



The American-Arab Anti-Discrimination Committee
Comments and Recommendations to the
Department of Homeland Security
on the proposed changes to ESTA and to Form I-94W

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I am writing to you on behalf of the American-Arab Anti-Discrimination Committee (ADC), the country's largest Arab-American civil rights organization. ADC is committed to protecting civil rights, promoting mutual understanding, and preserving the Arab cultural heritage. ADC has protected the Arab-American community for thirty-five years against discrimination, defamation, racism, and stereotyping. ADC respectfully takes this opportunity to submit its comments and concern to the Department of Homeland Security (DHS) regarding the proposed changes to ESTA and to CBP form I-94W, requesting visitors to add information associated with online presence, i.e. social media identifier. ADC firmly opposes the proposed rulemaking.

The proposed rulemaking violates the First Amendment and human rights to freedom of speech, expression, assembly and association. The proposed rulemaking will require anyone entering the United States, both non-immigrant and immigrant based visa holders to submit the sensitive username and passwords of their social media accounts to DHS. This requirement will inherently infringe on freedom of speech, compelling individuals to censor their speech due to DHS ability to mass police their thoughts, beliefs, and ideas.

To subject individuals protected speech and privacy to policing by the government is problematic. Such information will limit people's speech on the social media platforms. It would require giving up the constitutional rights and fundamental values that make this nation great and prominent. We truly believe that we can secure our land and encounter terrorism without sacrificing our constitutional principles. In addition, the effectiveness of the proposed change is

not foreseeable. It is unlikely that criminals and actual persons of interest will post accurate and incriminating information. The proposed changes are ineffective to the investigative process as well as its violations to civil rights and to the Constitution.

Constitutional and Human Rights Concerns:

The proposal may put DHS in conflict with the judicial system; and with the Supreme Court of the United States. The Supreme Court protects the right to anonymous and political free speech. See *Talley v. California*, 362 U.S. 60 (1960); and *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). Monitoring of an individual's private social media accounts could limit significantly their right to free speech, as it would restrict a fundamental right; and the use of social media more fearful and less active. This may setback to the free speech movement in a nation that is promoting such values worldwide. The United States historically has maintained a position promoting and calling for expansion and adoption of freedom of speech and expression all over the world. The United States led the international community during the World War I era promoting freedoms like free press, freedom of protest, and free speech. The proposed activity will not only have a negative impact but also represents derogation from our respect and enforcement of international human rights law. This policy could set precedent for even more restraints on the freedom of speech not only in the United States beyond this policy activity to U.S. citizens, but all over the world.

Protected speech on social media accounts includes any expression and communications including but not limited to actual posts, messages and chats, pictures, videos, hashtags. Speech that identifies an individual as Arab, Middle Eastern and/or Muslim must not be an indicator and/or flag for special treatment or extra scrutiny of any individual's social media account.

Policies and/or practices that engage in such identity protected characteristics as indicative and/or suggest behavior, “risk”, or concern are discriminatory and constitute profiling based on race, ethnicity, national origin, and/or religion. Discriminatory policing and profiling are ineffective.

Political speech and opposition to U.S. Government policies and/or foreign affairs, and offensive and controversial speech are protected speech. *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982); *Tinker v. Des Moines*, 393 U.S. 503 (1989). In *Texas v. Johnson*, the U.S. Supreme Court held that an action of the American flag desecration was represented “symbolic political speech” and thus protected by the First Amendment. 491 U.S. 397 (1989). Tens of millions of Americans are changing their online activity and self-censoring in response to current warrantless surveillance practices, a widespread diminution of freedom of expression that has no place in a free society. An individual’s right to privacy is violated where they are restricted in their private access of their social media. Similarly, there will be a chilling effect on freedom of speech and expression, and many foreign visitors will engage in self-censorship if the proposed change implemented.

To require social media account access is different than reporting other personal information like a cell phone or email. The main purpose of request and inclusion of cell phone or email on visa applications is to have contact information in case there is an issue with paperwork or need to get in touch with the applicant. Cell phone and email similarly does not impose an inherent burden on First Amendment and privacy protected activity. The use of social media identifiers would give the government intrusive access into the daily thoughts and activities each person without any individual basis for criminal activity. Immigration officials will be able to look at

any content of the applicant as well as the applicant's friends and follower's content, making immigration decisions based off their judgements of their own personal assessment of a person/their associates believed character.

The right to freedom of opinion and expression is a universal right protected as customary international law. The United States also recognizes freedom of speech through adoption of the Universal Declaration of Human Rights in 1948. The Declaration states "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." The proposal would allow further restrictions on the free speech and violate international law.

The global and open nature of the Internet providing citizens with new opportunities for exchanging information and opinions through social media is protected speech. The obligations of States under international Human Rights law, in particular the right to freedom of expression, the right to privacy and the protection of personal data, extend to the online sphere in the same way as they apply in person. These rights are customary international law. The European Union (EU) adopted the Human Rights Guidelines in order to better promote and defend freedom of expression online and offline. Among the priority areas of action pushed by the EU is to "promote and respect human rights in cyberspace and other information communication technologies." In *Handyside v United Kingdom* (5493/72), the European Court of Human Rights held in 1976 that "Freedom of expression is applicable not only to 'information' or 'ideas' that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population."

Misuse and Abuse Concerns:

The use of social media indicators is prone to misuse and abuse. There is no sufficient way to reign in misuse of information collected and/or viewed by DHS. No level of oversight is adequate to ensure that biases and political views of reviewers of social media accounts will not play a role and/or effect decision-making of individual's social media accounts. The proposed change also has a lot of answered questions and issues related to automation versus manual processing, clarification on standards of review and assessment, and opportunity for redress adverse decisions.

With the online identifier collection as highly invasive of human rights, freedom of speech, and privacy; serious concerns rise with the scale and scope of this program leading to a significant expansion of intelligence activity, arbitrary use, and disparate impact. All of the information collected through ESTA is shared, in bulk, with U.S. intelligence agencies and can be used to seed more intelligence surveillance unrelated to the applicant's eligibility for a visa waiver. Online identifier collection would create disproportionate risks. The risk of discrimination based on analysis of social media content, connections will have a disproportionate impact on the Arab community. The online presence of the Arab community is already subject to baseless and arbitrary scrutiny. The policy will subject Arabs to being exposed to even more intense scrutiny linked closely to their identity, ethnicity, and/or national origin.

The necessity and practical utility of social media identifiers:

ADC supports the ongoing evaluation of the investigative process due to the increasing violence threats our nation faces, and its necessity and practical utility in protecting our borders and making our land safe. However, receipt of the social media of foreign visitors will not really serve the purpose of encountering terrorism and violence. It is difficult to interpret behavior on

social media. Inaccurate interpretations of social media data can lead to consequences in a criminal justice context that can be very severe. On social media sites like Facebook and Twitter, users construct public or semi-public profiles where they not only interact with their friends, but also with their networks of friends. Therefore, posts on social media sites have different context and to specific group of people, and cannot necessarily reflect intended actions and/or probable cause. The idea itself of the proposed change would rationally be useless and it would complicate the legal cases. Criminals would not add their real identifiers and may use this as a misleading method.

Conclusion:

ADC strongly believes that the proposed change to ESTA and Form I-94W is an unnecessary and unpractical addition to the investigative system that it actually counterproductive and will infringe on the rights of innocent people. Measures and policies in any investigative process must not infringe on the Constitutional and human rights of all. Online identifier collection would be ineffective for screening visa-waiver applicants. The accuracy, veracity and relevance of information on social media Individuals who pose a threat to the United States are highly unlikely to volunteer online identifiers tied to information that would raise questions about their admissibility to the United States. This program is far more likely to collect the information of innocent people with no intent to commit a crime or harm anyone in the United States.