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SENATOR PATRICK LEAHY, CHAIR

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND HUMAN RIGHTS

SENATOR RICHARD DURBIN, CHAIR

HEARING ON “ENDING RACIAL PROFILING IN AMERICA”

TESTIMONY OF

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My thanks to Senator Durbin, Chair, Ranking Member Senator Graham, and all of the members of this Subcommittee for the opportunity to address the issue of racial profiling in America. This is the first Senate hearing on the issue since 2001, and in the intervening years,

much has changed in our political and national security landscape. But one thing remains the same. In 2001, in his first State of the Union address, President George W. Bush said that racial profiling “is wrong, and we will end it in America.”¹ President Bush’s assertion that profiling was wrong is just as true today, despite the fact that our country faces additional security challenges. Unfortunately, the eleven years since Mr. Bush spoke have not brought the end of profiling; rather, this tactic has surfaced in new law enforcement and security contexts – most importantly anti-terrorism and immigration. These new settings, however, do not change the fundamental facts we have known for years. Whatever the context, racial profiling is ineffective, indeed counterproductive, when it is used as part of a law enforcement or security system. Rooting this practice out is fundamental, because failing to do so makes all Americans less safe and secure.

Racial Profiling: Definition

I define racial profiling as law enforcement’s use of racial, ethnic, or religious appearance as one factor, among others, to decide who to stop, question, search, or otherwise investigate. Note that racial, ethnic, or religious appearance need not be the only factor; few if any law enforcement or security decisions are based on a single reason. Rather, appearance need only be one of the factors involved in attempting to predict who is most likely to be involved in wrongdoing. Description-based police actions – stops or other enforcement actions based on a reasonable description, provided by the public or other police officers – do not constitute profiling. Rather, description-based actions are ways of identifying the right person seen by

¹ President George W. Bush, Address to a Joint Session of Congress, February 27, 2001, Washington, D.C., accessed at <http://www.gwu.edu/~action/2004/bush/bush022701spt.html>.

someone. Using race as part of a reasonably detailed description is a well-accepted and legitimate part of the standard law enforcement arsenal. Racial profiling, on the other hand, aims to *predict* which unknown persons might be involved in an unknown crime. The idea behind profiling is to increase the odds that police action will net the right people based not on what a witness has seen or reported, but rather because of some physical characteristic the person shares with others.

The Three Waves of Profiling

Since the emergence of racial profiling in the early 1990s, the public has witnessed three waves of profiling. The first wave had its roots in the 1980s and the War on Drugs. During the 1980s, federal law enforcement authorities concluded that efforts aimed at drug interdiction on commercial aircraft had caused traffickers to begin transporting more of their product in cars and trucks, primarily on interstate highways.² To meet this challenge, the federal government began Operation Pipeline, a national law enforcement campaign that trained thousands of state and local police officers in drug interdiction methods for use against vehicles.³ By the early 1990s, drug interdiction units had become common in state, county, and municipal police departments all over the country. Among the best known of these interdiction efforts were the actions of the New Jersey State Police, which targeted blacks and Latinos on the New Jersey Turnpike,⁴ and the Maryland State Police's targeting of blacks on Interstate 95.⁵ Both of these efforts resulted in

² See David A. Harris, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* 20-23 (The New Press, 2002).

³ *Id.* at 23, 48.

⁴ *State v. Pedro Soto*, 734 A. 2d 350 (N.J. Super. Ct. Law Div. 1996).

⁵ *Wilkins v. Maryland State Police, et al.*, Civ. No. MJG 93-468 (D. Md. 1996).

legal action; both cases resulted in pioneering data-gathering efforts⁶ that proved, for the first time, that racial profiling was “real—not imagined.”⁷ By the end of 1999, polling data indicated that 81 percent of all Americans, white, black, and Latino, understood what racial profiling was, and wanted it stopped.⁸

The second wave of profiling began after the terrorist attacks of September 11, 2001. After those events, polling data showed another emerging consensus: nearly sixty percent of all Americans, including blacks and Latinos, now agreed that some degree of profiling should take place – with people who appeared to be Arabs or Muslims in airports on the receiving end.⁹ The nineteen suicide hijackers of September 11 were all Muslim men from Middle Eastern countries (with fifteen coming from just one country, Saudi Arabia), and the terrorist group responsible, Al Qaeda, espoused a twisted philosophy that they claimed came from Islam. Thus, to most Americans, profiling of Middle Easterners and Muslims just made sense; “they” were the source of the threat. For example, Stanley Crouch, the well-known writer, cultural critic, and recipient of the MacArthur “genius” award, wrote a nationally syndicated column for the New York Daily

⁶ E.g., Report of Dr. John Lamberth (plaintiff’s expert), in *Wilkins v. Maryland State Police, et. al.*, Civ. No. MJG 93-468 (D. Md. 1996).

⁷ Peter Verniero and Paul Zoubek, Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling, April 29, 1999, at 4, accessed at http://www.state.nj.us/lps/intm_419.pdf.

⁸ Frank Newport, “Racial Profiling Seen as Widespread, Particularly Among Young Black Men, Gallup Poll, December 9, 1999, accessed at <http://www.gallup.com/poll/3421/racial-profiling-seen-widespread-particularly-among-young-black-men.aspx>.

⁹ Jeffrey M. Jones, “Americans Felt Uneasy Toward Arabs Even Before September 11,” Gallup Poll Monthly, Sept. 28, 2001 (“Nearly six in 10 Americans interviewed in a September 14-15 Gallup poll favored requiring people of Arab descent to undergo special, more intensive security checks when flying on American airplanes.”), accessed at <http://www.gallup.com/poll/4939/americans-felt-uneasy-toward-arabs-even-before-september.aspx>.

News that carried the headline “Wake Up: Arabs Should Be Profiled.”¹⁰ According to Crouch, people of Arab ancestry in the U.S. simply had to put up with increased negative scrutiny even though they had done nothing to deserve it; this was necessary because of the actions of the September 11 hijackers. “So if pressure has to be kept on innocent Arabs until those Arabs who are intent on committing mass murder are flushed out, that is just the unfortunate cost they must pay to reside in this nation,” Crouch said. Crouch’s comments – by a prominent public intellectual, and disseminated nationwide – captured the sentiment of many people in this country, in law enforcement and outside it.

The third wave of profiling began in the mid 2000s, as illegal immigration became a hotly contested political issue. Illegal immigration had, of course, been a genuine issue in the recent past, but mostly took the form of arguments about demographic changes in society or labor economics. After the September 11 terrorist attacks, however, a concerted effort began to “re-brand” the issue: illegal immigration was portrayed as a national security threat.¹¹ The argument was that if uneducated agricultural workers from rural Mexico and Central America could make their way into the U.S. by the millions, so too could a few determined terrorists. Therefore, the allegedly porous borders of the U.S. were said to represent the gravest sort of threat. Concerted efforts began to coerce state and local police departments into joining immigration enforcement as “force multipliers” for overmatched federal agencies. For example,

¹⁰ Stanley Crouch, “Wake Up: Arabs Should Be Profiled,” St. Louis Post-Dispatch, March 19, 2002. Crouch’s column was nationally syndicated and originated in the New York Daily News.

¹¹ David A. Harris, The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America, 38 Rutgers L. J. 1, 19-20 (2006), accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008927##.

the proposed CLEAR Act¹² and its Senate counterpart, the Homeland Security Enhancement Act,¹³ threatened state and local governments with the loss of federal funds if they did not join the immigration enforcement effort. Then came the recent wave of state laws that legally obligated state and local law enforcement agencies to participate in immigration enforcement, whether or not agency leaders or local governments considered this a priority or a desirable law enforcement policy. Arizona's S.B. 1070 was the first of these; it obligated police officers in every law enforcement agency in the state to make inquiries about immigration status whenever encountering a person about whom there was a "reasonable suspicion" of some immigration irregularity.¹⁴ Alabama's new immigration statute¹⁵ is in many ways even more far reaching than the one in Arizona. (The Supreme Court will hear a legal challenge to the constitutionality of Arizona's law just eight days after this hearing.)

The important thing to note about all three waves of profiling is that, even though the stated purpose and context of each wave differs from the others, all three make use of the same tactic: using racial, ethnic, or religious appearance as a factor in enforcement efforts. The idea, in each wave, is that we know what the people who are the source of the problem look like, and it therefore makes sense to use appearance as one factor in deciding when to take action. Stated another way, the hypothesis behind profiling is that by using racial, ethnic or religious

¹² H. R. 2671, The Clear Law Enforcement for Criminal Alien Removal Act of 2003 ("the CLEAR Act"), 106th Cong., accessed at <http://www.govtrack.us/congress/bills/108/hr2671/text>.

¹³ S. 1906, The Homeland Security Enhancement Act of 2003, 106th Cong., accessed at <http://www.govtrack.us/congress/bills/108/s1906/text>.

¹⁴ Arizona S.B. 1070, Forty-ninth Legislature, Second Regular Session, 2010, accessed at <http://www.azleg.gov/legtext/49leg/2r/bills/sb1070s.pdf>.

¹⁵ Hammon-Beason Alabama Taxpayer and Citizen Protection Act, H.B. 56, 2012, accessed at <http://alisondb.legislature.state.al.us/acas/searchableinstruments/2011rs/bills/hb56.htm>.

appearance as an additional clue, we'll get better results on a per-stop basis. For every one hundred stops, searches, frisks, or the like we do, we'll find more drugs or guns (first wave), we'll be more likely to detect terrorists (second wave), or we'll be more likely to find more undocumented immigrants (third wave). But the unfortunate truth is there is no evidence for this; in fact, the evidence is all to the contrary. Using racial, ethnic, or religious characteristics does not sharpen law enforcement's accuracy. It makes law enforcement less accurate, and therefore all of us are less safe when profiling is in use than when it is not.

Why Racial Profiling Does Not Help Law Enforcement

For those who believe that using racial or ethnic appearance as one factor would obviously make law enforcement more targeted, and therefore more successful and efficient, the assertion that it does just the opposite seems counterintuitive. This makes it important to understand what the research says about how successful profiling *actually* is (as opposed to how successful people *think* it is), and what accounts for this.

In the late 1990s, data on police practices such as traffic stops and stop and frisk practices began to become available for the first time. These data often became public as a result of legal actions (such as law suits against the New Jersey State Police and the Maryland State Police) or government inquiries (e.g., the New York State Attorney General's probe of stop and frisk practices¹⁶ following the shooting of Amadou Diallo by four New York Police Department officers). The data allowed researchers to answer two related questions. First, did the police

¹⁶ Attorney General of the State of New York, "The New York Police Department's 'Stop & Frisk' Practices: A Report to the People of the State of New York," December 1, 1999, accessed at http://nysl.nysed.gov/uhtbin/cgisirsi/20120414131910/SIRSI/0/518/0/43937374/Content/1?new_gateway_db=ILIN K.

departments in question use race or ethnic appearance as one factor to target suspects? Second, if the department was engaged in racial or ethnic targeting, did using this tactic increase the “hit rate” – the rate at which officers found drugs or guns, or made arrests? The data showed that, for the police departments studied, blacks and Latinos were, indeed, targeted using race or ethnic appearance as one factor. The data simply did not support any other possible explanation (e.g., witnesses reporting more minority perpetrators, or heavy police deployment in high-crime minority neighborhoods). As for hit rates, when the data were disaggregated to show the hit rates police attained when targeting blacks and Latinos, as opposed to when they stopped, searched, and arrested whites, hit rates for the minority groups were not higher than hit rates for whites; they were not the same as the hit rates for whites. The hit rates for blacks and Latinos were actually lower – *measurably lower, by a statistically significant amount* – than the hit rates for whites. Using racial or ethnic appearance made police not more accurate and efficient, but less. In the years since these first studies, we have seen these results repeated over and over. In many contexts, in many types of police agencies, the results all fall in the same direction: when racial or ethnic profiling is used, police are less likely, not more likely, to catch the bad guys.

There are several important reasons for these results. The first and most important is that detection of unknown crimes involving unknown suspects involves, first and foremost the close, careful observation of behavior by highly focused and well trained investigators. To know whether a particular vehicle traveling down an interstate highway might be carrying a load of illegal drugs, the most important thing a police officer can do is to observe the behavior of the driver and any passengers. Behavior can be used to successfully predict other behavior; appearance does not predict behavior, except in the most misleading ways. When police attention is focused on the racial or ethnic appearance of the driver, instead of how the driver is

behaving, this distracts the observer from seeing the all-important behavior that might actually give the observer valuable clues. To use the old baseball cliché, using racial or ethnic appearance as a factor in deciding who to stop or search takes one's eyes off the ball. The observing officer who takes racial or ethnic appearance into account may still pay attention to behavior to some degree; race may not totally divert all of the observer's attention. But the hit rate studies prove that even a partial reduction in attention to behavior makes police action less accurate. For example, in the data from New York City on stop and frisks, the use of racial and ethnic appearance caused a marked drop in hit rates. For whites, where no racial characteristics were used, the hit rate was 12.6 percent. The hit rate for Latinos, on the other hand was 11.5 percent – a difference of roughly ten percent. The hit rate for blacks was lower still: 10.6 percent, a difference of about twenty percent from the hit rate for whites.¹⁷

There is no data, anywhere, that tends to show that using racial, ethnic, or religious appearance as part of a profile to spot potential terrorists (second wave profiling) or undocumented immigrants (third wave profiling) brings about any different results. The hit rates are likely to be just as poor when used in these contexts as they have been in the War on Drugs. Moreover, those who wish to profile persons who look like Muslims as potential terrorism suspects would be hard pressed to make such a profile work at even the simplest level. According to some estimates, there are now approximately 1.6 billion Muslims in the world, and they are scattered across almost every country and continent.¹⁸ There are Muslims who appear

¹⁷ Id.

¹⁸ This estimate, from 2010, comes from the Pew Research Center. Pew Forum on Religion and Public Life, "The Future of the Global Muslim Population," accessed at <http://features.pewforum.org/muslim-population-graphic/>. Other estimates are higher, at roughly two billion. World Muslim Population, "The Muslim population in 2012 is 2013.62 million," accessed at <http://muslimpopulation.com/World/>.

Asian, hailing from countries like Indonesia (the world's most populous Muslim country). Muslims include people from South Asia, from countries such as Pakistan. Others are African, coming from Nigeria, Somalia, Sudan, Kenya, and many other nations. There are, of course, hundreds of millions of Muslims from Middle Eastern countries. And there are millions of Muslims in the U.S.: a mixture of immigrants from around the world and native born American citizens. The possibilities for both false positives (persons who appear Muslim, but are not) and false negatives (persons who do not appear to be Muslim, but are) are literally limitless. Thus the potential for confusion and for obscuring important behavioral clues is very great indeed.

The critical question, however, remains having the right focus: behavior. And in one instance that came to public attention, professionals in the intelligence and counterterrorism community cautioned against profiling for precisely this reason: using racial, ethnic, or religious appearance as a factor distracts from observation of behavior. In an internal government memorandum, reported on by the Boston Globe in October of 2001, counterterrorism agents from both the Central Intelligence Agency and the FBI warned against ethnic and religious profiling.¹⁹ Using this tactic, they said, would damage, not advance, our counterterrorism efforts. The only way to succeed was careful observation of suspicious behavior and intelligence gathering. As one of the drafters of the memorandum told the newspaper, “fundamentally, believing that you can achieve safety by looking at characteristics instead of behavior is silly. If your goal is preventing attacks...you want your eyes and ears looking for pre-attack behaviors, not [physical] characteristics.”

¹⁹ Bill Dedman, “Airport Security: Memo Warns Against Use of Profiling as Defense,” The Boston Globe, Oct. 12, 2001.

The problem is just as difficult with third wave profiling, which seeks undocumented immigrants. Assuming that persons of Mexican or Central American heritage share a particular ethnic appearance, the first difficulty is that millions of U.S. citizens, all over the country, share these very same characteristics. This is, of course, especially true in the southwestern border states, such as Arizona. Thus using Latino appearance as a way of helping to spot illegal immigrants is widely over-inclusive. Even more important, being an illegal immigrant is not something that shows up in behavior. Rather, being an illegal immigrant means having a particular status vis-à-vis immigration law. For example, a person legally present on a student visa can become illegal by failing to carry the minimum number of required education credits, or by overstaying the visa by one day; the person's behavior does not change, but his or her status does. Thus there is no behavior for police to observe when operating under laws like those in Arizona or Alabama; they are inevitably forced into relying on ethnic appearance and accent. Thus these laws force the police to become ethnic profilers, whether officers want this role or not.

The Special Importance of Avoiding Profiling in Anti-terrorism Work

Beyond distracting law enforcement and anti-terrorism agents from observation of behavior, there is another important reason to avoid profiling of Arabs and Muslims. As the counterterrorism agents quoted in the Boston Globe article cited above said, counterterrorism that can succeed relies on two things: observation of pre-attack behavior, and – even more importantly – the gathering of intelligence that can lead us to potential attackers before they strike. The goal is not to respond after a terrorist attack or even to detect one and prevent it at the airport or train station or other public place; it is to prevent it well before it poses any danger.

Only successful and sustained intelligence gathering allows this to happen; only the gathering of useful information can put us in a position to head off catastrophe beforehand. Having information that points our security agents toward what will happen is the only way to keep ahead of potential terrorists. Thus we need intelligence now like we have never needed it before.

If there is a danger of international terrorists striking us on our own soil, and if (as some allege) the most likely suspects would be persons who either come from, or hide among, communities of Arabs or Muslims in the U.S., there is only one real source for the critical intelligence we need to keep ourselves safe: Arab-American and American-Muslim communities themselves. The people in those communities are the ones who know the language and understand the cultural cues; they are the ones who know who in their midst is new and might pose a danger. In short, if we need intelligence now more than ever, the people in our Arab and Muslim communities are the partners we need – indeed, that we must have.

Arab-American and American-Muslim communities have, in fact, turned out to be indispensable and reliable partners. For example, the first terrorist cell detected and broken inside the U.S. after September 11, 2001 – the case of the so-called Lackawanna Six, in a small town outside Buffalo, New York – resulted in the dismantling of the cell and the incarceration of all of its members, who had received terrorist training in al Qaeda camps.²⁰ That case was broken not by CIA spying or NSA wiretaps, and not through informants placed by the FBI or the NYPD. Rather, the breakthrough came because the American-Muslim community in Lackawanna, made up mostly of people of Yemeni ancestry, shared information about the young men with their own

²⁰ Dina Temple-Raston, *THE JIHAD NEXT DOOR: THE LACKAWANNA SIX AND ROUGH JUSTICE IN THE AGE OF TERROR* (PublicAffairs, 2007).

community police officer, and with the FBI.²¹ Before that, law enforcement was unaware of the group. That information led directly to the investigation, and to the avoidance of any danger that may have been posed by the cell. There have since been many other similar examples of Muslim communities sharing critical information with law enforcement and security services to keep the country safe from terrorism.

Using an anti-terrorism profile that includes Arab or Muslim appearance puts all of this at risk. When any group feels targeted because of who they are, the reaction is predictable: fear, resentment, anger, and alienation from the authorities. We need Arab and Muslim citizens to come to law enforcement when they have critical information, and many have. But introducing fear into the situation through profiling of the whole community will inevitably discourage this. When the government targets one's own community, the government becomes not a protector, but a threat; this is simple human nature. This will result, inevitably, in some diminution of the flow of information and intelligence to law enforcement, when we can least afford it. This is a real, though hidden, cost of profiling, and it is a cost that we can avoid if we are smart enough to appreciate our own self-interest.

The Current State of Constitutional Law Does Not Limit These Practices

In its current state, the law does not do much to limit the use of racial or ethnic profiling. In fact, it is not a stretch to say that the Fourth Amendment has been interpreted by the U.S. Supreme Court in ways that give these practices at least tacit approval.

²¹ David A. Harris, *GOOD COPS: THE CASE FOR PREVENTIVE POLICING* (The New Press, 2005).

The law concerning when police can order people they encounter to stop, and perhaps subject them to search, is governed by the Fourth Amendment to the United States Constitution. The Fourth Amendment protects all people against unreasonable searches and seizures. Until 1968, this meant that police had to have probable cause to make a seizure, i.e., an arrest. With the decision in *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court changed this. The Court said that when a police officer had reasonable suspicion that a crime was afoot and that a particular person was suspected of involvement therein, a police officer could stop the person – i.e., temporarily detain the person, against his or her will – for investigation. If the crime suspected involved a weapon, or if some clue indicated the presence of a weapon, e.g., a bulge in the person’s outer clothing that could be a weapon, the officer could perform a search in the form of a pat down. All of this did not require probable cause; rather, only reasonable suspicion – a lesser quantum of evidence – was needed. The *Terry* case remains the law for stops and frisks, and allows police officers to temporarily detain and cursorily search uncounted people every year based on very little evidence. Stops and frisks are a legal and necessary police tactic, to be sure, but the evidence suggests that the wide discretion that *Terry* gives law enforcement has been used in some police departments with great intensity and leads to a worsening of police/community relations, without a payoff in crime fighting. For example, in New York City, the Police Department has gone from performing roughly 160,000 frisks a year in 2003 to 575,000 in 2009,²² and 684, 000 in 2011.²³ In Philadelphia, a city with a smaller population, police use stops and frisks with even greater intensity than police in New York.²⁴

²² Delores Jones-Brown, et al., Stop Question & Frisk Policing Practices in New York City: A Primer 4 (2010), accessed at http://www.jjay.cuny.edu/web_images/PRIMER_electronic_version.pdf.

The Supreme Court has also opened the door wide to stops and searches of drivers and vehicles. In 1996, the Court decided that the police could use any traffic infraction officers witnessed, however trivial, as probable cause to stop a driver, even when they did so only as a pretext to investigate other crimes for which no evidence at all existed. The real reasons for the stop did not matter, the Court said, as long as the officer on the scene had witnessed some traffic offense. *Whren v. U.S.*, 517 U.S. 806 (1996) While a traffic stop does not confer on officers the authority to do a search of the vehicle, officers are free to “ask” drivers for “voluntary consent” to search, *Ohio v. Robinette*, 519 U.S. 33 (1996), or even to get a drug-sniffing dog to search the car, *Illinois v. Caballes*, 543 U.S. 405 (2005), without probable cause or even minimal reasonable suspicion.

In actions related to border enforcement, the Court has relaxed the rules even more. In *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976), the Court ruled that, at border-related checkpoints in the Southwest, border agents could select vehicles and refer them for so-called secondary screening based on the ethnic appearance of the occupants of the car. According to the Court, “it is constitutional to refer motorists selectively to the secondary inspection area... Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation.” 428 U.S. at 563. This statement is a stark reminder that, in cases involving the border and immigration, the Fourth Amendment provides almost no

²³ “NY AG’s Office Reviewing Stop and Frisk,” Wall Street Journal, April 11, 2012, accessed at <http://online.wsj.com/article/AP7c560e15c6df4c83b078efe1f11d7fc3.html>.

²⁴ Draft, “Stop and Frisk Practices in the U.S.: Where Are We Now?”, John Jay College of Criminal Justice, August 10 and 11, 2011, p. 25, accessed at http://www.jjay.cuny.edu/US_Harris_Stop_and_frisk_in_the_US.pdf (“[S]top and frisk activity has actually been more intense in Philadelphia than in New York: in 2009, police stopped 575,000 people [in] a city of roughly 8.175 million, a ratio of about one in fourteen. In Philadelphia in the same period, police stopped 250,000 in a city of 1.526 million – a ratio of one in six.”).

protection against racial and ethnic profiling at traditional checkpoints. With such inspection checkpoints in place now in every airport and in countless other settings, it becomes obvious that the Constitution and the law do very little or nothing to temper the use of racial or ethnic profiling.

Action: Pass the End Racial Profiling Act

One concrete recommendation for addressing this problem is passage of S. 1670, the End Racial Profiling Act of 2011 (ERPA).²⁵ This proposed legislation takes a multi-faceted approach to attacking the problem of racial profiling. First, ERPA provides a concrete prohibition on racial profiling, enforceable by declaratory or injunctive relief. Second, ERPA requires training on racial profiling as part of all federal law enforcement training, and also mandates the standardized collection of data on all routine investigatory activities. This data would be submitted to the U.S. Department of Justice. Third, police and security agencies at the state and local level could receive federal funding only by undertaking to adopt effective policies that prohibit racial profiling. ERPA would also authorize the Department of Justice to provide grants for the development of best policing practices that discourage racial profiling. Last, the law would require the Attorney General to report periodically on these efforts.

ERPA would represent a great step forward in the direction of eradicating the dangerous and destructive practice of racial profiling. If it became law, ERPA would put the government's commitment to eliminating racial profiling front and center, both within its own agencies and within state and local agencies receiving federal funds. The amount of money that the federal

²⁵ The End Racial Profiling Act of 2011, S. 1670, accessed at http://www.jjay.cuny.edu/web_images/PRIMER_electronic_version.pdf.

government channels into state and local law enforcement agencies tops several billion dollars a year. If we recognize that racial profiling is a practice that does not improve police and national security efforts but instead harms them, the least that can be done is for federal largess to serve as a lever to move police agencies away from profiling, and toward measures that are more effective. Particularly in the current fiscal climate, we should insist that the federal government ensure that our tax dollars are being used wisely and not subsidizing the counterproductive and wasteful practice of racial profiling.

Action: Correct the June 2003 U.S. Department of Justice Policy Guidance

The second thing that could have an immediate impact on the problem of racial profiling is to revise the U.S. Department of Justice’s June 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies²⁶ (“Profiling Guidance”). The Profiling Guidance, issued under then-Attorney General John Ashcroft, took some positive steps to confront the profiling issue, but also contains some loopholes that could be used to permit, or even justify, racial, ethnic, or religious profiling. The time to address these problems has come.

On the positive side, the Profiling Guidance defines racial profiling in a comprehensive, strong way. As a starting point, the Profiling Guidance says that in routine enforcement, federal law enforcement “may not use race or ethnicity to any degree” except as part of a “specific suspect description.” And even within a specific investigation, federal law enforcement “may consider race or ethnicity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal

²⁶ U.S. Department of Justice, “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies,” June 2003, accessed at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

incident, scheme, or organization.” This represents a strong response to the issue of racial and ethnic profiling, one that would go a long way toward addressing the problem.

But other aspects of the Profiling Guidance weaken the document. First, the guidance says that when investigating or preventing national security events, or in enforcing the laws that protect the national borders, federal law enforcement “may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States.” This reads, at first blush, like an extension of the prohibition against profiling, but it is actually just the opposite. As explained above, neither the Constitution nor the laws of the U.S. actually prohibit racial or ethnic profiling. In fact, cases such as *Whren v. U.S.* and *U.S. v. Martinez-Fuerte* encourage and even permit the use of racial and ethnic characteristics in law enforcement, especially in the immigration context. Thus there is no protection against the use of profiling in the two areas in which the federal authorities are most likely to engage in this activity: national security and immigration.

Second, while the Profiling Guidance prohibits profiling based on race or ethnicity, it does not prohibit profiling based on national origin or religion. This only reinforces the ability of federal officers to use this failed tactic in investigations touching on national security, in which Muslims are often the focus, and in immigration, in which Mexicans and people from Central American countries come under scrutiny. The omission of religious profiling from the Profiling Guidance could not be a clearer sign of what type of profiling is permitted or even encouraged. The omission of national origin from the Profiling Guidance calls to mind the now-defunct NSEERS (National Security Entry-Exit Registration System) reporting program, in

which people from twenty-five countries were obligated to report to immigration authorities,²⁷ often with negative consequences for these individuals.²⁸ Twenty-four of the twenty-five countries were nations with predominantly Muslim populations (the last was North Korea). Thus Muslims were targeted by using a convenient proxy characteristic: national origin.

Conclusion

Racial, ethnic, and religious profiling raise important moral questions about the legitimacy of targeting an entire population who share immutable physical characteristics, because of the actions of an infinitesimally small number of people from that group. Profiling also raises profound questions about the social cost of singling out persons for law enforcement scrutiny based on race and similar characteristics, and the long-term effects this has on the cohesiveness of our nation. Leaving these extremely important concerns aside, we can answer the claim that profiling leads to greater safety. The evidence is clear: using these types of profiling does not make us safer; it makes us *less safe*. It takes law enforcement's eyes off of behavior, upon which our agents need to have a laser-like focus. It wastes our resources. And it damages our intelligence capabilities by undermining the partnerships we must have with Arab and Muslim communities. Thus the costs of using profiling in the currency of safety and security are overwhelming. It is high time that these practices end.

²⁷ NSEERS – National Security Entry Exit Registration System, Special Registration Procedures, accessed at <http://www.uslaw.com/bulletin/nseers-national-security-entry-exit-registration-system.php?p=50>.

²⁸ Leslie Berestein Rojas, "NSEERS and Special Registration Are Gone, but Long-Term Effects Continue," Multi-American, Southern California Public Radio, accessed at <http://multiamerican.scpr.org/2012/01/nseers-and-special-registration-are-gone-but-long-term-effects-continue/>.