

UNCLASSIFIED



OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

**Best Practices to Protect Privacy, Civil
Liberties, and Civil Rights of Americans of
Chinese Descent in the Conduct of U.S.
Intelligence Activities**

May 2022

UNCLASSIFIED

Table of Contents

EXECUTIVE SUMMARY	3
REPORT SCOPE AND METHODOLOGY	5
INTELLIGENCE ACTIVITIES OF THE PEOPLE’S REPUBLIC OF CHINA	7
U.S. INTELLIGENCE AND RELATED SECURITY ACTIVITIES TO COUNTERACT AND MITIGATE INTELLIGENCE ACTIVITIES OF THE PEOPLE’S REPUBLIC OF CHINA8
CONCLUSION	22

EXECUTIVE SUMMARY

This report responds to two congressionally directed actions concerning the potential effects on Americans of Chinese descent of activities conducted by the U.S. Intelligence Community (IC) to counteract national security threats posed by the People's Republic of China (PRC). Specifically, Section 5712 of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, required the Director of National Intelligence, acting through the Office of Civil Liberties, Privacy, and Transparency (CLPT), to submit a report to Congress reviewing "how the policies, procedures, and practices of the intelligence community that govern intelligence activities and operations targeting the People's Republic of China affect policies, procedures, and practices relating to the privacy and civil liberties of Americans of Chinese descent who may be targets of espionage and influence operations by China." The law also requires that the report include recommendations "to ensure that the privacy and civil liberties of Americans of Chinese descent are sufficiently protected." Subsequently, Section 620 of the Intelligence Authorization Act for Fiscal Year 2021, Pub. L. No. 116-260, made the previously described report an annual requirement for the Director of National Intelligence and requires the report to address the civil rights of Americans of Chinese descent in addition to earlier references to privacy and civil liberties.

As stated in the *February 2022 Annual Threat Assessment of the U.S. Intelligence Community*, the IC assesses that the Chinese Communist Party (CCP) "will work to . . . undercut U.S. influence, drive wedges between Washington and its partners, and foster some norms that favor its authoritarian system."¹ As a component of these efforts, the Annual Threat Assessment states that the PRC "will continue expanding its global intelligence and covert influence posture to better support the CCP's political, economic, and security goals, increasingly challenging U.S. influence."² For this purpose, the PRC's foreign intelligence services have developed an aggressive human intelligence collection posture. The CCP and the PRC pose these national security threats, however, not the people of China and emphatically not Americans of Chinese descent.

The Office of the Director of National Intelligence (ODNI) CLPT led an interagency examination of the privacy, civil liberties, and related civil rights controls used by the IC when conducting intelligence and counterintelligence activities to counter the national security threats posed by the PRC. Specifically, the examination reviewed the privacy, civil liberties, and related civil rights controls, as well as related training, oversight, and avenues for the public to raise concerns regarding IC conduct. The privacy, civil liberties, and civil rights protections embedded in these intelligence programs protect all Americans. Consistent with the congressionally directed action, this examination reviewed the impact and efficacy of these privacy, civil liberties, and civil rights controls with respect to Americans of Chinese descent.

Based on IC privacy, civil liberties, and civil rights offices' input, the ODNI CLPT focused the review on three broad categories of intelligence and related security activities

¹ See February 2022 Annual Threat Assessment of the Intelligence Community at 6, *available at* <https://www.dni.gov/files/ODNI/documents/assessments/ATA-2022-Unclassified-Report.pdf>.

² *Id.* at 8.

conducted by IC agencies and components to counteract the national security threat posed by the PRC: (1) authorized foreign intelligence and counterintelligence collection by the IC that intentionally collects information regarding a particular U.S. person,³ (2) incidental collection of U.S. person information (including of Americans of Chinese descent) acquired in the course of authorized foreign intelligence and counterintelligence activities that do not target U.S. persons, and (3) processes related to the grant or revocation of a security clearance. ODNI CLPT, in conjunction with the IC agencies' and components' privacy, civil rights, and civil liberties officers, examined the policies and procedures related to these three categories of intelligence and security related activities, as well as related training, oversight mechanisms, and redress processes as applicable.

ODNI CLPT's examination determined that IC agencies and components have policies and procedures designed to protect the privacy, civil liberties, and civil rights in the execution of these categories of intelligence and related security activities. The IC has a solemn obligation to provide equal protection to all U.S. persons in accordance with the U.S. Constitution and applicable laws, policies, and regulations. The law is clear: no IC agency or component may conduct an intelligence activity (to include the targeting or collection of information) or otherwise make an employment decision (to include the granting or revocation of a security clearance, or related investigatory steps) based upon the racial or ethnic background of any U.S. person. Moreover, Executive Order 12968 makes clear that the U.S. Government "does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information."

In addition to these binding legal obligations, the IC has a deep commitment to securing the nation while also exemplifying America's values. Those values include equitable and fair treatment to persons of every race and ethnicity.

Conducting intelligence activities based upon race or ethnicity is also entirely inconsistent with the objective, fact-based criteria that underlie the tradecraft utilized by the IC. In a manner authorized by law, the IC must ground its foreign intelligence and counterintelligence collection activities on fact-based determinations regarding whether individuals have access to the information needed for the IC to fulfill its mission. Conducting intelligence activities or subjecting individuals to greater scrutiny during the security background process based upon race or ethnicity does not reflect the IC's commitment to objective intelligence collection. Moreover, as discussed in this report, it is the IC's assessment that the PRC's foreign intelligence services prioritize other factors over race or ethnicity when those services evaluate the potential recruitment of human assets.

Stated clearly, the IC may not target an individual in an intelligence collection activity because they are Chinese American. An American of Chinese descent must also not be

³ Executive Order 12333 defines a U.S. person as "a United States citizen, an alien known by the intelligence element concerned to be a permanent resident alien, an unincorporated association substantially composed of U.S. citizens or permanent resident aliens, or a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments." Executive Order 12333 at § 3.5(k). The Foreign Intelligence Surveillance Act contains a substantially similar definition of U.S. person. *See* 50 U.S.C. § 1801(i).

subjected to greater scrutiny in security clearance processes based on their race or ethnicity. Intelligence collection or security clearance actions based on such an unauthorized purpose violate the law, are inconsistent with the IC's values, and would not reflect the IC's fact and risk-based approach to intelligence tradecraft.

Although IC policies and procedures reflect an appropriate focus on the protection of privacy, civil liberties, and civil rights in the targeting and scope of intelligence and related security activities, ODNI makes four recommendations to IC agencies and components to further ensure the protection of the privacy, civil liberties, and civil rights of all Americans, including Americans of Chinese descent. First, ODNI recommends that IC agencies and components reemphasize the prohibition on conducting intelligence and related security activities based on race or ethnicity, to include those related to the granting or revocation of security clearances, in their training materials.⁴ Second, and relatedly, all IC agencies and components are encouraged to expand unconscious bias and cultural competency training to personnel involved in intelligence collection and security clearance processes. Third, ODNI recommends that privacy, civil rights, and civil liberties officers further develop and, when relevant, highlight the potential for disparate impacts on historically disadvantaged groups of U.S. persons, including Americans of Chinese descent, when conducting analyses and making recommendations regarding intelligence and related security activities. Fourth, ODNI will explore its ability to generate and make public demographic metrics regarding the length of time and the results of security clearance processes. These metrics would be utilized to identify and help rectify processes that may have a disparate impact on specific racial or ethnic groups. Actions consistent with these recommendations that have already been initiated are detailed in this report.

The ODNI will conduct an examination on an annual basis to monitor changes in IC practices based upon these recommendations and develop further recommendations as needed. ODNI expects those reviews will build on the findings in this report and anticipates that further examination will provide valuable perspective on whether the IC's protections provide equitable outcomes for other persons of color as well.

REPORT SCOPE AND METHODOLOGY

Section 5712(a) of the National Defense Authorization Act for Fiscal Year 2020 contained the following Sense of Congress with respect to the PRC and intelligence activities:

- (a) SENSE OF CONGRESS.—It is the sense of Congress that—
- (1) the People's Republic of China appears to be specifically targeting the Chinese-American community for intelligence purposes;

⁴ For example, with respect to security adjudications, ODNI has issued clear direction that discrimination on the basis of race or national origin is prohibited in national security eligibility determinations. *See* Security Executive Agent Directive 4: National Security Adjudicative Guidelines (hereinafter, SEAD-4), Appendix A, § 1(c) (effective June 8, 2017) (“The U.S. Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in making a national security eligibility determination.”). ODNI recommends reemphasizing this clear prohibition throughout training materials.

- (2) such targeting carries a substantial risk that the loyalty of such Americans may be generally questioned and lead to unacceptable stereotyping, targeting, and racial profiling;
- (3) the United States Government has a duty to warn and protect all Americans including those of Chinese descent from these intelligence efforts by the People's Republic of China;
- (4) the broad stereotyping, targeting, and racial profiling of Americans of Chinese descent is contrary to the values of the United States and reinforces the flawed narrative perpetuated by the People's Republic of China that ethnically Chinese individuals worldwide have a duty to support the People's Republic of China; and
- (5) the United States efforts to combat the People's Republic of China's intelligence activities should actively safeguard and promote the constitutional rights of all Chinese Americans.

Based on these findings, the Act directed that:

- (b) ...the Director of National Intelligence, acting through the Office of Civil Liberties, Privacy, and Transparency, in coordination with the civil liberties and privacy officers of the elements of the intelligence community, shall submit a report to the congressional intelligence committees containing—
- (c)
 - (1) a review of how the policies, procedures, and practices of the intelligence community that govern the intelligence activities and operations targeting the People's Republic of China affect policies, procedures, and practices relating to the privacy and civil liberties of Americans of Chinese descent who may be targets of espionage and influence operations by China; and
 - (2) recommendations to ensure that the privacy and civil liberties of Americans of Chinese descent are sufficiently protected.

Subsequently, Section 620 of the Intelligence Authorization Act for Fiscal Year 2021 Pub. L. No. 116-260, modified this reporting requirement to also address the civil rights of Americans of Chinese descent in addition to earlier references to privacy and civil liberties.

ODNI CLPT conducted its review of IC policies, procedures, and practices by working with IC privacy, civil rights, and civil liberties officers to identify the types of intelligence-related activities most likely to impact the privacy and civil liberties of Americans of Chinese descent. Having identified areas of potential privacy and civil liberties risk, the privacy, civil rights, and civil liberties officers then identified and detailed related policies and procedures (to include policies and procedures addressing the use of race and ethnicity and associated civil rights protections), training, compliance and oversight mechanisms, and redress processes designed to mitigate the identified risks. ODNI CLPT also consulted with subject matter experts at the National Counterintelligence and Security Center (NCSC), the ODNI Office of IC,

Diversity, Equity, and Inclusion (DEI), and the ODNI Office of Equal Employment Opportunity (OEEO). Additionally, ODNI CLPT engaged with non-governmental organization experts regarding Asian American civil rights and civil liberties protection. These meetings provided valuable perspective and substantially informed the recommendations made in this report.

INTELLIGENCE ACTIVITIES OF THE PEOPLE’S REPUBLIC OF CHINA

It is the IC’s assessment that while the PRC promotes the false narrative that individuals of Chinese descent owe some allegiance to the PRC, neither race nor ethnicity is the primary criterion utilized by the PRC’s intelligence services in their recruitment of intelligence assets.

More specifically, the *February 2022 Annual Threat Assessment of the U.S. Intelligence Community* states that the CCP “will work to . . . undercut U.S. influence, drive wedges between Washington and its partners, and foster some norms that favor its authoritarian system.”⁵ As a component of these efforts, the Annual Threat Assessment states that the PRC “will continue expanding its global intelligence and covert influence posture to better support the CCP’s political, economic, and security goals, increasingly challenging U.S. influence.”⁶

In order to support the CCP’s global ambitions, the PRC’s foreign intelligence services—including the Ministry of State Security and intelligence components of the People’s Liberation Army—have developed an aggressive human intelligence collection posture. These efforts have led to the PRC’s recruitment of numerous foreign citizens and intelligence, military, and civilian officials, including from within the U.S. Government. A U.S. person’s individual race or ethnicity, however, is not assessed as primary to the PRC’s U.S.-focused human intelligence recruitment rubric. PRC intelligence services instead prioritize the following factors: (1) the potential intelligence asset’s past, present, or future access to information of PRC interest; (2) the potential asset’s susceptibility to recruitment by the PRC intelligence services; (3) the potential asset’s affinity for and willingness to cooperate with the PRC; and (4) the potential asset’s accessibility to PRC intelligence officers for recruitment and handling by the PRC intelligence services. For example, legal travel to China has presented PRC intelligence services with opportunities for recruitment and handling, and such PRC intelligence activities have focused on U.S. business persons, retired U.S. Government officials, students, academics, scientists, and tourists, regardless of race or ethnicity. While some of these factors may in individual cases be correlated with having personal, financial, or professional connections with individuals or groups located within the PRC, it is the IC’s assessment that PRC intelligence services do not rely merely on race or ethnicity in assessing the recruitment potential of intelligence assets.

⁵ See February 2022 Annual Threat Assessment of the Intelligence Community at 6, *available at* <https://www.dni.gov/files/ODNI/documents/assessments/ATA-2022-Unclassified-Report.pdf>.

⁶ *Id.* at 8.

U.S. INTELLIGENCE AND RELATED SECURITY ACTIVITIES TO COUNTERACT AND MITIGATE INTELLIGENCE ACTIVITIES OF THE PEOPLE'S REPUBLIC OF CHINA

The IC's mission is to provide timely, insightful, objective, and relevant intelligence and support to inform national security decisions and to protect our Nation and its interests. Based on the significant threat posed by the PRC, IC agencies and components conduct numerous activities that seek insight about PRC plans and intentions in order to defend against counterintelligence and security threats posed by the PRC. U.S. intelligence activities are focused on the threat posed by the PRC and the CCP, including the threat posed by PRC intelligence services' recruitment of human intelligence assets.

It is important to note, however, that the CCP and the PRC pose these national security threats, not the people of China and, emphatically, not Americans of Chinese descent. As stated above, the IC assesses that an individual's Chinese descent is not one of the primary criteria utilized by the PRC's intelligence services in identifying potential intelligence assets.

Consistent with U.S. law and our shared values, the IC is not authorized to collect intelligence information, or conduct activities in support of security clearance processes, simply because an American is of Chinese descent. The IC's activities, however, do have the potential to impact the privacy, civil liberties, and civil rights of Americans; and the bar on intentionally collecting information on an individual because of their race or ethnicity does not mean that the resulting privacy, civil liberties, and civil rights impacts are necessarily uniformly distributed across all demographics. As described in the methodology section above, in the course of this review IC agencies and components identified intelligence and related security activities they engage in to combat threats posed by the PRC that have the greatest potential to impact Americans of Chinese descent. Based upon the IC agencies' and components' more detailed and classified input, ODNI CLPT identified the following three categories of relevant intelligence and related security activities, each of which is discussed in detail below: (1) authorized IC foreign intelligence and counterintelligence collection that intentionally collects information regarding a particular U.S. person, (2) incidental collection of U.S. person information (including of Americans of Chinese descent) acquired in the course of authorized foreign intelligence and counterintelligence activities that do not target U.S. persons, and (3) security investigations related to the grant or revocation of a security clearance. Each of these categories of intelligence and related security activities is described in this section, followed by an analysis of the applicable privacy, civil liberties, and civil rights controls that guide and restrict these activities. Recommendations for improving the protection of privacy, civil liberties, and civil rights are embedded in this analysis.

A. Intentional Foreign Intelligence and Counterintelligence Collection Regarding a Particular U.S. Person

1. Intentional Collection Activities Potentially Impacting Americans of Chinese Descent:

Executive Order 12333, a foundational grant of Executive authority defining and delineating the authorities and structure of the IC, begins with the statement “[t]imely, accurate, and insightful information about the activities, capabilities, plans, and intentions of *foreign* powers, organizations, and persons, and their agents, is essential to the national security of the United States.” (emphasis added). As described in a previous section and the April 2021 *Annual Threat Assessment*, PRC activities present a threat by such a foreign power to U.S. national security. But although the threat itself emanates from a foreign power, it does not follow that the IC may only collect information regarding foreign individuals to counter this threat. For example, a U.S. person may be assessed to be acting, unintentionally or intentionally, as an agent of a foreign power like the PRC, by collecting information on behalf of that foreign power. In such cases, the IC may seek to intentionally collect information concerning the U.S. person in order to mitigate the national security threat posed by the foreign power.

2. Privacy, Civil Liberties, and Civil Rights Protections for Intentional Collection:

Because intentional collection is directed at a particular U.S. person, intentional collection presents some of the most significant privacy and civil liberties risks. To mitigate these risks, the IC’s authority to intentionally collect information regarding U.S. persons is prescribed by statutes, Executive Order, and mandated agency policies.

The Foreign Intelligence Surveillance Act of 1978 (FISA) governs and restricts the IC’s authority to target a U.S. person through collection techniques such as electronic surveillance or the search of private property.⁷ Such electronic surveillance or searches targeting U.S. persons require a determination by a judge on a specialized court, the Foreign Intelligence Surveillance Court (FISC), that there is probable cause to believe that the U.S. person in question is an “agent of a foreign power.”⁸ In order to make this showing that a U.S. person is an “agent of a foreign power,” the government must provide facts to the FISC demonstrating that there is probable cause to believe that the U.S. person is engaged in knowing and intentional conduct in support of the foreign power.⁹ This is a determination that must be made based on the individual’s conduct; the individual’s race or ethnicity does not provide lawful basis for the court to determine that a U.S. person is an agent of a foreign power.

Other intelligence collection activities are governed by Executive Order 12333. Executive Order 12333 describes the types of intelligence collection that

⁷ See 50 U.S.C. § 1801, *et seq.*

⁸ See 50 U.S.C. §§ 1801 – 1805, 1821 – 1824, 1881b – 1881d.

⁹ See 50 U.S.C. § 1801(b)(2).

each IC agency or component may acquire. Some IC agencies or components are limited to collecting overtly or from publicly available sources, while other IC agencies may also collect through clandestine or other means. In all cases, Executive Order 12333 requires that any acquisition of U.S. person information be collected only pursuant to procedures approved by the head of the IC agency or component and the Attorney General, after consultation with the Director of National Intelligence.¹⁰ Collection efforts governed by such procedures include everything from the collection of “information that is publicly available or collected with the consent of the person concerned,” to “information obtained in the course of a lawful foreign intelligence [or] counterintelligence . . . investigation,” to “information concerning persons who are reasonably believed to be potential sources or contacts for the purposes of determining their suitability or credibility.”¹¹

Each of these Executive Order 12333 Attorney General procedures contains specific restrictions and requirements governing the intentional collection of information targeting a U.S. person. The specific requirements, factual basis, and approval levels for such targeted collection activities vary based on each IC agency or component’s authorities and mission and the sensitivity of the underlying collection effort (from less sensitive activities, such as the collection of publicly available information, to substantially more sensitive activities, such as the physical surveillance of a specific U.S. person). A commonality, however, is that all intelligence activities conducted pursuant to Executive Order 12333, including intentional collection of intelligence information regarding any U.S. person, may only be conducted for an authorized intelligence or counterintelligence purpose. For example, ODNI’s Attorney General Procedures state that ODNI may only collect “information concerning U.S. persons if done in the course of the ODNI’s duly authorized intelligence activities and in fulfillment of the ODNI’s national security responsibilities.”¹² The Attorney General-approved procedures of other IC agencies and components contain comparable provisions.¹³

¹⁰ See Executive Order 12333 §§ 1, 2.3.

¹¹ See *id.* § 2.3.

¹² See ODNI’s *Intelligence Activities Procedures Approved by the Attorney General Pursuant to Executive Order 12333* (hereinafter, “ODNI Procedures”), Section 2.2.4, available at https://www.intel.gov/assets/documents/702%20Documents/declassified/AGGs/ODNI%20guidelines%20as%20approved%20by%20AG%2012.23.20_OCR.pdf.

¹³ See, e.g., *Central Intelligence Agency Intelligence Activities: Procedures Approved by the Attorney General Pursuant to Executive Order 12333* (hereinafter, “CIA Procedures”), Section 2.3, available at <https://www.cia.gov/static/54871453e089a4bd7cb144ec615312a3/CIA-AG-Guidelines-Signed.pdf>; DHS’s *Office of Intelligence and Analysis Intelligence Oversight Guidelines* (hereinafter, “DHS Procedures”) at Section 2.1, available at [available at https://www.dhs.gov/sites/default/files/publications/office-of-intelligence-and-analysis-intelligence-oversight-program-and-guidelines.pdf](https://www.dhs.gov/sites/default/files/publications/office-of-intelligence-and-analysis-intelligence-oversight-program-and-guidelines.pdf).

Targeting intelligence collection to disadvantage an individual because they are an American of Chinese descent—or any other race or ethnicity—is never an authorized intelligence or counterintelligence purpose; to the contrary, targeting for such a purpose is unlawful. U.S. intelligence activities must comply with all aspects of U.S. law, including the U.S. Constitution’s guarantee of equal protection under the law. These legal requirements are reflected in every IC agency and component’s Attorney General-approved procedures. For example, the Executive Order 12333 Attorney General Procedures for the Department of Defense (DoD) state that in carrying out intelligence activities, DoD components “must carry out all activities in all circumstances in accordance with the Constitution and laws of the United States.”¹⁴ The procedures of other IC agencies and components, such as the Central Intelligence Agency¹⁵ and the U.S. Coast Guard,¹⁶ take a comparable approach. As stated in the ODNI Guidelines, but equally applicable to all IC agencies and components, “[t]he United States Government, including the ODNI, has a solemn obligation to protect fully the legal rights of all U.S. persons, including freedoms, civil liberties, and privacy rights guaranteed by federal law, including in the conduct of intelligence activities.”¹⁷ In addition, several IC agencies or components, particularly those with the most significant domestic authorities, have additional language that more specifically addresses race or ethnicity. For example, the Executive Order 12333 Attorney General Procedures for the Department of Homeland Security’s Office of Intelligence and Analysis (I&A) state that “I&A personnel are not permitted to engage in intelligence activities based solely on an individual’s or group’s race, ethnicity, gender, religion, sexual orientation, gender identity, country of birth, or nationality.”¹⁸ Similarly, the Federal Bureau of Investigation’s (FBI) Attorney General Procedures make clear that the Department of Justice’s policies restricting the use of race and ethnicity in law enforcement activities also apply equally to the FBI’s conduct of intelligence activities.¹⁹

Intentionally collecting intelligence information about individuals solely based on their race or ethnicity is also entirely inconsistent with the objective,

¹⁴ *Department of Defense Manual 5240.01: Procedures Governing the Conduct of DoD Intelligence Activities* (hereinafter, “DoD Procedures”), Section 1.2(b), available at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/524001_dodm_2016.pdf?ver=2017-07-31-143413-363.

¹⁵ See CIA Procedures, Sections 1.1 and 3.3.

¹⁶ See U.S. Coast Guard’s *Appendix A to COMDTINST M3820.12A: Attorney General Guidance for Coast Guard National Intelligence Element Activities* (hereinafter Coast Guard Procedures), Procedure 1.A.2, available at [https://www.intel.gov/assets/documents/702%20Documents/declassified/AGGs/CIM3820.12A_Final_26_JAN_21.pdf%20\(CG2%20Signature\)_OCR.pdf](https://www.intel.gov/assets/documents/702%20Documents/declassified/AGGs/CIM3820.12A_Final_26_JAN_21.pdf%20(CG2%20Signature)_OCR.pdf).

¹⁷ ODNI Guidelines, Section 1.2.

¹⁸ DHS Procedures, Section 1.

¹⁹ See *The Attorney General’s Guidelines for Domestic FBI Operations* (hereinafter, “FBI Procedures”), Section I.C.3, available at <https://www.justice.gov/archive/opa/docs/guidelines.pdf>.

fact-based criteria that underlie the tradecraft utilized by the IC. In a manner authorized by law, the IC must focus its foreign intelligence and counterintelligence collection targeting specific U.S. persons based on fact-based determinations regarding whether individuals have access to the information the IC needs to fulfill its mission. Targeting intelligence collection based upon invidious discrimination provides no such objective criteria.

3. Recommendations and Actions

While there is unanimity within the IC that race and ethnicity do not provide a basis for conducting an authorized intelligence activity to collect information on a U.S. person, ODNI recommends more clearly articulating this restriction in required privacy, civil liberties, and civil rights training programs to help ensure these restrictions are understood and enforced. All IC agencies and components conduct training to ensure that intelligence activities comply with all aspects of U.S. law, but the amount of training specifically concerning non-discrimination in intelligence collection decisions varied. FBI, for example, incorporates into their basic training for all new FBI agents and analysts specific components on the restrictions of the use of race, ethnicity, religion, and national origin in the conduct of investigations. This is a best practice. Role-based and scenario-driven training provide personnel with specific and actionable information to help IC personnel identify, prevent, and report to oversight entities any intelligence collection that may be driven by impermissible considerations, to include the use of race or ethnicity as a justification for intelligence collection.

Even when restrictions are fully understood, unintentional but still harmful bias can potentially affect operational decisions. ODNI therefore recommends the expansion of existing unconscious bias training. Such training is widely offered throughout the IC to address and minimize unlawful discrimination in the workplace. Identifying and mitigating previously unidentified biases also plays an important role in the current training provided to intelligence analysts. ODNI recommends more broadly offering comparable unconscious bias training in the intelligence operational context so those engaged in collecting intelligence information may more readily identify and mitigate unintentional bias that may impact their collection decisions. IC agencies and components are encouraged to adequately resource such unconscious bias training for intelligence operators, as well as evaluate the most effective approaches to such training in the operational context. The use of real world operational scenarios, for example, involving fact patterns featuring Americans of a variety of backgrounds may be one effective approach to conveying the importance of minimizing unconscious bias to reach more objective operational decisions.

B. Incidental Collection of U.S. Person Information

1. Incidental Collection Potentially Impacting Americans of Chinese Descent:

In some forms of intelligence collection, authorized collection against a valid foreign intelligence or counterintelligence target also inherently results in the *incidental* collection of information regarding others who are not being targeted. This incidental collection may include information concerning U.S. persons. For example, pursuant to FISA or Executive Order 12333, the IC may target for collection the communications of a non-U.S. person outside the United States for a valid foreign intelligence purpose. Such collection could include collecting the telephone calls of that non-U.S. person. If an American inside the United States calls the validly targeted non-U.S. person outside the United States, the IC collects not just the words spoken by the non-U.S. person overseas, but the whole telephone call, including the words spoken by the American in the United States. The IC refers to collection of such U.S. person information as “incidental collection.”²⁰

The IC neither has, nor could realistically generate, demographic information regarding U.S. persons whose information has been incidentally collected. Because these individuals are not targeted for collection, the IC often has little information regarding the identities of such Americans. In addition, and for the reasons described above, even when incidental collection did provide information of foreign intelligence or counterintelligence interest, demographic information such as race or ethnicity would be generally irrelevant to the IC as it is not relevant to the authorized purpose for the collection. Conducting additional and potentially invasive intelligence activities to acquire such demographic information would raise its own privacy and civil liberties concerns.

Despite the lack of metrics, the IC does not presume that the impact of incidental collection is evenly distributed across the American public. Because intelligence collections must be appropriately targeted and scoped to obtain information regarding foreign threats, an American’s increased interaction with a foreign threat actor may increase the likelihood that their information may be incidentally collected. As discussed above, IC agencies and components conduct numerous activities that seek insight about PRC plans and intentions in order to defend against counterintelligence and security threats from the PRC. While many Americans have no interactions with the PRC, some Americans may have interactions with the PRC as a result of familial, social, or business ties to China. Such interactions with the PRC do not in any way guarantee that the IC has collected information concerning their interactions with the PRC, but there may

²⁰ Targeting a non-U.S. person for the purpose of collecting information about a U.S. person without appropriate authorization to collect information about the U.S. person is referred to as “reverse targeting.” Reverse targeting is prohibited. *See, e.g.*, 50 U.S.C. § 1881a(b)(2) (stating that FISA Section 702 acquisitions “may not intentionally target a person reasonably believed to be located outside the United States if the purpose of such acquisition is to target a particular, known person reasonably believed to be in the United States”); 50 U.S.C. § 1881a(g) (requiring related Attorney General-approved guidelines to ensure compliance with the reverse targeting prohibition); and 50 U.S.C. § 1881c (providing an authorized process for targeting U.S. persons located outside the United States under circumstances in which a warrant would be required if the acquisition were conducted in the United States for law enforcement purposes).

be an increased risk of such incidental collection. Insofar as some Americans of Chinese descent may have greater interactions with the PRC, the risk of incidental collection increases for those individuals. This increased risk is also true for Americans not of Chinese descent with comparable connections to the PRC; the increased risk is therefore a function of actual relationships and not a function of race or ethnicity. Some impact may be correlated with race or ethnicity, however, due to an increased likelihood for underlying familial, social, or business connections with individuals or entities located in China.

2. Privacy, Civil Liberties, and Civil Rights Protections for Incidentally Collected Information

The privacy, civil liberties, and potential for related civil rights impacts of incidental collection have long been recognized and are accounted for and mitigated through specific procedures designed to minimize the collection, retention, and dissemination of incidental U.S. person information. For collection conducted pursuant to Executive Order 12333, these restrictions are found within the Attorney General-approved procedures discussed above.²¹ Although these Attorney General procedures also cover the more limited instances in which intentional collection is appropriate, the majority of these procedures deal with the more frequent occurrence of incidental collection of U.S. person information in the process of gathering intelligence or counterintelligence information. Under FISA, comparable rules for minimizing collection, retention, and dissemination of U.S. person information are required.²²

More specifically, IC agencies' and components' Executive Order 12333 Attorney General procedures have restrictions addressing the entire data lifecycle of incidental collection. As with intentional collection, the procedures require that a collection activity may only be conducted for an authorized purpose.²³ Collection activities must also be properly scoped to this authorized purpose. For example, the DHS Procedures permit incidental collection of U.S. person information only when “the incidentally acquired information is not itself deliberately sought” and “it would create an unreasonable burden to collect the information about the target without collecting the additional, non-targeted information.”²⁴ Subject to exceptions, many of the procedures restrict the length

²¹ See Executive Order 12333, § 2.3.

²² See, e.g., 50 U.S.C. §§ 1801 (h) (defining minimization procedures) and 1804(a)(4) (requiring a statement regarding the proposed minimization procedures in any application for electronic surveillance). As FISA procedures apply to a narrower swath of intelligence activities and the requirements of the FISA minimization procedures are generally comparable, or more restrictive, than those found in the Executive Order 12333 Attorney General procedures, the analysis that follows focuses on the IC agencies' and components' Executive Order 12333 procedures.

²³ See footnotes 12 and 13 and accompanying text.

²⁴ DHS Procedures, Section 2.1.3.2. See also DoD Procedures at Section 3.2(f)(4) (limiting the collection of non-publicly available U.S. person information to “no more information than is reasonably necessary” within the limits

of time unevaluated data that potentially contains incidental U.S. person information may be retained for evaluation by IC agencies or components.²⁵ Access limitations, training requirements, and restrictions on queries to seek information concerning a specific U.S. person in unevaluated information provide further protections in many IC agency and component procedures.²⁶ Permanent retention of U.S. person information, including incidentally acquired information, or the dissemination of U.S. person information outside the IC (for example, in an intelligence report) generally require specific findings with respect to the U.S. person information.²⁷

None of these protections for incidental collection turns on the race or ethnicity of the individual whose information has been incidentally collected. These rules apply equally to all Americans, including Americans of Chinese descent. As with intentional collection, the race or ethnicity of a U.S. person does not provide an authorized justification for modifying the scope of collection, retaining information for a longer period of time, querying collected information, or disseminating intelligence information in a different manner.

3. Recommendations and Actions

For the same rationale as was applicable to targeted collection, ODNI recommends that IC training more specifically focus on preventing discriminatory conduct in the collection, handling, and dissemination of incidental collection. Expanding the scope of unconscious bias training to those involved in the collection, handling, and dissemination of incidental collection will also help ensure that unintentional, but still harmful, bias plays no role in such important decisions.

In addition, while (as previously discussed) metrics regarding the demographics of those subject to incidental collection may be difficult or

of practicality); CIA Procedures, Section 3.3 (“In any collection activity, the CIA shall collect only the amount of information reasonably necessary to support that purpose.”) and 5.2(c) (requiring for collections of information in bulk or which cannot be promptly reviewed for retention that, among other requirements, the approving official document “any reasonable steps that were or will be taken to limit the information to the smallest subset of data containing the information necessary to achieve the purpose of the collection.”).

²⁵ See, e.g., DoD Procedures, Section 3.3(c)(2) (generally limiting the evaluation period of incidental collection obtained from targeting a person in the United States to five years, with potential for an extension under prescribed procedures).

²⁶ See, e.g., *Department of Energy Procedures for Intelligence Activities* (hereinafter DOE Procedures), Section V.E.1 (detailing requirements for access, querying, and training) available at <https://www.directives.doe.gov/files/department-of-energy-procedures-for-intelligence-activities/@@images/file>.

²⁷ See, e.g., ODNI Procedures, Sections 6.1 (detailing standards for permanently retaining information concerning a U.S. person and requiring that any U.S. person personally identifiable information (USPII) be retained only if that USPII is “necessary, or it is reasonably believed that the USPII may become necessary, to understand, assess, or act on the information”) and Section 7.2 (permitting dissemination of U.S. person information outside the Intelligence Community only when the retention standard has been met).

inappropriate to obtain, there are instances when the potential for disparate impact on certain groups of Americans can and should be taken into account. ODNI recommends that privacy, civil rights, and civil liberties officers further develop and, when relevant, highlight the potential for disparate impacts into their analyses and recommendations regarding intelligence programs. For example, the DNI's 2020 *Principles of Artificial Intelligence (AI) Ethics for the Intelligence Community*²⁸ requires the IC to “take affirmative steps to identify and mitigate bias” and the accompanying *AI Ethics Framework for the Intelligence Community*²⁹ further defines steps that should be taken to minimize bias, including determining whether the AI will “avoid perpetuating historical biases and discrimination.” While specific mechanisms for evaluating the potential for disparate impact will vary depending upon the nature of the intelligence activity and available data, privacy, civil rights, and civil liberties officers should use relevant tools and information to evaluate and, where practicable, mitigate privacy and civil liberties concerns that fall disproportionately on historically disadvantaged demographic groups. The IC Civil Liberties and Privacy Council, which led the development of the *AI Ethics Framework for the Intelligence Community*, will take the lead in developing and sharing such best practices and tools for conducting disparate impact analysis.

C. Security Clearances

1. Security Clearance Investigatory and Adjudicatory Activities Potentially Impacting Americans of Chinese Descent

All U.S. Government civilian and military personnel, consultants, contractors, and other individuals who require initial or continued eligibility for access to classified information are required to undergo an investigation and adjudication to determine their “loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgment, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing the use, handling, and protection of classified information.”³⁰ Applicants for new or renewed access to classified information must provide extensive and sensitive information regarding their associations, financial interests, and personal conduct in the course of security clearance investigations.³¹ Security clearance investigations may entail interviews with the subject’s past or present neighbors, associates, and co-workers. These interviews also may result in requests for, and receipt of,

²⁸ The *Principles of Artificial Intelligence Ethics for the Intelligence Community* are available at https://www.intelligence.gov/images/AI/Principles_of_AI_Ethics_for_the_Intelligence_Community.pdf.

²⁹ The *Artificial Intelligence Ethics Framework for the Intelligence Community* is available at https://www.intelligence.gov/images/AI/AI_Ethics_Framework_for_the_Intelligence_Community_1.0.pdf.

³⁰ Executive Order 12968, § 3.1(b) (Aug. 2, 1995); *see also* SEAD-4, Appendix A, § 1.

³¹ Before security clearance background investigations are initiated, the applicant signs consent forms authorizing the U.S. Government to collect all the information required in a security clearance investigation.

sensitive information regarding the subject of the investigation. As a result, these investigative activities impact the privacy of Americans of Chinese descent, and other U.S. citizens, seeking to obtain or retain a security clearance.

Information collected in the course of the security clearance investigation provides the basis for a security clearance adjudication. Security clearance adjudications require the “careful weighing of a number of variables of an individual’s life to make an affirmative determination that the individual is an acceptable security risk. This is known as the whole-person concept.”³² In evaluating the “whole person,” the adjudicator is required to consider myriad factors, including but not limited to the subject’s “allegiance to the United States,” the potential for “foreign influence” on the subject, “foreign preference” by the subject, as well as the subject’s “sexual behavior,” “personal conduct,” “alcohol consumption,” prior “handling [of] protected information,” and other factors.³³

The stakes are high for all involved in the security clearance process. For the U.S. Government, ensuring that individuals with access to properly classified information do not pose an unacceptable risk is a vital national security interest.³⁴ For individuals, obtaining and maintaining a security clearance is a prerequisite for many positions within and outside the U.S. government; denial or even delay of a security clearance may have a significant impact on their careers, livelihoods, or personal reputations. In addition, subjects of a security clearance investigation must entrust the U.S. government will appropriately collect, use, and protect the detailed and sensitive information needed to fully evaluate the security risk posed by the individual.

2. Privacy, Civil Liberties, and Civil Rights Protections in Security Clearance Investigations

All security clearance investigations and adjudications must be conducted according to requirements set forth in law and subject to common standards. Specifically, security clearance investigations must be conducted pursuant to the *Federal Investigative Standards*, December 2012, adopted by the Security Executive Agent and the Director of the Office of Personnel Management.³⁵ Adjudications must comply with the National Security Adjudicative Guidelines,

³² SEAD-4, Appendix A, § 2 (a).

³³ See SEAD-4, Appendix A, Guidelines A – M.

³⁴ See Executive Order 12968, § 3.1(b) (“Eligibility shall be granted only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of the national security.”)

³⁵ See, e.g., Intelligence Community Policy Guidance 704.1 § C.1 (requiring all background investigations for access to sensitive compartmented information comply with the *Federal Investigative Standards*). In May 2022, the Federal Investigative Standards were updated in the Federal Personnel Vetting Investigative Standards. Future reports will examine how these updates have affected and protected the privacy, civil liberties, and civil rights of Americans of Chinese descent.

which establish “the single, common adjudicative criteria for all covered individuals who require initial or continued eligibility for access to classified information.”³⁶ Uniform standards narrow the discretion of security clearance processes to help ensure the protection of privacy, civil liberties, and civil rights. In addition, strict access and use limitations apply to information acquired in the course of security investigations in order to protect the privacy and civil liberties of both the subjects of security clearance investigations and individuals who provide information in the course of such investigations.³⁷

In the course of this review, non-governmental organizations representing Asian Americans and Pacific Islanders and some individuals within the Federal government expressed concerns that Americans of Chinese descent were subject to longer and more invasive security clearance investigations, or that any associations or connections they may have with individuals in the PRC may have resulted in disparate results in the security clearance adjudicative process.

Discrimination in any aspect of the security clearance process is unlawful. Executive Order 12968 explicitly bars discrimination “on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in granting access to classified information.”³⁸ The same explicit bar on such unlawful discrimination features prominently in the National Security Adjudicative Guidelines.³⁹ As a result, an individual’s race or ethnicity are never an acceptable or authorized basis for granting or withholding a security clearance or conducting related investigative activities with respect to that individual.

Stated clearly, the law prohibits an individual from being subjected to greater scrutiny because they are an American of Chinese descent. Nor does their status as a Chinese American have any bearing on the adjudicative factors that may, or may not, make them eligible to hold a security clearance.

In contrast to impermissible factors such as race and ethnicity, the potential for a prospective or current security clearance-holder to be vulnerable to foreign influence is an important aspect of security clearance adjudications. Under the National Security Adjudicative Guidelines, “[f]oreign contacts and interests, including, but not limited to, business, financial, and property interests are a national security concern if they result in divided allegiance. [Foreign contacts and interests] may also be a national security concern if they create

³⁶ SEAD-4 § B.

³⁷ *See, e.g.*, ODNI Systems of Record Notice -17, ODNI Personnel Security Records, 76 Fed. Reg. 42739 (July 19, 2011) (requiring administrative, physical, and technical safeguards on ODNI security clearance records and limiting the sharing of such records).

³⁸ Executive Order 12968, Section 3.1(c).

³⁹ SEAD-4, Appendix A, § 1(c) (“The U.S. Government does not discriminate on the basis of race, color, religion, sex, national origin, disability, or sexual orientation in making a national security eligibility determination.”)

circumstances in which the individual may be manipulated or induced to help a foreign person, group, organization, or government in a way inconsistent with U.S. interests or otherwise made vulnerable to pressure or coercion by any foreign interest.”⁴⁰ Risk factors are not limited to instances in which a foreign adversary has affirmatively sought to compromise a U.S. citizen, but extend more broadly to a variety of potentially disqualifying conditions, including “contact, regardless of method, with a foreign family member, business or professional associate, friend or other person who is a citizen of or resident in a foreign country *if* that contact creates a heightened risk of foreign exploitation inducement, manipulation, pressure, or coercion.”⁴¹ Such security concerns can also be mitigated by a number of factors, including instances in which the subject “has such deep and longstanding relationships and loyalties in the United States, that the individual can be respected to resolve any conflict or interest in favor of the U.S. interest.”⁴²

Foreign contacts and interests alone are not disqualifying factors to obtain a security clearance; to the contrary, in some instances they help provide the experiences and skills required by the IC. The success of the IC’s mission requires that each agency or component recruit personnel with a broad range of experiences to meet our national security challenges. In particular, individuals with experience studying, living, and working abroad can provide unique and valuable skills, including knowledge of foreign languages and cultural competency, which are critical to providing objective and nuanced intelligence information and analysis.

Adjudication of the risks posed by foreign contacts and interests is not country-agnostic. The National Security Adjudicative Guidelines states that “[a]ssessment of foreign contacts and interests should consider the country in which foreign contact or interest is located, including, but not limited to, considerations such as whether [the country] is known to target U.S. citizens to obtain classified or sensitive information.”⁴³ As discussed above, the IC assesses the PRC conducts extensive efforts to obtain access to classified information and, as a result, foreign contacts and interests with individuals located in the PRC receive greater scrutiny than contacts with individuals in other foreign countries that have been assessed to pose a lesser counterintelligence risk.

An individual’s status as an American of Chinese descent is not a “foreign influence.” Nor does a Chinese American’s race or ethnicity have any bearing on their “deep and longstanding relationships and loyalties in the United States.” Many Americans of Chinese descent have no contacts with the PRC, while other

⁴⁰ SEAD-4, Appendix A, Guideline B (6).

⁴¹ SEAD-4, Appendix A, Guideline B (7)(a) (emphasis added).

⁴² SEAD-4, Appendix A, Guideline B (8)(b).

⁴³ SEAD-4, Appendix A, Guideline B (6).

Chinese Americans have family or financial interests in China that present acceptably low risks. For individuals of any race or ethnicity, only actual foreign contacts and interests qualify for potential scrutiny in the security clearance process. The risks posed by those actual foreign contacts and interests, the intelligence practices of the particular foreign country in question, and the degree to which the individual's actions and loyalties mitigate these risks are the only relevant factors to determining whether the individual could be vulnerable to foreign influence.

3. Recommendations and Actions

The Administration has prioritized the importance of a diverse national security workforce. Executive Order 14035, *Diversity Equity, Inclusion, and Accessibility in the Federal Workforce*, requires all Federal entities to “make advancing diversity, equity, inclusion, and accessibility a priority component of the agency’s management and agency strategic planning.”⁴⁴ Specifically to national security, the President has stated that “[i]t is the policy of my Administration to prioritize diversity, equity, inclusion, and accessibility as a national security imperative, in order to ensure critical perspectives and talents are represented in the national security workforce.”⁴⁵ The following recommendations are consistent with, and a component of, the IC’s broader implementation of these priorities.

First, the opacity of the security clearance process, as well as the many factors required to be considered in the “whole person” review, may result in the subject of the security clearance process inferring that the length or outcome of their security investigation and adjudication has been affected by unlawful racial animus or bias. Assessing whether this is the case in any particular security clearance process is a fact-intensive process. On a more systemic scale, ODNI CLPT and NCSC are using existing data to investigate whether race or ethnicity of security clearance holders affects various points in the security clearance process, to include the length of security clearance investigations and the adjudicative results. If the data demonstrates that security timelines, adjudicative decisions, or other aspects of the security clearance process differ by race or ethnicity, NCSC would attempt to determine potential root causes of these differences, such as whether individuals with relatively more foreign contacts of significant counterintelligence risk, like those from the PRC, experience comparable outcomes in the security clearance process. If resulting metrics indicate such a difference, NCSC and CLPT would determine points in the investigative and adjudicatory process that could benefit from additional training, more granular guidance, or enhanced oversight.

⁴⁴ Executive Order 14035 § 4 (June 25, 2021).

⁴⁵ National Security Memorandum, *Revitalizing America’s Foreign Policy and National Security Workforce, Institutions, and Partnerships*, § 1(c) (Feb. 4, 2021).

Second, ODNI further recommends that IC agencies and components ensure that all individuals involved in the security clearance process receive effective training on the long-standing non-discrimination principles that undergird the security clearance process. During the course of this review, representatives from non-governmental organizations provided examples of conduct that did not exhibit the professionalism and cultural competency expected of all personnel involved in the security clearance process. In response to these concerns, NCSC's Acting Director issued a February 2021 memo to all IC agencies and components stating "adjudicative and investigative elements must be educated on ethnic and cultural differences among Americans, consistent with existing law and policy, to ensure the fair and equal treatment of individuals in the security clearance process."⁴⁶ In February 2022, the DNI issued the *Federal Personnel Vetting Engagement Guidelines*, which among other things, provide specific guidance on the approach security personnel must use in engaging with the public in a manner that fosters public trust, enables the government to assist individuals in entering the workforce in a timely manner, and shapes a culture of personal accountability and shared responsibility. Additionally, ODNI expects that forthcoming updates to the National Training Standards will reemphasize for personnel vetting background investigators and adjudicators the importance of ensuring that vetting processes promote equitable treatment of individuals in alignment with the DNI's stated objectives to recruit and retain a diverse and talented IC workforce.

In training to the non-discrimination requirements and the *Federal Personnel Vetting Engagement Guidelines*, it is a best practice to incorporate real-world scenarios in which these principles are applied. For example, training for security clearance investigators should include preferred methods for verifying the U.S. citizenship status of associates of the clearance applicant without asking questions that would suggest an individual's race, ethnicity, or the languages spoken in their home are indicators that an individual is not a U.S. citizen. Privacy, civil rights, and civil liberties officers and agency/component diversity and inclusion personnel should provide assistance in the development of such effective training.

⁴⁶ Memorandum, Acting Director Michael Orlando, National Counterintelligence Surveillance Center, *Avoiding Discrimination in Security Clearance Actions* (Feb. 1, 2021).

CONCLUSION

While continuing to combat the significant national security threat posed by the PRC, IC agencies and components must ensure that their intelligence activities and security clearance processes protect the privacy, civil liberties, and civil rights of Americans of Chinese descent and all other Americans. Adherence to the law and policies that govern the IC, as well as the IC's values and professional tradecraft standards, help ensure equal protection and treatment to all Americans.