himself, Judge Straub suggested that something less than the *Jaycees* standard could be applicable in border searches and seizures: “It may also be true that the First Amendment’s balance of interests is [like the Fourth Amendment’s] qualitatively different where, as here, the action being challenged is the government’s attempt to exercise its broad authority to control who and what enters the country.” 509 F.3d at 102 n.5.

There is at least some authority suggesting Judge Straub’s suggestion is wrong, notably *Boyd v. United States*, 116 U.S. 616 (1886), which struck down a statute allowing certain compelled statements from importers regarding goods potentially imported in violation of the customs laws. Though not speaking to the precise point, *Boyd* repeatedly and sharply distinguished between the government’s nearly unbounded ability to seize physical contraband, and its limited ability to seize mere documentary information related to it. While *Boyd* is a Fourth and Fifth Amendment case, it at least suggests that the government’s power to demand disclosure of First Amendment-protected information at the border is less than its ability to inspect, detain, and seize potential physical contraband.

By and large, however, courts faced with issues of religious questioning or profiling at the border have managed to avoid a holding on the issue. *Kwai Fun Wong v. United States*, 373 F.3d 952, 974 n.29 (9th Cir. 2004) (avoiding determining whether aliens paroled into the United States under the “entry fiction” have non-procedural rights, as against religious profiling, akin to potential entrants at the border, or persons lawfully present); *Tungawara v. United States*, 400 F.Supp. 2d 1213, 1220 n.4 (N.D. Cal. 2005) (avoiding deciding whether level of suspicion required to strip-search non-admitted aliens “need be particular to the individual as opposed to, for example, a category of those traveling from a particular place”).

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FOR OFFICIAL USE ONLY**Within the United States**

While profiling on the basis of religion is frequently mentioned as illegitimate in precisely the same manner racial profiling is, there are essentially no cases discussing religious profiling separately from racial profiling, or religious questioning as such. While there are contexts in which police might discuss religion with suspects, these are not relevant to the question when police may raise religion in interrogation for the purpose of eliciting information about it.

Religious profiling and questioning

As in the border context, current claims of religious profiling are generally combined with allegations of racial, ethnic, or nationality discrimination: Police are accused of having singled an individual out for treatment due to an appearance that suggests a predominantly-Muslim ethnicity or nationality. Hence *United States v. Quintana*, 585 F.3d 1407 (11th Cir. 2009), concerned a Latino man seeking suppression of his arrest by officers who initiated a consensual encounter in part because they thought he was “Middle Eastern.” No court appears to have distinguished religious from racial/ethnic/national origin discrimination in these contexts, where what draws police attention is a perceived ethnic, racial, or national characteristic that allegedly *connotes* a religious affiliation.

There are relatively few other cases involving religious questioning, and none, so far as I can discern, attempt to set forth a comprehensive standard for when police questioning about religion is proper and when it would intrude on First Amendment (free exercise) or Fifth or Fourteenth Amendment (privacy or equal protection) interests. A rare exception is *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), a § 1983 action where plaintiff sought damages for harassing and abusive police questioning concerning her actual and perceived gender and “whether she believed in Jesus Christ.” Reversing a judgment for the plaintiff, the Fifth Circuit suggested that police have a general right to “ask the questions they believe will aid them in the investigation,” even if “in retrospect some question may be determined to be irrelevant and not within the government’s proper sphere of concern,” so long as the invasion of privacy does not outweigh the public purpose. *Id.* at 492-93.⁴ But it is not clear that *Ramie*’s essentially rational-basis balancing is the appropriate rule when religion is involved.

Related contexts**Police use of religion to extract confession**

Police interrogators will, not infrequently, reference religious concepts to elicit a suspect’s guilt and prompt a confession or other statement. There is clear case law that police may appeal to religion – just as they may make entirely false statements – so long as the suspect’s will is not overborne by a religious interrogation that rises to the level of coercion. *See*,

⁴ A handful of cases involve state investigations of public employees’ religion where the employee has been accused or suspected of improperly combining religion with state business. *E.g.*, *Vernon v. City of Los Angeles*, 27 F.3d 1385 (9th Cir. 1994). That circumstance is far removed from state questioning of private persons regarding religion.

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e.g., *State v. Newell*, 132 P.3d 833, 844 (Ariz. 2006) (explaining and applying doctrine); *People v. Adams*, 143 Cal. App. 3d 970 (1983) (same). It does not appear that these appeals to religion are aimed at eliciting information about the suspect's religion. If anything, they presuppose the religious views of the subject of the questioning, in order to obtain nonreligious information. These cases are therefore not helpful.

Sacramental controlled substances

As with importation, persons apprehended for use, possession, sale, or acquisition of controlled substances intended for sacramental use may have a religious defense to arrest or prosecution. It is at least possible police would ask a suspect apprehended with, say, peyote about his religious affiliation prior to effecting an arrest. But no reported cases set forth the permissible bounds of such questioning, and in general, persons capable of making a religious-use claim seem to know their rights and to assert them affirmatively in a police encounter. One court (pre-*Smith* and pre-RFRA, see *supra* note 2) rejected the idea that prearrest adversary process is required to test an individual's immunity from prosecution for possession of controlled substances for religious purposes. *Golden Eagle v. Johnson*, 493 F.2d 1179 (9th Cir. 1974).

Office for Civil Rights and Civil Liberties
U.S. Department of Homeland Security
Washington, DC 20528



**Homeland
Security**

May 3, 2011

Lena F. Masri, Esq
Staff Attorney
Council on American-Islamic Relations
Michigan Chapter
21700 Northwestern Highway, Suite 815
Southfield, Michigan 48075

Re: Complaint No. 11-06-CBP-0150 (Yusuf Harper)
Complaint No. 11-06-CBP-0151 (Yousef Mawry)
Complaint No. 11-06-CBP-0152 (Anonymous Canadian Citizen)
Complaint No. 11-06-CBP-0153 (Fawzy Mohamed)
Complaint No. 11-06-CBP-0154 (Wissam Charafeddine)
Complaint No. 11-06-CBP-0155 (Anonymous Muslim Female)
Complaint No. 11-06-CBP-0156 (Kheireddine Bouzid)
Complaint No. 11-06-CBP-0157 (Sheikh Ali Sulaiman Ali)
Complaint No. 11-06-CBP-0158 (Abdulrahman Cherri)
Complaint No. 11-06-CBP-0159 (Anonymous Egyptian Male)

Dear Ms. Masri:

The Office for Civil Rights and Civil Liberties received information from you on March 24, 2011, concerning repeated handcuffing, brandishing of weapons, prolonged detentions, invasive and humiliating body searches at the border, and inappropriate questioning that pertains to religion and religious practices by U.S. Customs and Border Protection (CBP) personnel.

Under 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1, the Office for Civil Rights and Civil Liberties has the responsibility to review and assess complaints against Department of Homeland Security employees and officials concerning violations of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion. CRCL has received a number of complaints like yours, alleging that U.S. Customs and Border Protection (CBP) officers have engaged in inappropriate questioning about religious affiliation and practices during border screening. We will add these complaints to the investigation we are opening on this subject. We are unable to discuss the specifics of this investigation without the express written consent of these complainants; however, once we have their consent, we will provide you with more specific details concerning this investigation.

This Office takes allegations of violations of civil rights and civil liberties very seriously. The purpose of our review is to assess if your complaint implicates issues that should be addressed by Department of Homeland Security management. Under 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-

Encl.

Office for Civil Rights and Civil Liberties
U.S. Department of Homeland Security
Washington, DC 20528



Office for Civil Rights and Civil Liberties
U.S. Department of Homeland Security
Washington, DC 20528



**Homeland
Security**

May 3, 2011

MEMORANDUM FOR: Alan Bersin
Commissioner
U.S. Customs and Border Protection

Alfonso Robles
Chief Counsel
U.S. Customs and Border Protection

FROM: Margo Schlanger *MS*
Officer for Civil Rights and Civil Liberties

Audrey J. Anderson *AJA*
Associate General Counsel (Legal Counsel)
Office of the General Counsel

SUBJECT: Complaint No. 10-10-CBP-0137 (b) (6)
Complaint No. 11-06-CBP-0167 (b) (6)
Complaint No. 11-06-CBP-0168 (b) (6)
Complaint No. 11-06-CBP-0169 (b) (6)
Complaint No. 11-05-CBP-0162 (b) (6)
Complaint No. 11-06-CBP-0160 (b) (6)
Complaint No. 11-03-CBP-0163 (b) (6)
Complaint No. 11-06-CBP-0150 (b) (6)
Complaint No. 11-06-CBP-0161 (b) (6)
Complaint No. 11-03-CBP-0164 (b) (6)
Complaint No. 11-06-CBP-0151 (b) (6)
Complaint No. 11-06-CBP-0152 (Anonymous) (b) (6) Citizen)
Complaint No. 11-06-CBP-0153 (b) (6)
Complaint No. 11-06-CBP-0154 (b) (6)
Complaint No. 11-06-CBP-0155 (Anonymous Muslim Female)
Complaint No. 11-06-CBP-0156 (b) (6)
Complaint No. 11-06-CBP-0157 (b) (6)
Complaint No. 11-06-CBP-0158 (b) (6)
Complaint No. 11-06-CBP-0159 (b) (6)
Complaint No. 11-03-CBP-0165 (b) (6)
Complaint No. 11-03-CBP-0166 (b) (6)
Complaint No. 11-05-CBP-0136 (b) (6)

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Complaint No. 11-05-CBP-0171 (b) (6)

The Office for Civil Rights and Civil Liberties (CRCL) has received numerous accounts from American citizens, legal permanent residents, and visitors who are Arab and/or Muslim, alleging that officials from U.S. Customs and Border Protection (CBP) repeatedly question them and other members of their communities about their religious practices or other First Amendment protected activities, in violation of their civil rights or civil liberties, or otherwise target them for extra scrutiny, questioning, or inappropriate comment based on their ethnicity or apparent religion. The purpose of this memorandum is to notify you of the complaints and describe the allegations, inform you that CRCL will retain these complaints for investigation, and explain how CRCL will work with CBP during our investigation.

ALLEGATIONS

The complainants allege they have been questioned about their religious practices and other inappropriate topics at land and air ports of entry. Allegations were received from a variety of sources, including correspondence directed to the Department by the ACLU and Muslim Advocates; a recent story that aired on National Public Radio (NPR); individually filed complaints; and a set of complaints filed on March 31 by the Council on American-Islamic Relations Michigan (CAIR-MI). Due to the number of complaints, the allegations are organized by Field Office and port of entry.

Boston Field Office

Boston Logan International Airport (BOS)

CRCL's Community Engagement Section conducts outreach and engagement events in the Boston-metro area. During that engagement, Muslim community members have expressed concerns about questions they are asked when returning to the United States. These questions include: what religion do you belong to? How religious are you? How often do you pray? Where do you pray? What mosque do you attend? and Why do you wear a beard?

1) More particularly, CRCL received a complaint from (b) (6) a U.S. citizen, who alleges (by his counsel, the ACLU) that since 2004, he has been subject to repeated delays by CBP when he presents himself for admission at U.S. ports of entry. (b) (6) lives in the Boston area, and travels frequently though Logan airport. (b) (6) alleges that his questioning during secondary inspections have been highly inappropriate. He alleges he has been asked: what mosque he prays at; how often he prays; and whether any of his family members are strictly religious. (b) (6) alleges his religion and national origin are the basis for his repeated referrals and subsequent inappropriate questioning. In April 2010, (b) (6) alleges that his computer, cell phone, and iPod were taken from him for three hours; and when he arose from his seat to ask about his status, an officer yelled at him to sit down. (b) (5)

2) (b) (6) has complained via our engagement meetings that he has been asked at Logan how often he prays and what mosque he attends. (b) (6) also alleges that during a four hour inspection on November 17, 2009, he was denied the use of a restroom and his electronic media were confiscated.

3) (b) (6) has complained via our engagement meetings that in August 2009 he was asked what mosque he attends and how often he prays.

4) (b) (6) has complained via our engagement meetings that on September 5, 2009, she was detained with her children for four hours. She alleges that her son was asked if the number on his basketball jersey was a reference to the Quran, that CBP did not allow her to respond to her daughter's cries, and that she was not provided with an interpreter, even though her English proficiency is low. (b) (6) alleges she was asked why she purchased clothing in Egypt, why she did not marry overseas like other Somali women, and why she was not fasting on a particular day.

Buffalo Field Office

Rainbow Bridge Port of Entry

5) A letter to the DHS Office of Inspector General from the ACLU and Muslim Advocates (since referred to CRCL) and the referenced NPR story both allege that on February 21, 2010, (b) (6) was referred to a secondary inspection which lasted over four hours. During his inspection, (b) (6) alleges he was asked a series of inappropriate questions, including: When did you convert? When did you become a Muslim? Which mosques do you attend? and How often do you attend the mosque?

6) According to the same NPR story, (b) (6) presented her passport to the CBP officer in primary earlier this year, and was subjected to discriminatory treatment based on her perceived status as a Muslim. For example, when her traveling companion (who wore a head covering) stated that she was in Canada to work on a story of a notorious religiously-motivated murder of a Muslim woman, the CBP officer asked (b) (6) if she was related to the murderer.

Service Port - Champlain

7) According to the ACLU/Muslim Advocates letter, on August 6, 2009, (b) (6) a U.S. citizen, arrived at the "Champlain border crossing." He was referred to secondary inspection for one hour. During his inspection officers allegedly asked: Do you go to the mosque? Why? How often? What mosque? Are you an Imam at the mosque? and Are you Shi'a or Sunni?

Lewiston Bridge Complex

8) In a complaint forwarded to CRCL by CAIR-MI, (b) (6) a U.S. citizen, states that in January 2010, after attending a conference on "Reviving the Spirit in Islam," he was asked a series of demographic questions. After an hour, a plain clothed officer asked him: Are you Muslim? Do you pray five times a day, in the mosque? Are there any extremists in our mosques? and Do you know any extremists? An hour later, two FBI agents arrived and questioned him because the "underwear guy from Nigeria had just tried to blow up a plane." The FBI agents asked him all of the questions listed above, as well as questioning him about his stay in Saudi Arabia and if that was where he converted to Islam. He states he was subject to similar questions in Miami in April 2010, however, when he was stopped at the Port Huron Port of Entry in January 2011, he was not asked religious questions.

Miami Field Office

Fort Lauderdale Airport (FLL)

9) According to the NPR story, (b) (6) a professor of Middle Eastern studies at Georgetown University, was referred to secondary inspection allegedly due to his "location of birth."

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While his account of his questioning is not entirely clear, (b) (6) implies that his American loyalty was questioned due to his perceived religion or ethnicity.

Seattle Field Office

Pacific Highway Crossing

10) According to the ACLU/ Muslim Advocates letter, on July 8, 2010, (b) (6) a U.S. citizen, was handcuffed when he presented himself for admission with his wife and one-year-old daughter. An FBI agent questioned (b) (6) during his inspection, and allegedly asked: What mosque do you attend? How often do you attend the mosque? So you don't consider yourself a religious person? Does anybody [at the mosque] talk about going back to the motherland? Do you give donations? Don't you have to pay a certain amount of your money religiously? Who do you give [charity] to? and Do you belong to any organizations?

Detroit Field Office

On March 24, 2011, CAIR-MI forwarded to CRCL a number of complaints on this topic, and alleged more generally that American Muslims crossing the U.S. (b) (6) border are subject to extensive questions about their religion and religious practices. CAIR-MI alleges that the following questions are most common: Do you pray five times a day? Which mosque do you pray at? Do you pray your morning prayer at the mosque? Who is the Imam at your mosque? Who else prays at your mosque? Which Muslim charities have you donated to? Which Muslim countries have you traveled to? During your travels to these countries, have you been approached by anyone suspicious? What do you think of Anwar al-Awlaki? Which Muslim organizations are you affiliated with? Are you affiliated with any terrorist organizations? Do you know any terrorists? and Are there terrorists in our mosques? The complaints connected to the Detroit Field Office listed below were all forwarded to us by CAIR-MI.

Unknown POE

11) (b) (6) and a traveling companion, (b) (6) allege that they were surrounded by officers with drawn guns after presenting their passports. After being handcuffed and taken to the secondary inspection area, (b) (6) was asked, inter alia whether id he attended Islamic schools, and what he thinks about Anwar Al Awlaki.

Ambassador Bridge Passenger Facility

12) An anonymous (b) (6) citizen of Somali origin alleges that on May 25, 2010, she was subjected to an intensive and humiliating personal search by a female officer, because of her national origin. She alleges the only question CBP asked her was where she was headed. Several Somalis mentioned that they heard CBP Officers in the booths ask each other "are we still pulling over the Somalis?"

13) (b) (6) a U.S. citizen, states that he is a truck driver who crossed the border frequently with a "FAST Express Card." (b) (6) alleges that repeated referrals to secondary inspection based on his ethnicity while he was driving his commercial vehicle forced him to drive less lucrative routes. He has filed a redress request with DHS TRIP (Redress number 2104553).

14) (b) (6) a U.S. citizen, alleges that he has been subjected to repeated intensive inspections at the border. He is repeatedly taken to the secondary inspection area in handcuffs, where he has stayed for hours, unable to place a phone call or use the restroom in private. He alleges that he has been asked many times about, "relations, relatives, work, . . . associations, organization

memberships, and other questions.” (b) (6) states that he has filed multiple DHS TRIP requests, but continues to be referred for additional inspection. Again, (b) (6) alleges that it is his ethnicity that is provoking extra scrutiny.

Detroit-Windsor Tunnel

15) An “Anonymous Muslim female of Somali origin,” of unknown citizenship, alleges that during border screening, after she was processed through US-VISIT, she was subjected to an intensive personal search that was “rough” and “humiliating.” She alleges that the CBP Officer asked her to remove her hijab, but she refused.

Detroit Metropolitan Airport (DTW)

16) (b) (6) a U.S. citizen, alleges that when he presented himself for admission on July 17, 2010, he was asked: What mosques he attended; if he was involved in any Islamic organizations; if he knew any terrorists or people involved in terrorism; the names and birthdates for a number of his family members, both those who live in the United States and overseas. He believes officers “googled” his name and asked him if he was involved in organizing a mosque-cleaning project several years ago. (b) (6) states his questioning was four or five hours in duration, only ending when he fell asleep in his chair.

17) (b) (6) states that he always has difficulties upon returning to the U.S., but that it is worst at the Detroit Metropolitan Airport. Questions include: which (b) (6) he is an imam at; what kinds of duties he performs; his roles in the Islamic organizations he affiliates with; how much money he brought to his community. In July 2010, he missed a connecting flight as a result of a four hour inspection.

Port Huron Port of Entry

18) (b) (6) citizenship unknown, states that he been stopped repeatedly by CBP, and each inspection is of increasing duration. At one such stop, an FBI agent allegedly asked about his place of worship and how many times he attended per week; his address in Lebanon; who he sees in Lebanon; whether he is affiliated with any terrorist organizations in Lebanon; and if his relatives have criminal records. In January 2011, he was met at the aircraft door by CBP at JFK and asked about his trip to Kuwait.

19) (b) (6) alleges that he has been “racially profiled, mocked, harassed, and threatened by officers at the border crossing and was searched, handcuffed, put into a room to stand while handcuffed and interrogated, all of which took 2 hours and twenty five minutes.” A CBP officer, upon recognizing the complainant asked, “Is this conference you went to just a ‘religious’ thing?”

Atlanta Field Office

Atlanta Hartsfield/Jackson International Airport (ATL)

20) Included in the ACLU/Muslim Advocates letter is a complaint about (b) (6) a U.S. citizen, who alleges that he has been questioned by CBP about protected beliefs, practices and associations on a number of occasions. Most recently, in early August 2009, (b) (6) was questioned by CBP for three hours about his involvement with a Muslim student association.

New York Field Office

John F. Kennedy International Airport (JFK)

21) The same ACLU/Muslim Advocates letter alleges that on August 18, 2010, (b) (6) a U.S. citizen, was asked about holy sites he visited on his trip abroad and also asked the following questions: Do you visit any Islamist extremist websites? Are you part of any Islamic tribes? Have you ever been to a madrassa or studied Islam full-time? and Do you attend a particular mosque?

22) In a complaint sent to CRCL by the CBP INFO Center, (b) (6) was referred to secondary inspection and asked the origin of his last name. He feels that his extensive questioning was discriminatory based on his ethnicity.

Unspecified Offices

23) (b) (6) recently wrote the Deputy Secretary, by counsel, to complain that he was on February 26, 2010 subjected to questioning about whether he was Sunni or Shi'ite, and told that he should expect to face similar questioning again. The letter was forwarded to CRCL for response.

In short, CRCL has received numerous complaints on this topic, with certain obvious commonalities among them. We should note that we have every expectation that at least some of the complainants are the subject of look-outs or watchlisting. Our investigation will be sensitive to the security needs served by border questioning of such individuals.

CRCL

CRCL Mission. CRCL supports the Department's mission to secure the Nation while preserving individual liberty, fairness, and equality under the law. CRCL integrates civil rights and civil liberties into all the Department's activities:

- Promoting respect for civil rights and civil liberties in policy creation and implementation by advising Department leadership and personnel, and state and local partners;
- Communicating with individuals and communities whose civil rights and civil liberties may be affected by Department activities, informing them about policies and avenues of redress, and promoting appropriate attention within the Department to their experiences and concerns;
- Investigating and resolving civil rights and civil liberties complaints filed by the public regarding Department policies or activities, or actions taken by Department personnel;
- Leading the Department's equal employment opportunity programs and promoting workforce diversity and merit system principles.

CRCL authorities. Under 6 U.S.C. § 345 and 42 U.S.C. § 2000ee-1, CRCL is charged with investigating and assessing complaints against DHS employees and officials of abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion. The procedures for our investigations and the recommendations they may generate are outlined in DHS Management Directive 3500.

Access to information. More particularly, 42 U.S.C. § 2000ee-1(d) grants this Office access to the "information, material, and resources necessary to fulfill the functions" of the office, including the complaint investigation function; Management Directive 3500 further authorizes CRCL to:

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- “Notify[] the relevant DHS component(s) involved of the matter and its acceptance by CRCL, and whether the matter will be handled by CRCL or by the component organization”;
- “Interview[] persons and obtain[] other information deemed by CRCL to be relevant and require[] cooperation by all agency employees”; and
- “Access[] documents and files that may have information deemed by CRCL to be relevant.”

Reprisals forbidden. In addition, 42 U.S.C. § 2000ee-1(e) forbids any Federal employee to subject a complainant or witness to any “action constituting a reprisal, or threat of reprisal, for making a complaint or for disclosing information to” CRCL in the course of this investigation.

This memorandum and its accompanying request for information are pursuant to these authorities.

Privilege and required transparency. Our communications with CBP personnel and documents generated during this review, particularly the final report, will be protected to the maximum extent possible by attorney-client and deliberative process privileges. Under 6 U.S.C. § 345(b), however, we submit an annual report to Congress—also posted on CRCL’s Web site—that is required to detail “any allegations of [civil rights] abuses . . . and any actions taken by the Department in response to such allegations.”

We look forward to working with your staff on this matter and will report back to you our findings and any recommendations.

SCOPE OF REVIEW

(b) (5)



QUESTIONS PRESENTED

This investigation will cover the following issues:

(b) (5)



It is possible that our investigation will reveal other matters of concern; if this occurs, we will inform you.

INITIATING THE INVESTIGATION

We request an initial discussion with your agency about this complaint and our plans for reviewing the matter. (b) (6) will be staffing this review, and I will remain closely involved. As you and your staff are aware, I have already conducted three meetings on these and related questions (though not examining particular cases), at airport ports of entry in Detroit, Boston, and Washington Dulles. I am also due to meet soon with staff from the CBP's National Targeting Center and CBP's Office of Intelligence and Operations Coordination on this as well as related topics.

Given the reach and number of these complaints and the sensitivity of this matter, it seems most appropriate to open this investigation with an "entrance meeting," involving appropriate CBP and CRCL personnel. For CRCL, the participants will include at least myself, Jeff Blumberg (the Director of CRCL's Compliance Branch), (b) (6) and OGC Counsel. I imagine both OFO, CBP Counsel, and your front office may wish to attend. Please have someone inform (b) (6) who at CBP should be included.

We look forward to working together to determine all the facts surrounding this matter and if appropriate, the best way forward. If you have any questions, please do not hesitate to contact me; your staff can also reach out to (b) (6) by phone at (b) (6) 866-644-8361 (TTY) or by email at (b) (6)

Copies to:

Thomas S. Winkowski
Assistant Commissioner
Office of Field Operations
U.S. Customs and Border Protection
(b) (6)

(b) (6)
Executive Director
Office of Diversity and Civil Rights
U.S. Customs and Border Protection
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Nena Morgan
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