

2023/06/05 APA Justice Monthly Meeting

APA Justice Meeting – Monday, 2023/06/05
1:55 pm Eastern Time / 10:55 am Pacific Time

Final Agenda

1. CAPAC updates

Speaker: Nisha Ramachandran, Executive Director, Congressional Asian Pacific American Caucus, nisha.ramachandran@mail.house.gov

Nisha was not able to attend. Casey Lee, CAPAC Policy Advisor, gave an update on CAPAC.

CAPAC Chair Judy Chu along with CAPAC Housing Task Force Chair Al Green introduced the Preemption of Real Property Discrimination Act which would preempt at the federal level state laws that would otherwise restrict the purchase of real property of an individual based on their country of citizenship.

CAPAC thanks everyone on the call who has supported and amplified this bill. Nearly 30 different organizations endorsed it officially. CAPAC will continue to closely monitor this issue and is grateful for space like these that continue to work on this issue. Please flag anything related to Nisha and Casey.

CAPAC is open for additional organizations to sign on and support the Judy Chu-Al Green bill. A public announcement was released, but the list of endorsing organizations can always be updated on the CAPAC website.

Casey can be reached at Casey.Lee@mail.house.gov. Nisha can be reached at nisha.ramachandran@mail.house.gov.

Casey uplifted a primer on the alien land law issue that was published by Just Security <https://bit.ly/3OIpwd2> and was penned by Edgar Chen, Special Policy Advisor, National Asian Pacific American Bar Association.

2. Anti-Profiling, Civil Rights & National Security Program - Asian Americans Advancing Justice | AAJC

Speaker: John Yang 杨重远, President and Executive Director, Advancing Justice | AAJC

John was not able to attend. Joanna Derman, Director of the Anti-Profilng, Civil Rights and National Security Program, gave an update on AAJC.

1. AAJC has developed messaging guidance and suggested talking points on how to frame conversations and policy work related to US-China strategic competition. They equip lawmakers and advocates with rhetorical tools so that they can be used to push back against harmful China threat inflation policy or the narrative that US-China competition is a zero sum game. Link to National Security Messaging Guidance: <https://bit.ly/3CU8Lo7>
2. AAJC has been working on a database to track all discriminatory land laws being introduced across the country. That database has gone live at <https://bit.ly/3PGBPr2>. It uses 3 categories of land, such as agricultural land, critical infrastructure, and real property, and only includes bills that apply to individuals.
3. AAJC is preparing a bill analysis guide that will be published in the next couple of days. It would allow lawmakers or advocates to conduct a quick review of US-China legislation and determine its potential for immediate harm. It can be used to evaluate land laws. It can be used more broadly for US-China legislation. AAJC encourages people to consider certain criteria when determining how to frame opposition to this type of legislation and how to tailor the policy response proportional to the identified threat. Have there been specific hearings or studies to justify the measures being taken? What are the harms that might be felt by Americans and American businesses if these policy proposals were to be enacted? This is forthcoming with consultation by congressional offices, including CAPAC. Link to bill analysis guide: <https://bit.ly/3NFWokx>

3. Update from Asian American Scholar Forum

Speaker: Gisela Perez Kusakawa, Executive Director, Asian American Scholar Forum (AASF), gpkusakawa@aasforum.org

Gisela was not able to attend. Mary Tablante, Associate Director of Strategic Communications, gave an update on AASF.

1. AASF has launched a video series titled "Project Pioneer" to educate the public on the history of Asian American and immigrant pioneers and scholars who have contributed to not just our country, but to the world. This is a partnership with the National Science Foundation. The first scientists highlighted are Drs. Simon Sze, Dawon Kahng, Nasir Ahmed, Raj Reddy, M.C. Frank Chang, and Teresa Meng. All of them are trailblazers in our history and society. Read <https://bit.ly/3XBxY00> and contact Mary to be informed and learn more.
2. AASF has had several meetings with the Biden Administration. Most recently Gisela and AASF President Yasheng Huang met with Under Secretary Jose Fernandez at the State

Department. They wanted to discuss the importance of Asian American scholars and researchers, and were very thankful to have this meeting to work together for a brighter future for scholars. The goal is to continue meeting with high-level officials to educate them on our issues and make sure that the voices of the scholar community are at the table. AASF joined a few organizations, including the Society of the Chinese Bioscientists in America, the Chinese American Hematologist and Oncologist Network, and the Chinese Biological Investigator Society, in a letter that raised concerns about widespread investigations of Asian American and immigrant scientists. One reporter called this NIH's own "China Initiative." This letter was published in *Science* magazine. On a bright note, AASF congratulates its member Professor Xiaoxing Xi for his impactful win for his appeal and its members Professors Gang Chen and Xihong Lin for their elections to the prestigious National Academy of Sciences.

3. AASF will be holding an event called "Demystifying Presidential Appointments" on June 8 at 5:30 Eastern Time, in partnership with APIACS or the Asian Pacific American Institute for Congressional Studies. Presidential appointment is one way to get more representation into the Federal Government.

These updates are posted on the AASF website at <https://www.aasforum.org/>. You can also subscribe to the AASF newsletter.

4. Warrantless Surveillance - Reauthorization of Section 702 of FISA

Speaker: Elizabeth Goitein, Senior Director, Liberty & National Security Program, Brennan Center for Justice at NYU School of Law

Liza began her report stating that this is an incredibly important legislative battle over the reauthorization of section 702 of FISA.

Section 702 authorizes warrantless surveillance. It is supposed to target only foreigners overseas, but for the last 15 years it has become a rich source of warrantless access to American's communications - their emails, their phone calls, their text messages - in a way that completely undermines Congress's intent and Americans' constitutional rights.

There have been a series of scandalous revelations over the past 3 years, mostly through declassified FISA court opinions and government reports, about the Government using Section 702 to spy on Americans because of their race, nationality, or ideology.

Asian Americans and Chinese Americans in particular are extremely likely to be victims of these types of abuses. The Brennan Center's position is that Congress should not be reauthorizing Section 702 without significant, sweeping reforms.

Section 702 was passed after 9/11 to make it easier to conduct surveillance of suspected foreign terrorists. It allows the Government to acquire the communications and other personal data of almost any foreigner overseas without an individualized court order, including that person's conversations with Americans. The FISA Court plays no role at all in approving the target, in contrast to when the Government wants to conduct surveillance of an American. The

court's role is limited to conducting general oversight, which mostly consists of approving the procedures for surveillance.

Section 702, even though it can only be targeted at foreigners overseas, inevitably sweeps in enormous volumes of Americans' communications because Americans communicate with foreigners. If the Government's purpose were to eavesdrop on those Americans, it could not do it through Section 702. It would have to obtain either a warrant in a criminal investigation, or what's called a FISA Title I order in a foreign intelligence investigation. That is an order that the Government gets from the FISA Court, if it can show probable cause that the target is an agent of a foreign power.

To prevent Section 702 from being used to get around those protections, Congress did two things. It required the Government to minimize the collection, sharing, and retention of Americans' information, and it required the Government to certify to the FISA Court on an annual basis that it is not using section 702 for the purpose of spying on Americans. That is called reverse targeting and it's prohibited by the statute.

It has become very, very clear in recent years that these protections for American rights have completely failed.

Rather than actually minimizing the sharing and retention of Americans data, the NSA [National Security Agency], which collects the data in the first instance, routinely shares portions of it with the FBI [Federal Bureau of Investigations], the CIA [Central Intelligence Agency] and the National Counter Terrorism Center, and all of those agencies retain the data for a functional minimum of 5 years.

Moreover - and this is really the crux of the problem - all of these agencies have adopted rules, which the FISA Court has approved, that allow them to run electronic searches of the data for the purpose of finding and retrieving Americans' phone calls, emails, text messages, etc. So having certified that they are targeting only foreigners overseas and therefore they don't have to get a warrant, as soon as they actually have the data in hand, they start rummaging through it looking for Americans' information.

This is a bait and switch that drives a massive hole through the protections of the Fourth Amendment and through the protections of FISA.

For a long time, we had no idea how many of these searches the FBI was conducting, because it basically refused to say. But we did learn last year that the FBI conducted around 200,000 of these "backdoor searches" in 2022 alone. That is more than 500 warrantless searches for Americans' communications every day,

Congress and the FISA Court have made some efforts to rein in these searches at least a little bit by imposing certain limitations, but the FBI has consistently violated those limitations. When Congress last reauthorized 702 in 2018, it included a requirement for the Government to obtain a warrant for a very small subcategory of these backdoor searches. As small as that subcategory is, it has still been triggered at least a hundred times according to the Government's reports between 2018 and now. As the Government has also reported, the FBI has never once complied with this warrant requirement out of these 100 times.

For other investigations outside this very narrow subcategory, the only limitation is a rule approved by the FISA Court that these searches have to be reasonably likely to return foreign intelligence or evidence of a crime. That is a low bar. But even so, FISA Court opinions starting in 2018 have found that the FBI engaged in widespread violations of that very low bar.

To name just a few examples that show up in the FISA Court opinions and in Government reports, FBI agents searched for the communications of 113 people who were arrested in connection with protests over the police killing of George Floyd, 19,000 donors to a Congressional campaign, a U.S. Congressman, a local political party, two “Middle Eastern men” whose sole offense was that a witness saw them loading boxes of cleaning supplies into a vehicle, multiple US Government officials, journalists, political commentators, and others.

In the case of Professor Xiaoxing Xi, a physics professor at Temple University, he was prosecuted based on false charges that he had shared secret information about superconductor technology. Those charges were the result of the Government's misreading of emails that the Government had intercepted. The Government ultimately had to drop the charges, but only after significant damage to Dr. Xi and his family. Dr. Xi has filed suit against the Government. In that suit, he alleges that the Government accesses emails using Section 702. So that is one potential example.

The very first thing that Congress must do as a precondition for any discussion of reauthorization is to close this backdoor search loophole. It can do so by requiring any Government agency that wants to conduct one of these searches to obtain either a warrant in a criminal case or a FISA Title I order in a foreign intelligence investigation.

There are a couple of other issues Liza discussed with respect to Section 702.

The first relates to the permissible scope of surveillance. When Section 702 was enacted, Government officials and lawmakers described its purpose as preventing terrorist attacks. As the threat of terrorism has become less salient, the Government's description of Section 702's value has shifted, so officials are now touting the law's usefulness in combating cyberattacks, fentanyl trafficking, and of course, espionage attempts by China and other major powers.

However, no threat of any kind is required to conduct Section 702 surveillance.

The law permits surveillance of any foreigner abroad as long as a significant purpose of the collection is to acquire “foreign intelligence.” That term is defined in the law extremely broadly to include any information relating to the conduct of US foreign affairs. A conversation between friends about trade policy between the United States and China would justify surveillance under this definition.

This overly broad scope of allowable surveillance has privacy implications, not just for the foreign targets, but for Americans as well.

The larger the pool of permissible targets, the larger the scope of incidental collection. When the Government is allowed to collect the communications of ordinary private citizens overseas, it greatly increases the chances that it is going to be picking up wholly innocent conversations between Americans and their friends, colleagues, and relatives abroad. That is a real risk for scholars and scientists who are often working with colleagues on an international basis because knowledge has no borders.

Therefore, another reform is to limit the permissible pool of targets to those who are likely to have some information about a specific threat to the United States or its interests. Unfortunately, that's a very difficult thing to define in a way that will completely prevent mischief, but we can do a lot better than the current lack of any limitations in the law.

The next issue is that FISA, including Section 702, generally applies only to domestic collection of intelligence, namely, collection inside the United States or from U.S.-based companies. Overseas collection for the most part is not subject to any legislative limits or judicial oversight whatsoever. It is governed only by executive order, primarily executive order 12333, which has far fewer protections for Americans' privacy than FISA or even Section 702.

This distinction between domestic collection and overseas collection might have made some sense in 1978, when FISA was passed. This distinction was incorporated at a time when domestic surveillance generally meant surveillance of Americans and overseas surveillance generally meant surveillance of foreigners.

That is obviously not true today. Digital communications travel all over the world in places that have nothing to do with where they were sent and where they are received.

The fact that foreigners' communications were being stored inside the United States was one of the main reasons that the Government said they needed to enact Section 702. But they skipped the second part of that issue, which is that Americans' communications are often routed or stored overseas in ways that can in some cases remove them from FISA's protections and expose them to executive order 12333 surveillance, with all of the lack of protections that entails.

That is a particular risk when the Government engages in "bulk collection," or indiscriminate dragnet collection that does not involve any specific target. That is something the Government does under executive order 12333 but not under Section 702.

This is an anachronistic state of affairs that leaves Americans' private information extremely vulnerable. Congress should address this problem by legislating limits on executive order 12333 surveillance programs that pull in Americans' information, and those limits should include, at a minimum, a warrant requirement for backdoor searches because backdoor searches also happen in this context.

There are actually a lot of other issues and problems with Section 702. What advocates are hoping is that there will be a unified and strong call for broad surveillance reform as part of the section 702 reauthorization. There is bipartisan skepticism of Section 702 this year, which is not something we have seen previously. That is leverage that Liza and advocates think it is very important to use to try to accomplish reforms not just to section 702, but to other authorities that are enabling warrantless collection of Americans' protected information.

At the conclusion of Liza's talk, Jeremy Wu announced that a webinar on Section 702 reauthorization was being organized by a coalition of organizations including APA Justice.

It would give us a chance to look at more details and contexts in terms of where the reauthorization process is and deeper insights into the needed reforms. More importantly, it raises the question of what the Asian American communities can or should do on the issue.

Many in the communities are still at the awareness stage although some of us were engaged in the reauthorization process six years ago.

5. Update on Civil Lawsuit on Florida Alien Land Law

Speaker: Clay Zhu 朱可亮, Partner, DeHeng Law Offices 德恒律师事务所; Founder, Chinese American Legal Defense Alliance 华美维权同盟

Commentators:

- Ashley Gorski, Senior Staff Attorney, National Security Project, American Civil Liberties Union (ACLU)
- Bethany Li, Legal Director, Asian American Legal Defense and Education Fund (AALDEF)

Clay provided the following updates on the civil lawsuit:

Florida governor signed Senate Bill 264 four weeks ago into state law which will take effect about 4 weeks from now on July 1. There is very limited time to respond. ACLU, AALDEF, and CALDA joined forces and filed this lawsuit against this discriminatory law on May 22.

Enough candidates and plaintiffs were located to decide on claims and remedies. The legal teams are working overdrive to prepare and finalize a motion for preliminary injunction, which we hope to file tomorrow. The goal is to stop the implementation of this law on July 1.

We have very short time to file this motion as well as to let the other party, Florida state government, to respond. We need to expedite the hearing schedule so the judge will have enough time to issue a ruling before July 1. Everybody is put into motion.

We have received tremendous support from organizations and communities. When Clay did the WeChat case almost 3 years ago, one of the biggest difficulties was to find and locate enough suitable plaintiffs. However, within 24 hours after the Florida law was passed and signed by the Florida governor, Clay received almost 2 dozen emails from people living in Florida, asking to be clients.

It shows our communities have realized that this is something we need to take a stand. Clay has also received tremendous support from sister and partner organizations.

We are also monitoring the situations in other states. The bill in Texas has not completely died yet. There is a special session to be called very soon in Texas to discuss and debate as well. Clay believes the Texas governor has a political agenda. We might see Texas passing a similar law in the coming weeks.

That is something we have to pay attention to. Some other red states have already passed their bills. Some of them have not targeted individuals, which are probably okay in terms of combating discrimination against the Chinese American communities, but those laws have their own problems as well.

There are about a dozen other states actively considering those bills for the purpose of the next election cycle. A lot of the red states are trying to score some political points and be the biggest China haters in the political landscape.

We are closely monitoring the situation. If any of those bills pass targeting individuals, we will go there and we will file legal challenges. That is our bottom line.

We are facing not only bills in multiple states, but also presidential candidates, including the Florida governor, who are taking a stance against China and bringing Chinese Americans into the picture as a scapegoat.

This is a dangerous political trend that we are trying to fight against.

There is a lot of community efforts happening in Texas and Florida. One of the reasons the Texas bills have stalled is because of the tremendous work by Professor Steven Pei and so many other people and Texas-based organizations lobbying the legislature, voicing our opposition to the bills.

Clay is pleased to see that these efforts are going on in many other states and locations.

Lawyers are the last stop to fight the bills that have already passed. We hope we can achieve some positive results in the coming weeks and months.

Ashley Gorski followed Clay with the following remarks.

It is an absolute honor to be working alongside Clay and Bethany on this important litigation. We are going to see this political dynamic continue to play out.

It is essential that we do all that we can to stop this Florida bill in its tracks to prevent copycat litigation from going forward and to work alongside so many community organizations that have been doing the hard work of advocating directly with the legislatures to try to stop these bills from going into effect.

Unfortunately, because Florida did what it did, we are the last stop. We are now working around the clock to try to get a good outcome for the plaintiffs and to have this law enjoined before it goes into effect.

Ashley underscores that this law is stigmatizing and discriminatory just by virtue of it being in the books.

We are representing people whose lives are very concretely affected by this law going into effect. They risk losing deposits on the property that they have already contracted, but the transaction has not closed yet. The property is for their home. It is unique. It is irreplaceable. If this law goes into effect, they are going to lose out on the opportunity to purchase that property.

We also represent a real estate brokerage firm that has already seen a decline in prospective clients and expects to lose a significant percentage of its business because of this law.

Ashley is grateful that Clay was able to connect with these clients and that we are in a position to try to do all the we can to stop this law from going into effect.

Bethany Li followed Ashley with the following comments.

I echo the thanks to all co-counsels in the fast work on this case given the tight timing and the amount of efforts that have already gone in and going forward.

We are also grateful to be working with the Florida community organizations even before the law passed. We are working hard to try to oppose the bill in as many different ways as possible through hearings and protests.

The work that we are doing here on this case is very much in line with the China initiatives that we have done in the past, such as with the South Asian and Muslim community after 9/11.

Asian American communities have been targeted for being national security threats and harmed.

Throughout the call today, we are hearing not just the alien land law passed in Florida and the ones that we continue to monitor, but also a lot of the surveillance issues that have affected Asian American communities across the board as well as communities of color.

One of the ways in which we try to approach our work against violence in Asian American communities is to pay closer attention to how the United States and different states enact laws and policies at different levels contribute to that violence, despite their rhetoric about wanting to protect and support Asian American communities from violence.

We appreciate all the attention and efforts that have been put into this.

6. Update on Alien Land Bills

Speaker: Haipei Shue, President, United Chinese Americans Commentator:

- Gene Wu, Member, Texas House of Representatives

Steven Pei served as moderator from this point on. Steven has been heavily involved with the alien land bill developments in multiple states.

Haipei reported from Florida where he convened a two-day retreat with the Chinese American community leaders to summarize what they have learned and how to move forward.

About 60 people from six major cities in Florida attended the retreat in Orlando. It was basically a statewide retreat. The retreat was funded by Civic Leadership USA, a Chinese American Foundation based in California. It was planned for June some time ago.

With the sudden appearance of the alien land bill, the participants not only saw the bill firsthand, but many were also actively involved in fighting it. They had to incorporate a lot of that into the retreat in Florida.

Many of the attendees shared their life experiences and their aspirations and described their lives before April 19, when they went to Tallahassee to protest and testify in the legislature.

From that day on, many in the Chinese American community have a new life, a new purpose, and a new sense of urgency. A new 501(c)(4) organization was born out of this protest

movement. The name is Florida Asian American Justice Alliance (FAAJA) which is basically a coalition in Florida.

The passion of our community has never been this high to be engaged in civic and political activities. Many local leaders are actively talking about how they are going to get engaged, organize a community for the 2024 elections, and support others who supported us.

At the same time, Chinese American communities in Louisiana and Alabama are still fighting against the bills that impact their lives in their states.

Louisiana will have a final Senate floor vote today. It will seal the fate of that bill. The only option going forward appears to be veto by the governor.

The alien land bills impact the Chinese community countrywide.

UCA is finalizing either a meeting in person or over the phone with Deputy Assistant Secretary of the Department of Housing and Urban Development (HUD) who oversees the Federal Fair Housing Act, hoping to request and maybe even force the Federal Government to come out with opinions about the discriminatory discrepancy between the Federal law and the State law. How can a real estate agent be loyal to both?

UCA will have similar retreats in other states that have been affected by such laws and prepare for next year. Bills have been introduced in many states. Those who failed to pass will return in 2024, a presidential election year.

Participants have joined the UCA activities from California, Georgia, North and South Carolina to Florida. They have also joined weekly meetings started by Texas state representative Gene Wu every Sunday evening since February. These town hall meetings have become a focus of the grass roots organizations across the states. Gene also plays a very important role between grassroots organizations and Washington DC.

Gene reported from a courtroom that the alien land bills have been a real challenge in the legislature. For his decade in office, the Asian American community, especially the Chinese American community, is not well organized. He himself had doubts about in the legislature.

However, Gene saw how angry the community has become because of the importance of the alien land bills, massive organizational efforts, and some real key leaders stepping up to fill the gap. That was how the Texas bills were defeated.

The real key was the community's participation - the protests and the constant stream of contacts with legislators during the legislative process, to the point where even some Republicans were afraid to touch this.

It is very clear in other states like Louisiana and Florida, they did not have a strong Asian presence in the legislative body.

What Gene witnessed was that we had people who are very friendly to our community and who understood the implications of the law were hesitant to take the lead in organizing the protests and other activities simply because they felt like it was not in their place.

That is not true everywhere. Gene was glad to see in many other states, African American legislators just stood up and took the lead in defending against some of these bills.

We need more national leadership on this issue because this issue is not going away.

We were hoping that the bill being defeated in Texas would encourage other states to go away, but instead, this drive to implement the alien land bills has spread throughout to the rest of the United States, mostly in red states, for now. There is a serious concern that it would spread into purple and blue states.

This is an existential crisis for the Asian community and especially for the Chinese community.

We have periods and waves of anti-Chinese, anti-Asian sentiment in our nation's history, but this is one of the strongest pushes against our community that Gene has ever seen.

Either we stand up and fight, or it is game over.

The laws are just the tip of the wave, the crest of the coming wave is anti-Asian hate.

There is a perfect storm of Covid, of tensions with China, and economic factors that are going to create the right environment for dramatically increased anti-Asian hate.

It should be incumbent upon all Asian communities to start a campaign nationally that this is wrong.

It is racist to hold Asian Americans responsible for what happens in other parts of the world when you don't do that to anybody else.

That is a racist trope that has been used against our community since there was such a thing as an Asian American. It needs to happen, and it needs to happen now. There needs to be a national push.

We need to engage our media celebrities. We need to engage elected officials. We need to engage the President. We need to engage a lot of other groups to push back against this.

On the news today, there was a piece about the interaction between Chinese warships and the United States warships. This is going to get worse before it gets better. Either we start responding to it and start addressing it publicly, either we start aggressively advocating for the Asian community and defending our community, our lives are at stake, or really bad things are going to come.

A part of this is also fighting these bills at the national level. Gene very much appreciates what CALDA and other groups have done in filing a lawsuit in Florida, but there are other states and there are other places.

Gene hopes that we can wake up our community more so than they are now, and get everyone engaged.