CURRENT DEVELOPMENTS IN THE EXECUTIVE BRANCH: DEPARTMENT OF HOMELAND SECURITY TO COLLECT SOCIAL MEDIA INFORMATION ON IMMIGRANTS

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I. INTRODUCTION

In September 2017, the Department of Homeland Security ("DHS") announced that it would begin collecting social media information on anyone trying to immigrate to the United States.[1] This group includes those petitioning for entry into the United States, green card holders, and even naturalized citizens.[2] The government plans to require nearly all visa applicants to submit five years of social media handles for specific platforms identified by the government, and there is an option to list handles for other platforms not explicitly required.[3] The proposed policy is expected to affect nearly 15 million would-be immigrants and has received critiques from a few media outlets as well as civil liberty advocates since its announcement.[4] There is also at least one lawsuit challenging the policy as a violation of First Amendment rights.[5]

This piece first lays out the background of this policy in Section II, describing which government bodies are charged with administering the policy and how the original policy (before the social media modification) came into existence. Next, in Section III, the article describes the policy in detail: what it does, who it affects, when it came into effect, and the practicality of implementing it. Lastly, Section IV describes the critical responses to the policy and the possible legal arguments that can be made to challenge it.

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1. Ron Nixon, *U.S. to Collect Social Media Data on All Immigrants Entering Country*, THE N.Y. TIMES (Sept. 28, 2017), https://www.nytimes.com/2017/09/28/us/politics/immigrants-social-media-trump.html.

2. *Id.*

3. Tal Kopan, *US to require would-be immigrants to turn over social media handles*, CNN (Mar. 29, 2018), https://www.cnn.com/2018/03/29/politics/immigrants-social-media-information/index.html.

4. *See* Nixon, *supra* note 1; *see also* Levi Sumagaysay, *Trump administration sued for info on plan to collect immigrants' social media data, 'extreme vetting'*, SILICONBEAT (Oct. 4, 2017), http://www.siliconbeat.com/2017/10/04/trump-administration-sued-for-info-on-plan-to-collect-immigrants-social-media-data-extreme-vetting/; *see also* Kopan, *supra* note 3.

5. Knight Institute v. DHS, No. 1:17-cv-07572 (S.D.N.Y. filed Oct. 4, 2017).

II. BACKGROUND

DHS implements U.S. immigration law and policy through the U.S. Citizenship and Immigration Services. The implementation includes the processing, and adjudication of applications submitted for citizenship, asylum, or other immigration benefits.[6] The former Immigration and Naturalization Services ("INS") used a system called "Alien Files" ("A-Files"), assigning each potential immigrant a number correlating with a file containing all of the agency's records on the individual.[7] DHS has since combined the A-File system with others under a collective system of records called the "Department of Homeland Security/U.S. Citizenship and Immigration Services, U.S. Immigration and Customs Enforcement, U.S. Customs and Border Protection—001 Alien File, Index, and National File Tracking System of Records" ("System of Records").[8] The System of Records contains information regarding "transactions"—including information about adjudication of benefits, immigration violations, and enforcement actions—involving an individual as he or she passes through the U.S. immigration process.[9]

Although DHS contends that it already had the ability to monitor social media that is publicly available, it has never proclaimed social media to be part of an immigrant's official records.[10] DHS contends that the purposes of the System of Records is to aid immigration processing, adjudication, and to protect national security.[11] The policy of monitoring an applicant's social media accounts appears to originate from President Trump's calls to institute "extreme vetting" of immigrants wanting to enter the country. After the San Bernardino terrorist attack in 2015, greater attention was placed on immigrants' social media use when it was revealed that one of the attackers had advocated jihad in posts on a private social media account using a pseudonym that authorities did not find before allowing her to come to the US.[12] DHS Secretary Kelly hinted in 2017, that they may even want full access to a visa applicant's social media information, including passwords.[13] Soon enough, the change appeared on the Federal Register. In addition to requiring the five years of social media history, visa applications will also ask for previous

6. Meeting of The President's National Security Telecommunications Advisory Committee, 82 Fed. Reg. 43,556 (Sept. 18, 2017).
7. *Id.*
8. *Id.*
9. *Id.*
10. Bryan Lynn, *U.S. Begins Collecting Social Media Information from Immigrants*, LEARNING ENGLISH (Oct. 22, 2017), https://learningenglish.voanews.com/a/us-begins-collecting-social-media-passwords-information-from-immigrants/4079134.html.
11. *Id.*
12. Evan Perez, *San Bernardino shooter's social media posts on jihad were obscured*, CNN (Dec. 14, 2015), https://www.cnn.com/2015/12/14/us/san-bernardino-shooting/index.html.
13. Aaron Cantú, *Trump's Border Security May Search Your Social Media by 'Tone'*, THE NATION (Aug. 23, 2017), https://www.thenation.com/article/trumps-border-security-may-search-your-social-media-by-tone/.

telephone numbers, email addresses, prior immigration violations, and any family history of involvement in terrorist activities.[14]

Whether or not this policy modification should have been subject to notice and comment rulemaking depends on whether it is a policy statement or legislative rule. Legislative rules are subject to notice and comment rulemaking, while policy statements are not.[15] Under *American Mining Congress v. Mine Safety & Health Admin.*, because this modification creates new requirements for those the policy applies to, it seems more like a legislative rule than a policy statement.[16] If this modification is indeed a legislative rule, its existence violates administrative law since the change was not made before going through the entire notice and comment process.[17]

III. THE POLICY

This new policy was published in a notice on the Federal Register on September 18, 2017.[18] DHS accepted comments on the modification until October 18, 2017 and 2,994 comments were filed. The notice modifies the aforementioned System of Records by expanding the category of records to include "social media handles, aliases, associated identifiable information, and search results."[19] The Department of Homeland Security contends that the modification of the System of Records is in compliance with the Privacy Act of 1974 ("Privacy Act").[20]

This act applies to systems of records, which are defined as "a group of any records under the control of an agency from which information is retrieved by the name of an individual or by some identifying number, symbol, or other identifying particular assigned to the individual."[21] The Privacy Act sets out "fair information practice principles in a statutory framework governing the means by which Federal Government agencies collect, maintain, use, and disseminate an individual's records."[22] Agency officials contend that including one's social media information in the System of Records will make screenings of individuals immigrating to the U.S. more effective.[23]

DHS began collecting this information on October 18, 2017.[24] Although a spokesperson for DHS said the agency already had the ability to "monitor

14. *See* Kopan, *supra* note 3.
15. Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993).
16. *See generally id.* (holding that since the change to agency policy made by issuing policy letters did not create new requirements for those regulated, this change was a policy statement rather than a legislative rule).
17. *Id.* at 1110.
18. Meeting of The President's National Security Telecommunications Advisory Committee, *supra* note 5.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. Nixon, *supra* note 1.
24. Meeting of The President's National Security Telecommunications Advisory Committee, *supra* note 5.

publicly available social media to protect the homeland," and that this is not a new policy, it is the first time the agency has proclaimed such sources to be part of an immigrant's official records.[25] According to the notice, newly collected information will come from sources not previously specified, including publicly available information obtained from the internet, public records, public institutions, interviewees, and commercial data providers.[26] Under the new policy, social media information collected will thus become part of the individual's immigration file.[27]

Collection of social media information will not only apply to those trying to immigrate to the U.S., but also to green card holders and naturalized citizens.[28] For those trying to enter the U.S., it is unclear if monitoring of an individual's social media accounts will only take place during the application process for immigrating to the U.S., or if it will continue after the application is granted.[29]

In order to effectively sift through the vast amount of social media data, ICE officials reached out to software providers at a tech industry conference in late 2017, asking for algorithms to "assess potential threats posed by visa holders in the United States and conduct ongoing social media surveillance of those deemed high risk."[30] At the time of this writing however, ICE has no such algorithm.[31]

IV. RESPONSE

Following the announcement of this policy, privacy advocates, and civil liberty groups expressed concern.[32] The national political director for the American Civil Liberties Union ("ACLU") predicted that the policy would undoubtedly have a chilling effect on the free speech that's expressed every day on social media.[33] Privacy advocates also worry that the monitoring could suck in information on American citizens who communicate over social media with immigrants.[34] It is also unclear how any government monitoring of one's social media account can take into account the subjective nature of language in different cultural contexts, especially when using a computerized algorithm.[35]

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25. Bryan Lynn, *U.S. Begins Collecting Social Media Information from Immigrants*, LEARNING ENGLISH (Oct. 22, 2017), https://learningenglish.voanews.com/a/us-begins-collecting-social-media-passwords-information-from-immigrants/4079134.html.
26. Privacy Act of 1974; System of Records, 82 Fed. Reg. 43,556 (Sept. 18, 2017).
27. *Id*.
28. Nixon, *supra* note 1.
29. *Id*.
30. George Joseph, *The Trump Administration Wants to Track the Facebook Feeds of Foreign Visitors*, MOTHER JONES (Nov. 28, 2017), https://www.motherjones.com/politics/2017/11/the-trump-administration-wants-to-track-the-facebook-feeds-of-foreign-visitors/; *see also* Lynn, *supra* note 9.
31. *See* Lynn, *supra* note 9.
32. Nixon, *supra* note 1.
33. *Id*.
34. *Id*.
35. See Cantú, *supra* note 12.

An analogous issue would involve campaign finance jurisprudence, with government regulations that inadvertently chills free speech.[36] In campaign finance jurisprudence, the Federal Election Commission ("FEC") passes campaign finance regulations that do not directly address speech but still inadvertently chill free speech (in campaign finance cases, contributing money to a candidate is a form of speech).[37] To make sure that campaign finance regulations do not impinge on First Amendment rights, courts have applied a balancing test laid out in *Buckley v. Valeo*.[38]

In the first part of the balancing test, the court decides which of the three tiers of scrutiny to apply to the regulation.[39] The lower the level of scrutiny, the more deference that is given to the government. Thus, a regulation is more likely to be upheld, regardless of the burden it puts on free speech, under lower levels of scrutiny. The three tiers of scrutiny from lowest to highest are: (1) rational basis review, (2) intermediate scrutiny, and (3) strict scrutiny. If a regulation is subject to strict scrutiny, it must further a compelling government interest and be narrowly-tailored to achieve this interest.[40] Under intermediate scrutiny, the regulation must further an important government interest.[41] Under rational basis review, the regulation need only further a legitimate government interest.[42] Regulations that have a severe effect on free speech are normally subject to strict scrutiny; regulations that have a significant but less than severe effect are normally subject to intermediate scrutiny; regulations that only modestly affect free speech are normally subject to rational basis review.[43] Since the Supreme Court has not yet applied the tiers of scrutiny to this new immigration policy, it is unclear which category the policy will fit into, if at all.

Additionally, it is important to note that these First Amendment protections may not apply to those outside of the U.S., as it has not been decided whether the First Amendment applies extraterritorially. For non-citizens inside the U.S., the First Amendment is generally thought to apply to them, as it protects "people" rather than citizens.[44] Supreme Court cases regarding Fourteenth and Fifth Amendment protections have interpreted that these protections apply to non-citizens on the basis on that the Amendments protect

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36. *See generally* Buckley v. Valeo, 424 U.S. 1, 25, 96 (1976) (laying out the tiers of scrutiny, a part of the case which was not overruled).

37. *See* FEC v. Colo. Republican Fed. Campaign Comm., 533 U.S. 431, 440 (2001) (holding that political contributions and spending are forms of speech protected by the First Amendment).

38. Ala. Democratic Conference v. Attorney Gen., 838 F.3d 1057, 1062-63 (2016).

39. Catholic Leadership Coal. of Tex. v. Reisman, 764 F.3d 409, 424 (5th Cir. 2014).

40. Burson v. Freeman, 504 U.S. 191, 221 (1992).

41. Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980).

42. United States v. Carolene Products Co., 304 U.S. 144 (1938).

43. *See generally* Buckley v. Valeo, 424 U.S. 1, 25, 96 (1976) (laying out the tiers of scrutiny, a part of the case which was not overruled).

44. U.S. CONST. amend. I.

"people" rather than explicitly mentioning citizens.[45] A similar logic might be applied in First Amendment cases.

Civil Right groups also critique the new policy, fearing that it will disproportionately burden Muslim immigrants, which is a possible Establishment Clause violation.[46] Another concern is that the new policy will treat naturalized U.S. citizens as second-class citizens, which is a possible Fourteenth Amendment violation.[47] Additionally, the new policy and will chill freedom of association, which is a possible First Amendment violation.[48]

Since the policy has gone into effect, there has been at least one lawsuit related to it.[49] This suit was filed by the Knight First Amendment Institute at Columbia University, which submitted a Freedom of Information Act Request against the Trump administration. The request states that the administration has "failed to provide enough information about its plans regarding vetting of U.S. visitors and immigrants."[50] A staff attorney at the Knight Institute stated in a press release that the policy change threatens to "chill free speech to the detriment of U.S. residents and non-residents alike."[51] The Constitution does not explicitly protect citizens or non-citizens from having their information shared; this protection comes from the Privacy Act of 1974.[52] However in February 2017 under the Trump Administration, DHS announced that it would no longer apply this protection from the Privacy Act to those who are not citizens or lawful permanent residents.[53] Thus, it seems unlikely that privacy and immigrants' rights groups can challenge this new policy based on a constitutional right to privacy, but rather only on human rights arguments, which do not provide as strong of a legal basis for such challenges. However, as the First Amendment protects the rights of "people," non-U.S. citizens and unlawful residents may still be able to challenge the new policy to the extent that it chills their First Amendment speech and association rights.[54]

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45. *See* Session v. Morales-Santana, 137 S.Ct. 1678, 1683 (2017) (applying the Equal Protection Clause of the Fourteenth Amendment to a non-citizen in the U.S.); *see also* U.S. v. Wong Kim Ark, 169 U.S. 649, 704 (1898) (finding that the term "persons" under the Fifth Amendment includes aliens living the U.S.).

46. Letter from Juvaria Khan, Staff Attorney, Muslim Advocates, to Jonathan R. Cantor, Acting Chief Privacy Officer, Dep't Homeland Sec. (Oct. 18, 2017), *available at*: https://www.muslimadvocates.org/files/MA-Comment-to-DHS-FINAL.pdf.

47. *Id*.

48. *Id*.

49. Knight Institute v. DHS, No. 1:17-cv-07572 (S.D.N.Y. filed Oct. 4, 2017).

50. Sumagaysay, *supra* note 4.

51. *Id*.

52. Tina Vasquez, *Trump is Paving the Way for Erosion of Immigrants' Privacy Rights*, REWIRE. NEWS (Mar. 29, 2017), https://rewire.news/article/2017/03/29/trump-paving-way-erosion-immigrants-privacy-rights/.

53. *Id*.

54. U.S. CONST. amend. I.

V. CONCLUSION

The modification has only been in effect for a few months at the time of writing. In the interim, reports are emerging that ICE is using "backend Facebook data, such as the "IP addresses corresponding to each login to Facebook, to locate and track" immigration violation suspects.[55] According to this story, ICE agents were able to locate a suspect using this data, and the ICE agents also obtained the suspect's phone number.[56] So far, there has been no news about immigrants being denied entry into the United States based on social media information. As for First Amendment concerns, if it indeed turns out to be the case that First Amendment rights are chilled, the Trump administration may be in for many more lawsuits related to the issue.

55. Lee Fang, *ICE Used Private Facebook Data to Find and Track Criminal Suspect, Internal Emails Show*, THE INTERCEPT (Mar. 26, 2017), https://theintercept.com/2018/03/26/facebook-data-ice-immigration/.

56. *Id.*