



**Written Statement of
Anthony D. Romero
Executive Director
American Civil Liberties Union**

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**Subcommittee on the Constitution, Civil Rights and Human
Rights**

Hearing on “Ending Racial Profiling in America”

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The American Civil Liberties Union (ACLU) is a non-partisan advocacy organization with over a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of equality and justice set forth in the U. S. Constitution and in our laws protecting individual rights. We appreciate the opportunity to submit testimony regarding the pervasive problem of racial profiling in its traditional as well as in its newer yet just as pernicious forms. Most importantly, this hearing can highlight the solutions to racial profiling that are within our grasp. Congress can pass the End Racial Profiling Act and the administration can take other concrete steps outlined in this statement that will help put an end to the practice of racial profiling in all its forms. We stand in strong support of these initiatives.

Every year, thousands of people are stopped while driving, flying, or even walking simply because of their actual or perceived race, ethnicity, national origin, immigration or citizenship status, or religion. They are not stopped because they have committed a crime, but because law enforcement authorities wrongly assume that they are more likely to be involved in criminal activity because of their physical appearance. A 2004 report by Amnesty International estimates that one in nine Americans has been victimized by racial profiling—a total of 32 million people nationwide.¹

Racial profiling occurs when law enforcement authorities impose humiliating and often frightening interrogations, searches, detentions and surveillance on people targeted not because of evidence of criminal activity but because of the individual's perceived race, ethnicity, nationality or religion. Racial profiling is policing based on crass stereotypes and assumptions instead of on facts, evidence and good solid police work. In addition to being ineffective, unfair and destroying community trust in law enforcement, racial profiling violates the U.S. Constitution by betraying the fundamental American promise of equal protection under the law and by infringing on the Fourth Amendment guarantee that all people be free from unreasonable searches and seizures.

For years, the ACLU has been at the forefront of the fight against all forms of racial profiling through both advocacy and litigation. In a groundbreaking report published in 1999,¹ we highlighted some of the most harrowing cases of racial profiling and offered solutions to address this issue. We have also litigated many cases on behalf of victims of racial profiling.

For example:

- On Lincoln's Birthday, 1993, the ACLU of Maryland filed a federal class action lawsuit, *Robert L. Wilkins, et al. v. Maryland State Police, et al.*, on behalf of the Wilkins family and all other African-American motorists traveling Maryland roadways. A year earlier Robert Wilkins and his family were traveling on Maryland Interstate 68 when a Maryland State Trooper stopped the car for speeding and asked the driver to consent to a search. Wilkins, a public defender, explained that there was no reasonable basis for the search and refused to consent, but the Trooper ordered Wilkins and his family to get out of the car and to stand in the rain while the dog sniffed through the car in a fruitless search for

¹ David A. Harris, *Driving While Black: Racial Profiling On Our Nation's Highways* (American Civil Liberties Union) (1999) available at <http://www.aclu.org/racial-justice/driving-while-black-racial-profiling-our-nations-highways>.

drugs. Despite all of his efforts to lead a good life, despite his Harvard law degree, his career in public service, church and community involvement, Wilkins's skin color was all the trooper could see. The case helped bring national attention to the practice of racial profiling and helped popularize the term "driving while black." As a result of the settlement agreement, Maryland was required to maintain records of all traffic stops that resulted in vehicle search requests. In May 2010, President Obama nominated Robert Wilkins for a federal judgeship in the District of Columbia; he was confirmed unanimously by the Senate on December 23, 2010.

- In 2009 the ACLU reached a settlement agreement with Transportation Security Administration (TSA) and JetBlue Airways after filing suit on behalf of Raed Jarrar, an Iraqi-born U.S. resident who was barred from a flight until he covered his T-shirt, which read in "We Will Not Be Silent" in English and Arabic. On August 12, 2006, Jarrar was waiting to board a JetBlue flight when he was approached by two TSA officials. One of them told Jarrar that he needed to remove his shirt because it made other passengers uncomfortable, telling him that wearing a shirt with Arabic writing on it to an airport was like "wearing a t-shirt at a bank stating, 'I am a robber.'" Jarrar asserted his First Amendment right to wear the shirt, but eventually relented to the pressure from the TSA officials and two JetBlue officials who surrounded Jarrar in the gate area and made it clear to him that he would not be able to get on the plane until he covered it up. Terrified about what they would do to him, Jarrar reluctantly put on a new t-shirt purchased for him by JetBlue. The lawsuit later revealed that JetBlue and the TSA officials did not consider Jarrar to be a security threat. Nevertheless, even after he put the new shirt on, Jarrar was allowed to board the plane only after JetBlue changed his seat from the front of the plane to the very back.
- The ACLU is currently litigating a class action suit brought with allied organizations on behalf of Jim Shee and other plaintiffs against S.B. 1070, Arizona's racial profiling law. Shee is an elderly resident of Litchfield Park, Arizona, a U.S. citizen of Spanish and Chinese descent who has lived in Arizona his entire life. In April 2010, Shee was stopped twice by Arizona police and asked to produce identification documents, with no resulting citations. In the lawsuit, Shee expressed his fear that S.B. 1070 would lead to his detention because he is unable to prove that he is a U.S. citizen without carrying his passport around.

In addition to litigation, the ACLU has also worked with Congress to build support for legislative remedies, such as the End Racial Profiling Act (ERPA)² – recently introduced by Senator Benjamin L. Cardin (D-MD) – which prohibits racial profiling by federal law enforcement officers and conditions receipt of certain federal criminal justice funding on states adopting similar prohibitions. While passage of End Racial Profiling Act and strengthening of the Department of Justice Guidance Regarding the Use of Race by Federal Law Enforcement Agencies are critical to ending the practice of racial profiling, there are also interim steps that Congress can take to reduce racial profiling such as defunding immigration enforcement initiatives that foster racial profiling of Latinos and other people of color - including the 287(g) and Secure Communities programs.

² End Racial Profiling Act of 2011, S.1670, 112th Cong. (2011).

The ACLU is not alone in calling for an end to racial profiling. In February 2001, President George W. Bush said of racial profiling: “It’s wrong, and we will end it in America. In so doing, we will not hinder the work of our nation’s brave police officers. They protect us every day – often at great risk. But by stopping the abuses of a few, we will add to the public confidence our police officers earn and deserve.”³ President Barack Obama, in response to the arrest of Harvard Professor Henry Louis Gates, said,

There’s a long history in this country of African- Americans and Latinos being stopped by law enforcement disproportionately. That’s just a fact...And even when there are honest misunderstandings, the fact that blacks and Hispanics are picked up more frequently and oftentimes for no cause casts suspicion even when there is good cause. And that’s why I think the more that we’re working with local law enforcement to improve policing techniques so that we’re eliminating potential bias, the safer everybody is going to be.”⁴

Unfortunately, such expressions of opposition to the concept of racial profiling have failed to generate results in practice and, instead, we face new and more insidious examples of profiling taking root. We must come together now to end this unlawful blight on our society.

The Three Faces of Racial Profiling

For more than a century, black men and women traveling through predominantly white neighborhoods have been stopped and questioned for no reason — simply because police officers felt they didn’t belong there. During the past decade, as international terrorism has become a subject of intense concern, those of Arab and South Asian descent have been spied upon, stopped, questioned, and subjected to intensified police scrutiny based on perceived race, religion, and national origin rather than any evidence of wrongdoing. Most recently, as anti-immigrant sentiment has flourished in many parts of the country, local police in Alabama have been circulating in predominantly Hispanic neighborhoods, telling individuals to go inside their homes or possibly face arrest – because the state passed a law requiring police to be immigration agents.⁵

While Americans tend to think about racial profiling in strictly traditional terms of police stops based on skin color, the common thread tying such actions to the unwarranted detention of an Arab American for national security investigation or the unjustified arrest of a Latino individual for an immigration check is unmistakable. All of it is plain and simple discrimination. As an organization that represents clients impacted by the full spectrum of racial profiling, the ACLU’s testimony will provide an in-depth look at each of the three “faces” of racial profiling - routine law enforcement, immigration and border control, and national security policy. Every form of racial profiling is ineffective, and it always erodes the bond that effective law enforcement officials try to build with the communities they protect. Such actions violate the Constitution. Racial profiling – in whatever form – has no place in American life.

³ Department of Justice, *Fact Sheet: Racial Profiling* (2003), available at: http://www.justice.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf.

⁴ Press Release, The White House Office of the Press Secretary, News Conference By The President (July 22, 2009), available at http://www.whitehouse.gov/the_press_office/News-Conference-by-the-President-July-22-2009.

⁵ Ed Pilkington, “The grim reality of life under Alabama’s brutal immigration law,” *The Guardian*, October 11, 2011, <http://www.guardian.co.uk/world/2011/oct/14/alabama-immigration-law-families-trapped?newsfeed=true>.

Reclaim Justice: Racial Profiling in Routine Law Enforcement

Despite claims that we have entered a “post-racial” era, racial profiling remains a troubling nationwide problem. Recent data documents the persistence of racial profiling in communities throughout the country. For example:

- A 2008 report by the ACLU of Arizona found that Native Americans were 3.25 times more likely, and African Americans and Hispanics were each 2.5 times more likely, to be searched during traffic stops than whites. It also found that whites were more likely to be carrying contraband than Native Americans, Middle Easterners, Hispanics and Asians on all major Arizona highways.⁶
- A 2008 report by Yale Law School researchers (commissioned by the ACLU of Southern California) found that black and Hispanic residents were stopped, frisked, searched and arrested by Los Angeles Police Department officers far more frequently than white residents, and that these disparities were not justified by local crime rates or by any other legitimate policing rationale evident from LAPD’s extensive data.⁷
- A 2009 report by the ACLU and the Rights Working Group documented racial and ethnic profiling in 22 states and under a variety of federal programs.⁸
- A 2012 analysis by the New York Civil Liberties Union found that between October and November 2011 about 94 percent of students arrested by the New York City Police Department were black or Latino, and that black students were almost nine times more likely to be arrested than white students. Students in New York City have been arrested for offenses like writing on a desk, cursing, and pushing or shoving.⁹

⁶ ACLU of Arizona, *Driving While Black or Brown 3* (2008), available at <http://www.acluaz.org/DrivingWhileBlackorBrown.pdf>.

⁷ ACLU of Southern California, *Racial Profiling & The LAPD: A Study of Racially Disparate Outcomes in the Los Angeles Police Department I* (2008), available at <http://www.aclu-sc.org/documents/view/47>.

⁸ ACLU and Rights Working Group, *The Persistence Of Racial And Ethnic Profiling In The United States: A Follow-Up Report To The U.N. Committee On The Elimination Of Racial Discrimination* (2009), available at http://www.aclu.org/pdfs/humanrights/cerd_finalreport.pdf.

⁹ New York Civil Liberties Union, *New NYPD Data Shows Racial Disparities in NYC School Arrests*, February 22, 2012, available at <http://www.nyclu.org/news/new-nypd-data-shows-racial-disparities-nyc-school-arrests>.

Racial profiling is based on false assumptions and results in ineffective law enforcement.

Racial profiling in routine law enforcement is fueled by the assumption that minorities commit more of the types of crimes that profiling is used to detect, such as drug crimes. However, this assumption has been widely denounced and disproven through data analysis. In 2002, former Attorney General John Ashcroft said,

this administration...has been opposed to racial profiling and has done more to indicate its opposition than ever in history. The President said it's wrong and we'll end it in America, and I subscribe to that. Using race...as a proxy for potential criminal behavior is unconstitutional, and it undermines law enforcement by undermining the confidence that people can have in law enforcement.¹⁰

However, reports detailing the results of traffic stops and searches for contraband show that people of color, including African Americans and Latinos, are no more likely, and often less likely, to have illegal drugs and other contraband than whites. Contrary to popular perception, black people use illegal drugs in roughly the same proportion as people of other races and ethnicities.¹¹ Black people are no more likely to speed, drive recklessly, or forget to replace broken headlights than drivers of other ethnicities. Notwithstanding such facts, black people are more likely to be pulled over, and much more likely to be searched.

- An analysis by the New York Civil Liberties Union found that from 2002 to 2011 the NYPD conducted more than 4.3 million street stops. About 88 percent of those stops – nearly 3.8 million – were of innocent New Yorkers, meaning they were neither arrested nor issued a summons. Black and Latino residents comprised about 87 percent of people stopped.¹² Police used physical force more often on black and Latino people than during stops of white people. No guns were found in 99.8 percent of stops. Thus, while the routine use of such discriminatory practices did little to improve public safety, such practices did succeed in alienating communities of color and making them increasingly reluctant to cooperate with the police in conducting criminal investigations.
- A 2001 Department of Justice report found that, although blacks and Latinos were *more* likely to be stopped and searched by police, they were *less* likely to be in possession of contraband. On average, searches and seizures of white drivers yielded evidence 17 percent of the time, compared to only 8 percent of the time for black drivers and only 10 percent of the time for Latino drivers.¹³

¹⁰ Department of Justice, *Fact Sheet: Racial Profiling* (2003), available at http://www.justice.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf.

¹¹ The 2007 National Survey on Drug Use and Health showed that 9.5% of African Americans, 8.2% of whites, 6.6% of Hispanics and 4.2% of Asians. Substance Abuse and Mental Health Services Administration, *Results from the 2007 National Survey on Drug Use and Health: National Findings* 25 (2008), available at <http://oas.samhsa.gov/2k7/2k7nsduh/2k7Results.cfm>. The National Institute of Health found that African American youth use illegal drugs and alcohol and smoke cigarettes at substantially lower rates than white youth. National Institute on Drug Abuse, *Monitoring the Future national results on adolescent drug use: Overview of key findings, 2006* (2007), available at <http://monitoringthefuture.org/pubs/monographs/overview2006.pdf>.

¹² New York Civil Liberties Union, “NYCLU Analysis Reveals NYPD Street Stops Soar 600% Over Course of Bloomberg Administration,” February 14, 2012, available at <http://www.nyclu.org/news/nyclu-analysis-reveals-nypd-street-stops-soar-600-over-course-of-bloomberg-administration>

¹³ Patrick A. Langan, Lawrence A. Greenfeld, Steven K. Smith, Matthew R. Durose, and David J. Levin. *Contacts between Police and the Public: Findings from the 1999 National Survey*, Bureau of Justice Statistics February 2001.

- A 2000 GAO report on the activities of the U.S. Customs Service found that, among U.S. citizens, black women were nine times more likely than white women to be x-rayed after being frisked or patted down. In keeping with the 2001 DOJ finding, and contrary to what such practices would suggest, researchers found that black women were less than half as likely as white women to be found carrying contraband.¹⁴

These reports are representative of others that have produced similar findings. Racial profiling is based on false assumptions about crime and people of color. It diverts limited law enforcement resources away from more effective strategies. Racial profiling also causes resentment in targeted communities and makes people in those communities less likely to cooperate in investigations. When individuals and communities fear the police, they are less likely to call law enforcement when they are the victims of crime or in emergencies. Creating a climate of fear compromises public safety.

Racial profiling is not a victimless crime

Not only is racial profiling an ineffective law enforcement strategy, it also incites feelings of helplessness, frustration, anxiety and anger for innocent victims of the practice.

- In 2010, ABC News produced a piece entitled, “Shopping While Black” to illustrate the problem of racial profiling in stores. The network actually went so far as to plant actors to pretend to shop in high-end New York boutiques, while cameras filmed the actions of sales people and security officers as African-American teens shopped. What they found was that the teenagers were routinely harassed and made objects of suspicion, regardless of their conduct.¹⁵
- An ACLU report from 2009 highlighted the story of Yawu Miller, a black reporter from the Bay State Banner. Miller decided to test just how quickly he would be pulled over while driving through Brookline, MA, a predominantly white and wealthy town adjacent to Boston. Within minutes, not one, but *three* police cruisers appeared behind him, lights flashing. “Are you lost?” one officer asked. When Miller replied no, another officer quickly followed up, saying, “You’re from Roxbury. Any reason why you’re driving around in circles?”¹⁶
- Last year, Brooklyn Councilman Jumaane Williams and an aide to the New York City Public Advocate, Kirsten John Foy, were handcuffed and arrested at a city parade in New York after a dispute over whether they should be admitted to a blocked off area reserved for public officials. After they entered the area, police officers angrily confronted the

¹⁴ U.S. General Accounting Office. *Testimony Before the Subcommittee on Government Management, Information and Technology, Committee on Government Reform and House of Representatives*, April 2001, available at <http://www.gao.gov/archive/2000/g100150t.pdf>.

¹⁵ Smawley, Michelle and Mary Healy, “What Would You Do? Shopping While Black,” ABC NEWS, May 5, 2010, available at <http://abcnews.go.com/WhatWouldYouDo/shopping-black-racial-profiling-store/story?id=10416960>.

¹⁶ Harris, *supra* note 1.

Council Member and aide, and refused to acknowledge the public officials' credentials. An officer shoved Williams after the council member attempted to communicate with a supervising officer, and Foy was thrown forcefully to the ground and handcuffed. Williams was grabbed by the arm and also handcuffed. The public officials were then detained for about an hour before being released. Williams suggests that his arrest was representative of a larger problem of the NYPD targeting "young, black, with locks and earrings."¹⁷

- The New York City Police Department has also targeted Muslim New Yorkers for intrusive surveillance (including the compilation of dossiers) without suspicion of any criminal activity. According to a series of Associated Press articles that began in August 2011, the NYPD had been dispatching undercover officers into Muslim neighborhoods to monitor daily life in bookstores, cafes and nightclubs, and has even infiltrated Muslim student organizations in colleges and universities. The NYPD has been using informants, known as "mosque crawlers" to monitor religious services, even when there is no evidence of wrongdoing. The NYPD has also engaged in pretextual stops of Muslim residents. According to the Associated Press, the NYPD sent police officers to Pakistani neighborhoods in New York City to stop cars in order to provide the NYPD with an opportunity to search the National Crime Information Center database and to look for suspicious behavior.¹⁸
- Lizzy Dann, a third-year law student and the Outreach Chair for NYU Law School's Muslim Law Students Association (MLSA) described to the ACLU how the NYPD's suspicionless surveillance has affected Muslim students: "I and other community members feel betrayed by our own police force, and the fact that it's the police singling out Muslims for unfair treatment makes us all deeply concerned that other parts of society see us as suspect, too, even though we've done nothing wrong. . . My fellow students describe censoring themselves in classes to avoid saying anything that might be taken as controversial or out of the mainstream on contemporary political issues even where they should be most free – in academia. They are afraid that if they are seen as "too Muslim" in their views, non-Muslim students and professors will see them as suspect, like the NYPD has. Muslim students' growing silence impoverishes our intellectual community; we are less able to learn from one another when we do not share our candid thoughts and ideas."

¹⁷ Fernanda Santos and Michael Wilson, "Police Detain Brooklyn Councilman at West Indian Parade," *N.Y. Times*, Sep. 6, 2011, at A20. See also New York Civil Liberties Union, "Jumaane Williams, Kirsten John Foy and NYCLU Welcome NYPD Discipline, Demand Greater Police Accountability," November 10, 2011, available at <http://www.nyclu.org/news/jumaane-williams-kirsten-john-foy-and-nyclu-welcome-nypd-discipline-demand-greater-police-accou>. In November 2011, the NYPD's disciplined three officers involved in the wrongful arrests of Council Member Jumaane D. Williams and Public Advocate aide Kirsten John Foy. Id.

¹⁸ For a listing of the Associated Press series on this issue, see Associated Press, *Highlights of AP's probe into NYPD intelligence operations*, available at <http://www.ap.org/media-center/nypd/investigation>. See also New York Civil Liberties Union, "NYCLU Urges City Council to Investigate NYPD Spying on Muslim New Yorkers," October 6, 2011, available at <http://www.nyclu.org/news/nyclu-urges-city-council-investigate-nypd-spying-muslim-new-yorkers>; New York Civil Liberties Union, "NYCLU and ACLU Call For Investigation into NYPD Profiling of Muslims and Ethnic Groups," February 22, 2012, available at <http://www.nyclu.org/news/nyclu-and-acclu-call-investigation-nypd-profiling-of-muslims-and-ethnic-groups>.

As these stories suggest, racial profiling is an all too common occurrence, affecting the lives of responsible, productive citizens as they dine, drive, or shop. Not only is this not a victimless crime, but the victims are all around us. They include not just those who are detained, but those who fear being detained and restrict their activities as a consequence of that fear. As the stories illustrate, these interactions hurt and humiliate individuals while doing irreparable damage to relationships between law enforcement and the community.

Racial profiling violates human rights standards

Additionally, racial profiling violates international standards against non-discrimination and undermines United States human rights obligations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), ratified by the U.S. in 1994, and the International Covenant on Civil and Political Rights (ICCPR), ratified by the U.S. in 1992.

Under the ICERD, the United States accepted the obligation to refrain from engaging in racially discriminatory acts and practices. Article 2 of the ICERD obligates the United States to “take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations, which have the effect of creating or perpetuating racial discrimination.”¹⁹

Similarly, under the ICCPR, the United States must not only cease all racial profiling on a national level, it must also actively monitor the policing activities of law enforcement agencies at all levels in order to locate and eliminate any racial profiling practices. Both the ICCPR and ICERD require its state parties to refrain from committing discrimination and to undertake affirmative steps to prevent and put an end to existing discrimination.

Multiple international human rights bodies, including the United Nations’ Committee on the Elimination of Racial Discrimination (which monitors implementation of the ICERD), have raised concerns about the persistence of racial and ethnic profiling by U.S. law enforcement. In its 2008 concluding observations to the United States, the Committee “note[d] with concern that despite the measures adopted at the federal and state levels to combat racial profiling...such practice continues to be widespread.”²⁰ The Committee reiterated its recommendations in 2009, calling on the U.S. government to “make all efforts to pass the End Racial Profiling Act.”²¹

In spring 2009, before the United States officially joined the U.N. Human Rights Council, the U.S. government publicly acknowledged that it needed to improve its domestic compliance with its obligations under international human rights treaties.²² In March 2011, during the council's evaluation of U.S. domestic human rights performance (known as the Universal Periodic

¹⁹ International Convention on the Elimination of All Forms of Racial Discrimination art. 2, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

²⁰ U.N. Committee on the Elimination of Racial Discrimination [CERD], Consideration of Reports submitted by States Parties Under Article 9 of the Convention: Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America, ¶ 14, U.N. Doc. CERD/C/USA/CO/6 (May 2008).

²¹ Letter from Chairperson of the Committee on the Elimination of Racial Discrimination to the United States (Sept. 28, 2009), available at http://www.aclu.org/files/pdfs/humanrights/uncerddresponse_racialdiscrimination.pdf

²² United States Department of State, *United States Human Rights Commitments and Pledges* (April 2009), available at <http://www.state.gov/documents/organization/121976.pdf>.

Review), the U.S. government formally committed to take a number of concrete steps to improve U.S. human rights performance at home including committing to “[p]rohibit and punish the use of racial profiling in all programs that enable local authorities with the enforcement of immigration legislation and provide effective and accessible recourse to remedy human rights violations occurred under these programs.”²³ The extent to which the United States lives up to its public commitments on human rights will substantially impact our country’s reputation around the world.²⁴

Racial profiling is a violation of our fundamental principles of justice, tainting everything it touches. The persistent use of perceived race, ethnicity, religion or national origin as the basis for questioning and arrest not only weakens the legitimacy of law enforcement in the eyes of the citizens whom they are supposed to protect, but also damages our collective image in the eyes of the world. For these reasons, we urge Congress to move toward reclaiming justice by passing the End Racial Profiling Act, which prohibits law enforcement from subjecting a person to heightened scrutiny based on race, ethnicity, religion or national origin, except when there is trustworthy information, relevant to the locality and timeframe that links a person of a particular race, ethnicity, national origin or religion to an identified criminal incident or scheme. In addition to defining and explicitly prohibiting racial profiling, ERPA would also mandate training to help police avoid responses based on stereotypes and false assumptions about minorities. ERPA would also mandate data collection, authorize grants for the development and implementation of best policing practices and would require periodic reports from the attorney general on any continuing discriminatory practices. ERPA is the one legislative proposal that offers hope for a comprehensive response to this intractable problem.

Reclaim Due Process: Racial Profiling in Immigration and Border Enforcement

Immigration and border enforcement practices continue to promote racial profiling of those who look or sound foreign. In one example, the ACLU and its Tennessee affiliate recently filed a lawsuit challenging Immigration and Customs Enforcement’s (“ICE’s”) conduct of a raid in Nashville. In the raid, authorities allegedly detained and interrogated, among others, a U.S. citizen child simply because of the color of his skin.²⁵ Racial profiling reform must include scrutiny of ICE’s Secure Communities and 287(g) programs, as well as Customs and Border Protection (“CBP”) enforcement activities at international borders and in the U.S. interior.

The Secure Communities program creates an incentive for state and local police to make minor or pretextual arrests based on racial profiling because even if someone is later cleared of wrongdoing S-Comm can still lead to deportation

²³ Humanrights.gov, *Accepted UPR Recommendations* (March 2012) ¶ 108, <http://www.humanrights.gov/wp-content/uploads/2012/03/USAcceptedRecommendations-2010UPR.pdf>.

²⁴ American Civil Liberties Union, *Unfinished Business: Turning the Obama Administration’s Human Rights Promises Into Policy*, available at https://www.aclu.org/files/assets/unfinished_business_aclu_final.pdf.

²⁵ Lindsay Kee, ACLU of Tennessee, “We Don’t Need a Warrant, We’re ICE” (Oct. 21, 2011), available at <http://www.aclu.org/blog/immigrants-rights/we-dont-need-warrant-were-ice>

The Obama administration's central immigration enforcement initiative is Secure Communities. Under this program, any time an individual is arrested and booked into a local jail, his or her fingerprints are electronically run through ICE's databases. After a similar ICE jail screening program (the Criminal Alien Program or CAP) was initiated in Irving, Texas, the Warren Institute at the University of California, Berkeley, found strong evidence that police engaged in racial profiling. The report concluded that there was a "marked rise in low-level arrests of Hispanics."²⁶ Apparently, ICE ignored the evidence of racial profiling in the Irving, Texas program because a recent newspaper analysis of Secure Communities in Travis County, Texas, revealed that "more than 1,000 people have been flagged for deportation in Travis County in the past three years after arrests for minor infractions such as traffic tickets or public intoxication."²⁷ Secure Communities creates an incentive for state and local police to target immigrants for arrest for minor offenses or even pretextually. Police understand that even if the arrest is baseless or the person is later cleared of wrongdoing, Secure Communities will bring that person to ICE's attention for potential deportation.

Secure Communities has been aggressively deployed by ICE over the last four years to 2,590 jurisdictions, despite vehement objections by three state governors (Illinois, New York, and Massachusetts) and many local leaders across the country. Massachusetts Governor Deval Patrick explained his opposition to Secure Communities: while "[n]either the greater risk of ethnic profiling nor the overbreadth in impact will concern anyone who sees the immigration debate in abstract terms . . . [for] someone who has been exposed to racial profiling or has comforted the citizen child of an undocumented mother coping with the fear of family separation, it is hard to be quite so detached."²⁸

Despite Department of Homeland Security (DHS) Secretary Napolitano's assertion that Secure Communities is "track[ing] down criminals and gang members on our streets,"²⁹ ICE's own data shows this is grossly misleading. Nationwide, more than 56 percent of people deported under Secure Communities had either no convictions or only misdemeanor convictions. By processing non-criminals, misdemeanants, and persons arrested but not convicted, Secure Communities sends a message to local police that ICE will turn a blind eye to how arrestees came to be fingerprinted. And by focusing on those who pose no threat to society, ICE's actions contribute nothing to public safety; the agency's claim to focus on serious felons reveals itself to be deliberately misleading hyperbole.

Secure Communities has had consequences for lawful residents, such as U.S. citizen Antonio Montejano. Montejano, a Latino, was subjected to four days of unlawful detention after having his immigration status questioned based on an arrest stemming from his children's handling of store merchandise. The incident resulted in his pleading guilty to an infraction, an offense lesser than a misdemeanor. Montejano remained in custody despite repeatedly proclaiming his U.S.

²⁶ Trevor Gardner II and Aarti Kohli, The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program*, September 2009, 1, 5, 8, available at http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf

²⁷ Dave Harmon, "Undocumented immigrants in jail: Who gets deported?" AUSTIN AMERICAN-STATESMAN (Mar. 18, 2012), available at <http://www.statesman.com/news/statesman-investigates/undocumented-immigrants-in-jail-who-gets-deported-2244677.html?viewAsSinglePage=true>

²⁸ Letter from Gov. Deval Patrick to Bristol County Sheriff Thomas M. Hodgson (June 9, 2011).

²⁹ Secretary Napolitano's Remarks on Smart Effective Border Security and Immigration Enforcement (Oct. 5, 2011).

citizenship. Upon his release, he says his 8-year-old son asked him, “‘Dad, can this happen to me too because I look like you?’ I feel so sad when I heard him say this. But he is right. Even though he is an American citizen – just like me – he too could be detained for immigration purposes because of the color of his skin – just like me.”³⁰ In 2011, the Warren Institute released a study estimating that 3,600 U.S. citizens have been apprehended under Secure Communities.³¹

DHS has deployed Secure Communities in jurisdictions where local law enforcement agencies have been or are being investigated by the Department of Justice (“DOJ”) Civil Rights Division for discriminatory policing targeting Latinos or other immigrants. For example, DHS continues to operate Secure Communities in the New Orleans area even though DOJ earlier this year concluded that the New Orleans Police Department (“NOPD”) has engaged in patterns of misconduct that violate the Constitution and federal statutes. DOJ documented multiple instances of NOPD officers stopping Latinos for unknown reasons and then questioning them about immigration status. Members of the New Orleans Latino community told DOJ that Latino drivers are pulled over at a higher rate than others for minor traffic violations.³² DOJ cites several incidents when Latino workers called police after being victimized by crime, but were then questioned about immigration status and offered no support in pursuing a criminal case. DHS has continued to operate Secure Communities in New Orleans, despite DOJ’s findings of biased policing. In this context, it is unsurprising that in Orleans Parish, Secure Communities’ deportations are composed of 59% non-criminals and 20% misdemeanants.³³ This combined rate of 79% far exceeds the national average and makes New Orleans one of the worst-performing jurisdictions when measured against Secure Communities’ congressionally mandated focus on the most dangerous and violent convicted criminals.

Similarly, in 2011 DHS chose to activate Secure Communities in Suffolk County, New York, even though DOJ was investigating the Suffolk County Police Department (“SCPD”). Many Latino crime victims in Suffolk County described how SCPD demands to know their immigration status. In September 2011, DOJ informed SCPD that its policy governing the collection and use of information about immigration status of witnesses, victims, and suspects is subject to abuse. DOJ also recommended that SCPD revise its use of roadblocks in Latino communities and prohibit identity checks and requests for citizenship documentation.³⁴

Other jurisdictions with records of discriminatory policing where DHS continues to operate Secure Communities include Maricopa County, Arizona (sued by DOJ); Alamance County,

³⁰ Statement of Antonio Montejano (Nov. 30, 2011), available at http://www.aclu.org/files/assets/antonios_statement.pdf

³¹ Aarti Kohli, Peter Markowitz, and Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, 5-6 (2011), available at http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf; see also Sandra Baltazar Martinez, “Santa Fe Man One of thousands of Legal Citizens Incarcerated by ICE,” *Sante Fe New Mexican* (Nov. 20, 2011), available at <http://www.santafenewmexican.com/Local%20News/Citizens-rounded-up>

³² United States Department of Justice, *Investigation of the New Orleans Police Department*, Mar. 16, 2011, 63, available at http://www.justice.gov/crt/about/spl/nopd_report.pdf

³³ U.S. Immigration and Customs Enforcement, *Secure Communities: IDENT/IAFIS Interoperability Monthly Statistics through Feb. 29, 2012*, available at http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2012-to-date.pdf

³⁴ See Suffolk County Police Department Technical Assistance Letter (Sept. 13, 2011), available at http://www.justice.gov/crt/about/spl/documents/suffolkPD_TA_9-13-11.pdf

North Carolina (under DOJ investigation); Puerto Rico (adverse DOJ findings released in September 2011); East Haven, Connecticut (DOJ report finding “biased policing, unconstitutional searches and seizures, and the use of excessive force” for Hispanic residents, followed by a federal indictment of four officers); and Alabama (sued by DOJ for passing HB 56 which, inter alia, mandates verification of immigration status by Alabama law enforcement).

Racial profiling in Secure Communities jurisdictions manifests itself in many forms. For example, a former Sheriff’s deputy in McHenry County, Illinois, recounted that “[i]n 2006, the department began posting monthly lists praising deputies with high ticket and arrest totals . . . prompting younger deputies to compete. Seipler said he was told in 2007 by one deputy that a place to make easy traffic arrests was a predominantly Hispanic apartment complex where, presumably, some residents were illegal immigrants who couldn’t get driver’s licenses In those officers’ zeal to snag unlicensed drivers, Seipler said, he feared they were violating the rights of licensed, law-abiding Hispanic citizens.”³⁵ Similarly, in Milwaukee, a statistical analysis determined that police pulled over Hispanic city motorists nearly five times as often as white drivers, and that “Black and Hispanic drivers were arrested at twice the rate of whites after getting stopped.”³⁶

In West Virginia, two months after Secure Communities was activated, early on a Sunday morning, eleven people in three vehicles left Lobos, a popular Latin dance club in Inwood, a farming region. All are of Hispanic heritage and departed with designated drivers. One is the young mother of two U.S. citizen children (then ages 5 months and 2 years). The vehicles, traveling separately, were stopped by the West Virginia State Police (WVSP) a mile from Lobos, purportedly for the following infractions: failure to stop at stop sign, crossing the centerline, and “side registration light” out. No drivers were issued traffic citations, but all eleven were held on ICE detainees. The children were left for a month without their parents, who could not even contact them for three days. These arrests took place in a context where WVSP’s Martinsburg detachment, which made the stops, has been documented to be twice as likely to stop Hispanic drivers as white drivers.³⁷ When the ACLU affiliates of West Virginia and Pennsylvania visited the Lobos arrest site six months later, they saw no stop sign where a state trooper said that infraction took place. The trooper then changed his statement to say there was failure to stop at an intersection.

ICE Director John Morton has testified to Congress that “I totally recognize the concern on racial profiling. We are instituting a whole series of analytical steps working with [DOJ’s] Civil Rights Division, the [Office for Civil Rights and Civil Liberties (CRCL)] at DHS, inviting them to literally be part of the analysis with us so that we can root out and identify any jurisdictions that

³⁵ Joe Mahr and Robert McCoppin, “Study suggests racial mislabeling skews McHenry County sheriff data Tribune analysis suggests sheriff’s deputies underreported Hispanics in traffic stops.” *Chicago Tribune* (Mar. 26, 2011).

³⁶ Ben Poston, “Racial gap found in traffic stops in Milwaukee.” *Milwaukee Journal Sentinel* (Dec. 3, 2011), available at <http://www.jsonline.com/watchdog/watchdogreports/racial-gap-found-in-traffic-stops-in-milwaukee-ke1hsip-134977408.html>

³⁷ See West Virginia Division of Justice and Community Services, WV Traffic Stop Study: 2009 Final Report, *Search Disparity Indices and Ratios for State Police Detachments*, available at http://www.djcs.wv.gov/SAC/Documents/WVSAC_Traffic_statestopratios09.pdf

are misusing Secure Communities.”³⁸ ICE subsequently announced that “[f]our times a year, beginning in June 2011, CRCL and ICE will examine Secure Communities data to identify law enforcement agencies that might be engaged in improper police practices.”³⁹ No such data review has yet been released, leaving it to nongovernmental analysts to find and disclose the troubling figure that “Latinos comprise 93% of individuals arrested through Secure Communities though they only comprise 77% of the undocumented population in the United States.”⁴⁰ Even if DHS data review does occur in every Secure Communities jurisdiction (2,590 and counting), however, CRCL has no authority to investigate a state or local law enforcement agency’s (LEA’s) racial profiling. In addition, despite Director Morton’s statement, there has been no involvement by DOJ in Secure Communities oversight, a surprising gap given the FBI’s central role in transmitting fingerprints to ICE. ICE’s promised oversight is illusory nearly a year after its announcement, while Secure Communities’ damage to community policing and trust in law enforcement continues.

ICE continues to partner with “bad actor” state and local law enforcement agencies that engage in racial profiling, creating a culture of impunity in the 287(g) program

287(g) refers to ICE’s delegation of federal immigration authority to state and local LEAs under section 287(g) of the Immigration and Nationality Act. There are two types of delegation: task forces, with roaming arrest authority, and jail-based agreements allowing state and local officers to act as immigration agents. The Inter-American Commission on Human Rights has emphasized that “[a]s in the case of the CAP and Secure Communities Programs, the 287(g) agreements open up the possibility of racial profiling . . . ICE has failed to develop an oversight and accountability system to ensure that these local partners do not enforce immigration law in a discriminatory manner by resorting to racial profiling”⁴¹ 87% of jurisdictions with 287(g) agreements had a Latino population growth rate higher than the national average.⁴²

Many domestic reports have also concluded that 287(g) is a failed program. The DHS Office of Inspector General (OIG) produced 3 comprehensive reports criticizing ICE’s oversight.⁴³ ICE continues to partner with “bad actor” state and local LEAs, creating a culture of impunity in the 287(g) program, as in Secure Communities. 287(g) data in Tennessee from 2010 shows that the top five charges immigrants faced as a gateway to deportation continued to be traffic or minor crimes.⁴⁴ In the first nine months of FY 2010, 20,000, or half, of the immigrants encountered by

³⁸ John Morton, Testimony to the House Appropriations Committee’s Subcommittee on Homeland Security (Mar. 13, 2011).

³⁹ OCRCL, “Overview of CRCL/ICE Quarterly Statistical Monitoring of Secure Communities,” available at <http://www.ice.gov/doclib/secure-communities/pdf/statisticalmonitoring.pdf>

⁴⁰ Kohli, Markowitz, and Chavez, *Secure Communities by the Numbers*, supra.

⁴¹ See Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*. (Dec. 30, 2010), 66, 144, available at <http://cidh.org/pdf%20files/ReportOnImmigrationInTheUnited%20States-DetentionAndDueProcess.pdf>

⁴² See Justice Strategies, *Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement*. (Feb. 2009), 16, available at <http://www.justicestrategies.org/sites/default/files/publications/JS-Democracy-On-Ice-print.pdf>

⁴³ DHS, Office of Inspector General, *The Performance of 287(g) Agreements*. (Mar. 2010), available at http://www.dhs.gov/xoig/assets/mgmttrpts/OIG_10-63_Mar10.pdf (updates in Sept. 2010 and Sept. 2011).

⁴⁴ Brian Haas, “Fewer deportations put 287(g) immigration program at risk.” *The Tennessean* (Nashville), May 26, 2011.

287(g) officers were arrested for misdemeanors, primarily accused of traffic offenses.⁴⁵ Earlier investigations by the ACLU of Georgia in Cobb⁴⁶ and Gwinnett⁴⁷ counties, and by the ACLU of North Carolina⁴⁸ detailed pretextual, race-based encounters under 287(g). While ICE's fiscal year 2013 budget request commendably includes a phasing-out of task force agreements, the agency will continue existing state and local jail-based agreements which allow deputized officers to act as immigration agents in assessing their colleagues' arrests.

State laws like Arizona's S.B. 1070 and Alabama's HB 56 have harmed all communities of color in those states – U.S. citizens and immigrants alike

There is no safety net of state laws on which to rely against racial profiling. Most states do not have laws prohibiting racial profiling by law enforcement. 29 states mention racial profiling in statutes, but only 19 require law enforcement to collect data on traffic stops, and there is no standardization of this data. Further, five of the states that prohibit racial profiling only ban the use of race as the *sole* determinant for initiating a stop.⁴⁹ Indeed, there has been a recent proliferation of state laws that effectively require law enforcement agencies to engage in racial profiling in the name of immigration enforcement. Beginning with Arizona's passage of state law S.B. 1070 in April 2010, some states have required their law enforcement agencies to detain and investigate the immigration status of anyone suspected of being an undocumented immigrant. The originally enacted version of S.B.1070 explicitly permitted racial profiling as a component of law enforcement stops, before the law's backers hurriedly amended it. Although most of these state immigration laws pay lip service to racial profiling by including prohibitions on the illegal practice "except to the extent permitted by the United States or [state] Constitution," numerous police chiefs and sheriffs in these states have stated publicly that there is no way to enforce the laws' "show me your papers" provisions without engaging in stereotypes based on race and ethnicity. S.B. 1070 and its imitators in Utah, Indiana, Georgia, Alabama, and South Carolina (where ICE intends to expand its 287(g) presence), have created a legal regime in which state and local police must stop people based on their race or ethnicity for purposes of inquiring into immigration status.

Although laws have been enjoined in Arizona and other states, the Arizona experience demonstrates that racial profiling does, in fact, follow from such law enforcement practices. In a case recorded by the ACLU of Arizona, Saul Razcon, a Latino man driving on a Tucson-area freeway was stopped by the Arizona Highway Patrol in August 2010, allegedly for a broken window. He was asked for his driver's license and the officer also requested his passenger's

⁴⁵ OIG, Sept. 2010 report, 24, available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-124_Sep10.pdf

⁴⁶ American Civil Liberties Union of Georgia Legal Foundation, *Terror and Isolation in Cobb: How Unchecked Police Power Under 287(g) Has Torn Families Apart and Threatened Public Safety*. (Oct. 2009), available at <http://www.acluga.org/racial%20profiling%20Cobb.pdf>

⁴⁷ American Civil Liberties Union of Georgia Legal Foundation, *The Persistence of Racial Profiling in Gwinnett: Time for Accountability, Transparency, and an End to 287(g)*. (Mar. 2010), available at <http://www.acluga.org/gwinnettracialreportfinal.pdf>

⁴⁸ American Civil Liberties Union of North Carolina Legal Foundation and Immigration & Human Rights Policy Clinic, University of North Carolina at Chapel Hill, *The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina*. (Feb. 2009), available at http://www.acluofnorthcarolina.org/files/287gpolicyreview_0.pdf

⁴⁹ Rights Working Group, *Faces of Racial Profiling: A Report from Communities Across America* (2010), 10, available at <http://rightsworkinggroup.org/sites/default/files/ReportText.pdf>

license, before questioning whether the three young girls in the back – aged 11, 13 and 17 – had “papers.” One of the girls admitted that she didn’t. ICE officers arrived and a parent raced to the scene in order to prevent his documented stepdaughter from being taken away. He recalled: “Saul was stopped for next to nothing. The officer told me that he didn’t know if they were ‘terrorists or criminals.’ This greatly offended me and made me think that this man was racist and shouldn’t be working as a police officer.”⁵⁰ The other two girls, sisters, were deported to Mexico.

To put these stops in larger perspective, the Arizona Department of Public Safety makes more than 500,000 stops per year, only 2% of which result in an arrest.⁵¹ S.B. 1070 would introduce racial profiling into every one of these stops by making “suspicion” based on stereotypes of what undocumented immigrants look or sound like a major part of day-to-day law enforcement.

The ACLU and its allies are also litigating a certified class action against the Maricopa County (Arizona) Sheriff’s Office (MCSO) for a pattern and practice of racial profiling of Latinos and illegal stops and seizures. Under S.B. 1070, profiling would be legitimized for agencies like MCSO, which DOJ recently concluded “engaged in a widespread pattern or practice of law enforcement and jail activities that discriminate against Latinos. This discrimination flows directly from a culture of bias and institutional deficiencies that result in the discriminatory treatment of Latinos.” DOJ’s statistical expert opined that “this case involves the most egregious racial profiling in the United States that he has ever personally seen in the course of his work, observed in litigation, or reviewed in professional literature.”⁵²

Racial profiling arises from state and local efforts to enforce immigration laws not just in Arizona, but in other states that have adopted such policies and laws. In Alabama, provisions of state law HB 56 have gone into effect, which encourage racial profiling through “show me your papers” requirements. Jose Contreras, a grocery store owner in Albertville, which has a sizable Latino population, noted that the police checkpoints have been “a nuisance to our community for the last two years, but since HB 56, I’ve heard of many more incidents of police detaining and sometimes deporting immigrants, about three to four accounts a week.”⁵³ In the summer of 2011, a Latino man reported that he was pulled over by police while driving under the speed limit. He alleged that the officer stayed in his car until a tow truck arrived. The officer then approached and said the man’s car would be towed. The driver asked why and was told that he was stopped because he had no papers or driver’s license. Upon being shown both a valid driver’s license and title to the car, the officer said the driver would have to pay for the tow truck. The driver refused and was released.

HB 56 has caused many Latinos to fear leaving their homes. According to Birmingham resident Isobel Gomez, “[i]f [police] see me they will think I’m suspicious and then they will detain me

⁵⁰ Andrew Kennis, “Latinos Continue To Be (Illegally) Told, ‘Show Me Your Papers!’” *Alternet* (Sept. 27, 2011).

⁵¹ Univ. of Cincinnati Policing Inst., *Traffic Stop Data Analysis Study: Year 3 Final Report Prepared for the Arizona Department of Public Safety*. 17 (2009).

⁵² U.S. DOJ, Civil Rights Division, Letter from Assistant Attorney General Thomas E. Perez to Maricopa County Attorney Bill Montgomery (Dec. 15, 2011), available at http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf

⁵³ Kennis, *supra*.

indefinitely. They will see the colour of my skin.”⁵⁴ Race-based apprehensions under HB 56 have marred the law from its first days, when Etowah County’s Sheriff touted the apprehension of a Yemeni man as the first state immigration arrest. After a weekend of detention, the man was determined to be in the U.S. lawfully and released.⁵⁵ All people of color are vulnerable to “show me your papers” checks that disproportionately fall on them: the first 11 people arrested by the Tuscaloosa police for failing to have drivers’ licenses after HB 56 went into effect were “two black females, four black males, one white female and four Hispanic males.”⁵⁶

The ACLU is aware of numerous reported cases of racial profiling under HB 56’s auspices. For example, in February 2012 a Latino man alleged that he was standing and talking to an acquaintance at a gas station when two local police officers approached. The officers asked the men if they had Alabama identification. When one answered that he had his passport, the officer asked if he had a green card, adding that “police have the right to ask.” When the men said they did not, they were arrested. No immigration charges were brought by ICE against the complainant, who paid \$400 to get his car out of impound. He does not know what happened to his acquaintance. Arrests for driving without a license are also frequently a pretext for racial profiling. The Alabama experience bears this out: In November 2011, a Latino man was pulled over by a police officer, allegedly because of broken windshield wipers, even though it wasn’t raining. Earlier this year, another Latino man was pulled over, allegedly because of a defective headlight. Each was arrested for driving without a license. In the headlight case, the complainant’s U.S. citizen partner said that when she collected his vehicle both headlights worked fine.

The evidence is clear. When police officers are tasked with enforcing immigration laws, they necessarily resort to racial stereotypes about who “looks foreign.” Yet there is no way to tell by looking at a person or listening to a person whether he or she is in the U.S. without lawful status. State laws like Arizona’s S.B. 1070 and Alabama’s HB 56 target undocumented immigrants, but they have harmed all communities of color in those states – U.S. citizens and immigrants alike. While DHS has suspended additional deployment of Secure Communities in Alabama, it continues to operate the program in a majority of Alabama jurisdictions and in all other states which have passed racial profiling laws like Arizona’s, as well as to partner with law enforcement agencies in 287(g) agreements in five of these states. DHS must immediately end all federal participation in immigration enforcement programs that involve state and local law enforcement agencies from these states.

Customs and Border Protection (CBP) has engaged in racial profiling at the borders and far beyond, including frequent interrogations of people of color

A 2011 report by the New York Civil Liberties Union and its partners found that Border Patrol agents are using aggressive policing tactics far from the border in upstate New York to increase

⁵⁴ Ed Pilkington, “The grim reality of life under Alabama’s brutal immigration law.” *The Guardian* (Oct. 14, 2011).

⁵⁵ “First alleged violator of Ala. immigration law is legal.” *Associated Press* (Oct. 4, 2011).

⁵⁶ Ben Flanagan, “Tuscaloosa police: Not all charged for ‘license not on person’ since immigration law passed are foreign born.” *Al.com* (Oct. 12, 2011).

arrest rates with little regard for constitutional rights.⁵⁷ Agents claim they have authority to question people about immigration status anywhere within 100 miles of an international boundary. Two-thirds of the United States population lives in areas where CBP believes relevant constitutional protections are inapplicable, locations where everyone is subject to questioning and detention that offends the Fourth Amendment.

For many years, armed Border Patrol agents boarded domestic Amtrak trains and Greyhound buses at stops in western New York, waking up slumbering passengers to demand papers and detaining those carrying no proof of legal status.⁵⁸ The report found that from 2006 to 2009, there were 2,743 transportation raid arrests in western New York. Despite the Border Patrol's mission, less than 1 percent of these arrests were made at entry, seriously undermining claims that such raids are aimed at border traffic. Indeed, the vast majority of individuals arrested, 76 percent, had been in the United States for more than one year. The raids led to arrests mostly of Latinos, men, and individuals with a "medium" or "black" complexion.⁵⁹ A pending Freedom of Information Act (FOIA) lawsuit alleges that Border Patrol agents use racial profiling in these encounters, conducting checks with no warrants or reasonable suspicion of illegal entry.⁶⁰ The transportation raids, which have also occurred on the southern border,⁶¹ have had a chilling effect on the ability of people of color – including authorized visitors, students, and documented immigrants – to travel.

In the town of Forks, Washington, which is 60 miles from the nearest ferry-crossing into Canada and 200 miles from the nearest land crossing, Latinos report being stopped and asked for papers at gas stations, grocery stores, farmers' markets, on bicycles, and while paying bills at City Hall. Border Patrol agents stop individuals based on their appearance and accent, and are often called in by local police to act as interpreters in traffic stops and minor investigations, thereby allowing them to check the immigration status of those involved (such interpretation "assistance" is also frequent at the southern border).⁶² Similarly, in upstate New York, Latino farmworkers report being asked for papers outside churches, stores, and on the steps of their homes, causing

⁵⁷ New York Civil Liberties Union, NYU Law School Immigrant Rights Clinic, and Families for Freedom, "Justice Derailed: What Raids on New York Trains and Buses Reveal about Border Patrol's Interior Enforcement Practices" (Nov. 2011), available at <http://www.nyclu.org/news/report-reveals-troubling-border-patrol-tactics-upstate-new-york>.

⁵⁸ See, e.g., Nina Bernstein, "Immigrants on Trains Near Northern Border Detained," *N.Y. Times* (Aug. 29, 2010), available at http://www.nytimes.com/2010/08/30/nyregion/30border.html?_r=1&hpw; Adam Klasfeld, "Border Police Must Release Arrest Statistics from New York Area," *Courthouse News* (June 21, 2011), available at <http://www.courthousenews.com/2011/06/21/37563.htm>

⁵⁹ *Justice Derailed*, supra, at 16.

⁶⁰ Complaint, *Families for Freedom v. CBP* (S.D.N.Y. 2010) (No. 10 CV 2705), 3-4, available at <http://www.courthousenews.com/2011/06/21/Border%20Police%20FOIA%20complaint.pdf>

⁶¹ See, e.g., ACLU of New Mexico, "Border Patrol Agents 'Ask For Papers' in Bus Station and Fail To Return Belongings to Individuals Deported to Mexico." (Dec. 7, 2011), available at <http://aclu-nm.org/border-patrol-agents-%E2%80%9Cask-for-papers%E2%80%9D-in-bus-station-and-fail-to-return-belongings-to-individuals-deported-to-mexico/2011/12/>

⁶² Nina Shapiro, "Nowhere-Near-the-Border Patrol in Forks," *Seattle Weekly* (July 27, 2011), available at <http://www.seattleweekly.com/2011-07-27/news/nowhere-near-the-border-patrol-in-forks/>; see also "Border Patrol arrest at farmers market stuns bystanders," *Peninsula Daily News* (Sept. 4, 2011), available at <http://www.peninsuladailynews.com/article/20110904/NEWS/309049990>

residents to cover their windows and stay inside,⁶³ while in New Mexico two CBP agents were suspended for exposing CBP practice of “shotgunning traffic” by making unjustified stops.⁶⁴

Two cases encountered by the ACLU of Michigan exemplify the prevalence of racial profiling that harms trust of law enforcement in border communities. Last Thanksgiving, two Latino farmworkers were arrested by a Michigan Sheriff’s department after reporting a stolen bicycle and tools. The officer who responded allegedly demanded to see identity papers after arriving during the family’s holiday meal, detained both men, and alerted ICE to assume their custody. In February 2011, Tiburcio Briceno, a naturalized U.S. citizen, was stopped by a Michigan State Police officer for a traffic violation while driving in a registered company van. Rather than issue him a ticket, the officer interrogated Briceno about his immigration status based, allegedly, on Briceno’s Mexican national origin and limited English. Dissatisfied with Briceno’s valid Michigan chauffeur’s license, the officer called CBP. Briceno’s car was impounded and the officer told him he would be deported. Briceno says he reiterated again and again that he was a U.S. citizen, and offered to show his social security card. The officer refused to look.

Briceno was released after CBP officers arrived and confirmed that he was telling the truth. “Becoming a U.S. citizen was a proud moment for me,” Briceno has since reflected. “When I took the oath to this country, I felt that I was part of something bigger than myself; I felt that I was a part of a community and that I was finally equal to every other American. Although I still believe in the promise of equality, I know that I have to speak out to make sure it’s a reality for me, my family and my community. No American should be made to feel like a criminal simply because of the color of their skin or language abilities.”⁶⁵

At the border as elsewhere, racial profiling is ineffective and wasteful law enforcement that regularly deprives people of their freedom without due process. In addition to passing ERPA, Congress should also in the interim defund the Department of Homeland Security’s Secure Communities and 287(g) programs, both of which foster racial profiling, and conduct oversight of border security to ensure that it is grounded in effective law enforcement techniques. Moreover, we have seen the racial profiling that results from state and local officers enforcing immigration law, whether due to state laws or federal cooperation programs. And the Department of Justice needs to respond with more robust civil rights protections.

Reclaim Equality: FBI Racial Profiling & Racial Mapping

Racial profiling extends beyond community enforcement and into the nationwide intelligence and law enforcement policies and practices of the Federal Bureau of Investigation (FBI). The FBI’s own documents demonstrate how the Bureau systematically targets innocent Americans for profiling based on race, ethnicity, religion, national origin and political activities protected by the First Amendment. Many communities throughout the country have been singled out,

⁶³ *Justice Derailed*, supra.

⁶⁴ ACLU of New Mexico, “ACLU Defends Border Patrol Agents for Exposing Practice of ‘Shotgunning.’” (May 11, 2010), available at <http://aclu-nm.org/aclu-defends-border-patrol-agents-for-exposing-practice-of-%E2%80%98shotgunning%E2%80%99/2010/05/>

⁶⁵ ACLU of Michigan, “ACLU Urges State Police to Investigate Racial Profiling Incident.” (Mar. 21, 2012), available at <http://www.aclumich.org/issues/racial-justice/2012-03/1685>

including: Chinese and Russian communities in California; Middle-East and Muslim communities in Michigan; African Americans in Georgia; and Latinos in Alabama, New Jersey and other states.

The FBI also uses the guise of “community outreach” to collect and store intelligence information from community groups and religious institutions, and has provided its agents with inaccurate, biased training materials. Such counterproductive, discriminatory FBI practices waste law enforcement resources, damage valuable relationships with communities and encourage racial profiling at the state and local level.

Flawed DOJ and FBI Policies

FBI racial profiling practices stem, in large part, from fundamentally flawed Department of Justice (DOJ) and FBI policies. In its 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (Guidance on Race), DOJ prohibited race from being used “to any degree” in law enforcement investigations (unless describing a specific suspect), but it carved out a loophole permitting racial and ethnic profiling in national security and border integrity investigations.

Attorney General’s Guidelines

In December 2008, in the Bush Administration’s final month in office, then-Attorney General Michael Mukasey instituted new guidelines (AG Guidelines) that authorized the FBI to conduct investigations called “assessments” without requiring any factual predicate suggesting the target of the investigation is involved in illegal activity or poses a threat to national security. The AG Guidelines allow the FBI to use a number of intrusive investigative techniques during these assessments, including physical surveillance, retrieving data from commercial databases, recruiting and tasking informants to attend meetings under false pretenses, and conducting both overt FBI interviews and “pretext” interviews in which FBI agents misrepresent their identities in order to elicit information.

A 2009 FBI Counterterrorism Division “Baseline Collection Plan”, acquired by the ACLU through the Freedom of Information Act, reveals the types of information the FBI gathers during assessments, including identifying information (date of birth, social security number, driver’s license and passport numbers), telephone and e-mail addresses, current and previous addresses, current employer and job title, recent travel history, criminal history, whether the person lives with other adults, possesses special licenses or permits, or received specialized training, and whether the person has purchased firearms or explosives.⁶⁶ *The New York Times* reported that the FBI conducted 82,325 assessments on individuals and groups from March 2009 to March 2011. This is particularly troubling because the FBI retains indefinitely all data collected during assessments, regardless of whether any criminal violation or threat to national security is identified. And of those assessments, only 3,315 developed information sufficient to justify opening more intrusive predicated investigations, which is remarkable given the low

⁶⁶ FBI Electronic Communication from Counterterrorism Division to All Field Offices (9/24/2009) (on file with the ACLU).

“information or allegation” threshold for opening a preliminary investigation under the AG Guidelines.

Nothing in the 2008 AG Guidelines protects innocent Americans from being thoroughly investigated by the FBI for no good reason. To the contrary, these Guidelines allow groups to be investigated based on their First Amendment-protected activity so long as it is not the sole basis for such investigation, and they do not clearly prohibit using race, religion, or national origin as important, even leading factors in initiating assessments.

The FBI Domestic Investigations and Operations Guide

A 2008 internal FBI guide to implementing the AG Guidelines, called the Domestic Investigations and Operations Guide (DIOG),⁶⁷ makes clear that the FBI interprets the AG Guidelines to provide it with expansive authority to use race and ethnicity in conducting assessments and investigations. Although DOJ’s Guidance on Race states that race cannot be used “to *any* degree” absent a specific subject description (albeit with a carve-out for national security and border integrity investigations), the DIOG contains a more permissive standard: that investigating and intelligence collection activities must not be based “*solely* on race.” (emphases added.) Under the DIOG, the FBI is permitted to “identify locations of concentrated ethnic communities” and “Collect and analyze racial and ethnic community demographics,” data about racial and ethnic “behaviors,” “cultural traditions,” and “life style characteristics” in local communities.

Together, the Guidance on Race, the AG Guidelines, and the DIOG permit the FBI to engage in racial, religious, and national origin profiling without any basis to believe that the communities and individuals being targeted for investigation are engaged in any kind of wrongdoing.

Flawed FBI Policies in Practice

The ACLU has filed Freedom of Information Act (FOIA) requests in 34 states, and related lawsuits in four states, seeking to uncover how FBI and DOJ policies on racial profiling are being implemented across the country. The documents we have obtained thus far reveal widespread FBI mapping of ethnic and racial communities, exploitation of “community outreach” efforts to gather intelligence, and use of biased and inaccurate training materials that foster biased law enforcement.

FBI Racial Mapping

The FBI practice of “geo-mapping” allows FBI agents to collect and analyze racial and ethnic demographic information to identify racial and ethnic communities, including the location of businesses and community centers/organizations, “if these locations will reasonably aid in the analysis of potential threats and vulnerabilities, and, overall, assist domain awareness of the

⁶⁷ U.S. Department of Justice, Office of Inspector Gen., *A Review of the FBI’s Investigations of Certain Domestic Advocacy Groups* (2010), available at: <http://www.justice.gov/oig/special/s1009r.pdf>.

purpose of performing intelligence analysis.”⁶⁸ Based on the data the ACLU has collected from the FBI, it is apparent the FBI is making crass racial stereotypes about which ethnic groups commit which types of crimes. Then, the FBI uses the racial and ethnic demographic information it collected to map communities where people fitting that profile might live. Locating and mapping such communities will undoubtedly lead to disparate treatment in FBI investigative activity (and may already have done so), based on the racial and ethnic stereotypes used in conducting the “assessments.” For example:

- A Detroit FBI memorandum entitled “Detroit Domain Management,” notes there are more than 40 groups designated as terrorist organizations by the U.S. State Department, many of which originate in the Middle East and Southeast Asia.⁶⁹ It states that “because Michigan has a large Middle-Eastern and Muslim population, it is prime territory for attempted radicalization and recruitment by these terrorist groups,” the Detroit FBI seeks to open a “Domain Assessment for the purpose of collecting information and evaluating the threat posed by international terrorist groups conducting recruitment, radicalization, fundraising, or even violent terrorist acts within the state of Michigan.” Collecting information about the entire Middle-Eastern and Muslim community in Michigan, and treating them all as suspect, is unjust and an affront to religious freedom.
- A 2009 Atlanta FBI “Intelligence Note from Domain Management,” purporting to identify potential threats from “Black Separatist” groups, documents population increases among “black/African American populations in Georgia” from 2000 to 2007. While significant portions of this document are redacted, it seems to focus improperly on First Amendment activity, such as non-violent protests after a police shooting and appearances in support of a congressional candidate.
- A 2009 San Francisco FBI memorandum stated that “San Francisco domain is home to one of the oldest Chinatowns in North America and one of the largest ethnic Chinese populations outside mainland China,” and justified the opening of a “Domain Management – Criminal” assessment because “[w]ithin this community there has been organized crime for generations.”⁷⁰ The memorandum also references evidence of the existence of “Russian criminal enterprises” in San Francisco to justify a Domain Management assessment of the “sizable Russian population” in the San Francisco region.

⁶⁸ Federal Bureau of Investigation Domestic Investigations and Operations Guide, (Dec. 16, 2008), available at <http://www.muslimadvocates.org/cgi-bin/mt/mt-search.cgi?IncludeBlogs=1&search=investigative>.

⁶⁹ Memorandum from Detroit Domain Management Federal Bureau of Investigation (July 6, 2009) (on file with ACLU), available at <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011609.pdf>.

⁷⁰ Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to Mara Salvatrucha Threat, Jan. 21, 2009, available at <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM009170.pdf>; Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to MS-13Threat, Dec. 15, 2008, available at <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011388.pdf>; Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to MS-13 Locations, Sept. 22, 2008, available at <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM008040.pdf>; Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to Mara Salvatrucha (MS-13), Sept. 4, 2008, available at <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM007857.pdf>; Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to Mara Salvatrucha Threat, Jan. 21, 2009, available at <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM009170.pdf>.

- Several documents from FBI offices in Alabama, New Jersey, Georgia and California indicate the FBI is conducting Domain Management assessments to examine threats posed by the criminal gang Mara Salvatrucha (MS-13).⁷¹ While MS-13 represents a criminal threat that law enforcement needs to understand, the FBI uses the fact that MS-13 was originally started by Salvadorian immigrants to justify broad Domain Management assessments targeting several different Hispanic communities. A September 2008 Intelligence Note produced by the Newark FBI office claims “MS-13 is comprised of members from Central American countries,” yet the “Domain Team” collected population data for other individuals from other Spanish-speaking countries, including Mexico, Cuba, the Dominican Republic and Colombia, as well as the U.S. Territory of Puerto Rico. It also identified the five New Jersey counties with the highest Hispanic populations. Whether this data would be useful in finding locating MS-13 members is doubtful, particularly because the Mobile FBI’s Intelligence Note points out that while “MS-13 members are typically Salvadorans, Guatemalans, and Honduran nationals or first-generation descendants...MS-13 has been known to admit Mexicans, Dominicans, *and non-Hispanic individuals*” (emphasis added).⁷²

Targeting entire communities for investigation based on erroneous racial, religious, or national origin stereotypes as described above is inefficient, ineffective and produces flawed intelligence. The FBI should focus on criminal suspects and actual security threats, not entire communities. The FBI’s offensive and exploitative use of race, religion and national origin in the racial mapping program is evidence that the existing Guidance on Race fails to protect the constitutional rights of minority communities in the United States, and must be amended. We urge Congress to compel the Obama administration to correct the misguided policies currently in effect.

FBI Exploiting Community Outreach for Intelligence

Documents obtained by the ACLU demonstrate that the FBI is not only mapping ethnic and racial communities, but it is also using community outreach programs to collect, store, and disseminate information about Americans’ First Amendment-protected activities. FBI agents attending community events under the guise of community outreach are recording the content of presentations given at the events; the names, identifying information, and opinions of attendees; and information about the community groups, the names and positions of leaders, and the racial, ethnic and national origin of members.⁷³ The San Francisco FBI field office also conducted a years-long “Mosque Outreach” program that collected and illegally stored intelligence about American Muslims’ religious beliefs and practices. FBI agents recorded information including the content of sermons and religious materials, information about congregants’ religious activities and the names and contact information of religious leaders. This information was

⁷¹ Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to MS-13 Locations, Sept. 22, 2008, available at <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM008040.pdf>.

⁷² Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to Mara Salvatrucha Threat, Jan. 21, 2009, available at <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM009170.pdf>.

⁷³ ACLU Eye on the FBI Alert, Dec. 1, 2011 available at http://www.aclu.org/files/assets/aclu_eye_on_the_fbi_alert_community_outreach_as_intelligence_gathering_0.pdf.

classified as “secret,” marked as “positive intelligence” and disseminated outside of the FBI.⁷⁴ The retention of such information violates the federal Privacy Act which prohibits maintenance of records about individuals’ First Amendment-protected activities.

Community outreach programs are a crucial mechanism for establishing communication, mutual understanding and trust between government agencies and the public they serve. Exploiting these programs to gather intelligence secretly betrays the trust that is essential to enforcing the law effectively in a democratic society. The Mosque Outreach program is an affront to religious liberty. Religious freedom is a fundamental and defining feature of our national character. At the core of religious freedom is a guarantee that we can gather as religious communities and worship free of government scrutiny and surveillance.

FBI Biased Training

The FBI has further contributed to racial and religious profiling across the country by providing religiously biased training, not only to FBI agents but also to certain state and local officials collaborating with the FBI. The ACLU and investigative reporters have uncovered numerous FBI counterterrorism training materials that falsely and inappropriately portray Arab and Muslim communities as monolithic, alien, backward, violent and supporters of terrorism. These documents show that the FBI used these biased materials between at least 2003 to 2011, and they were an integral part of FBI training programs. For example, a 2003 FBI memorandum from San Francisco shows that the FBI sought to renew a contract with a trainer and “expert” advisor to FBI agents, whose draft lesson plan asserted racist and derogatory assertions about Arabs and Islam. These lesson plans asserted:

“the Arab mind is a Cluster Thinker, while the Western mind tends to be a linear thinker,” and “although Islam was not able to change the cluster Arab mind thinking into a linear one...it alleviated some of the weakness that inflicted the Arab mind in general.”⁷⁵

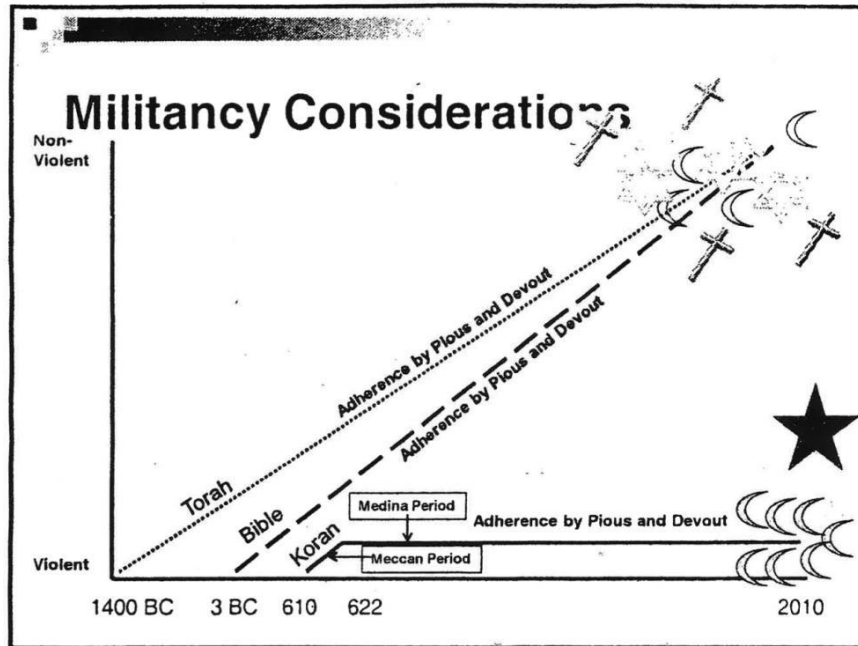
Another training slide asserted that the FBI can evade the law, stating that “[u]nder certain circumstances, the FBI has the ability to bend or suspend the law and impinge on freedoms of others.”⁷⁶ Yet another FBI training included the below graph that shows devout Muslims as consistently violent over a 1300-year span, while graphing devout Judaism and Christianity as inexplicitly ascending directly to non-violence from 1400 BC to 2010 AD.⁷⁷

⁷⁴ ACLU Eye on the FBI Alert, March 27, 2012 available at <http://www.aclu.org/blog/religion-belief-national-security/fbi-foia-docs-show-use-mosque-outreach-illegal-intel>.

⁷⁵ Memorandum from San Francisco Division of the Federal Bureau of Investigation, Nov. 3, 2003 available at <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM013039.pdf>.

⁷⁶ Spencer Ackerman and Noah Shachtman, “FBI Memo: Agents Can ‘Suspend the Law’,” *wired.com*, March 28, 2012 available at <http://www.wired.com/dangerroom/2012/03/fbi-memo-bend-suspend-law/>.

⁷⁷ Spencer Ackerman, “FBI Teaches Agents: ‘Mainstream’ Muslims Are ‘Violent, Radical,’” *wired.com*, Sept. 14, 2011 available at <http://www.wired.com/dangerroom/2011/09/fbi-muslims-radical/>.



In response to public outcry over such blatantly biased materials, the FBI launched a welcomed comprehensive review of its training materials in September 2011, which reportedly led to the removal of 876 offensive or inaccurate pages used in 392 presentations.⁷⁸ While FBI officials have attempted to characterize these biased trainings as isolated incidents, similar problematic biases can be found in official intelligence products. A 2006 FBI Intelligence Assessment, “The Radicalization Process: From Conversion to Jihad,” identifies religious practice—including frequent attendance at a mosque or a prayer group, growing a beard, and proselytizing—as indicators that a person is on a path to becoming a violent extremist. The ACLU and 27 other organizations have called on the FBI to revoke such flawed products, but the FBI has so far refused.⁷⁹

Last month, as a result of the FBI training material review, the FBI issued vague three-page Guiding Principles and DOJ issued an equally unspecific two page memorandum with which future FBI training must comply.⁸⁰ While there is certainly value in reiterating basic, common sense principles and confirming that training must comply with the Constitution, these documents are wholly inadequate to prevent future biased training because they do not provide specific guidance on standards for training or expertise requirements for trainers. There is also no indication that those responsible for biased trainings have been held accountable. To truly remedy its mistakes, the FBI must counter the biased influence of past trainings by retraining inappropriately trained FBI agents; hold those who provided inappropriate training accountable;

⁷⁸ Letter from Senator Richard Durbin to Robert Mueller, Director of the FBI, March 27, 2012 available at <http://www.documentcloud.org/documents/328740-fbi-training-letter.html>.

⁷⁹ Letter to Robert Mueller, Director of the FBI, Oct. 4, 2011 available at http://www.aclu.org/files/assets/sign_on_letter_to_dir_mueller_re_radicalization_report_10.4.11.pdf.

⁸⁰ The FBI’s Guiding Principles, Touchstone Document on Training 2012 available at <http://www.fbi.gov/about-us/training/guiding-principles>; Memorandum from James Cole, Deputy Attorney General, Training Guiding Principles, March 20, 2012 available at <http://www.justice.gov/dag/training-guiding-principles.pdf>.

and take concrete measures to ensure that future training is aimed at real crime and security problems and based on sound research.

Our Constitution guarantees that we are free to hold any religious belief. But, biased trainings that contain false information about religious beliefs and practice undermine trust in law enforcement and our nation's commitment to religious liberty and equal protection of the law. These trainings have the effect of discriminating against a particular religion and fuel divisiveness by casting suspicion over an entire religious community.

And biased training inevitably results in biased policing. That is why eliminating federally funded training that promotes racial, religious and national origin bias is an essential part of tackling America's racial profiling blight.

We urge Congress to take action to restore equal protection by passing the End Racial Profiling Act and compelling the Obama administration to take steps to correct the misguided policies currently in effect. Congress should demand the Attorney General revise the DOJ Guidance on Race to close the national security and border integrity loopholes, prohibit profiling based on religion and national origin, and include enforceability mechanisms. Further, the Guidance should make explicit its application to intelligence activities, and should be expanded to cover state and local law enforcement agencies that work on federal task forces or receive federal funding.

While the End Racial Profiling Act and revision of the DOJ Guidance comprise the overarching solutions, as in the previous sections on routine law enforcement and immigration, there are a few key interim measures that would partially address issues of profiling in the context of national security. Congress should demand the Attorney General modify the AG Guidelines to eliminate the FBI's authority to engage in suspicion-less "assessments," and prohibit racial and ethnic mapping. Congress should also compel the DOJ Inspector General to investigate the apparent Privacy Act violations within the FBI's San Francisco and Sacramento Divisions and initiate a broader audit of FBI practices nationwide to determine the scope of the problem.

Conclusion

I understand as well as anyone the pervasive sense of fear that gripped New York City and the entire country following the horrific attacks on September 11, 2001. I actually began my tenure at the ACLU – in our national headquarters just blocks from ground zero – four days before 9/11. Still, targeting entire communities for investigation based on erroneous racial, religious, or national origin stereotypes is inefficient, ineffective and produces flawed intelligence. When we tolerate this type of profiling in the guise of promoting national security, we actually jeopardize public safety and undermine the ideals set forth in the Constitution.

In America in 2012 and beyond, policing based on stereotypes instead of facts and evidence must not remain a fixture in our national landscape. By and large, Americans today do not consider themselves prone to racial profiling, but research confirms that we are all influenced by implicit bias. Implicit bias includes stereotypes and attitudes of which a person is unaware, that a person does not consciously intend, and that a person might reject after conscious self-reflection. For

law enforcement officers, the consequences of decisions influenced by implicit bias are generally greater than they are for ordinary citizens harboring such bias. Fortunately, clear evidence confirms that when law enforcement officers are trained about implicit bias, they do better at policing and can override their unconscious preconceptions. Training on implicit bias is a critical part of ending the pervasiveness of racial profiling in America.

The tragic story of Trayvon Martin, a seventeen-year-old, who died from a fatal gunshot wound two months ago in Sanford, Fla. has garnered national attention, bringing to light valuable questions about the role of race and stereotypes in law enforcement practices. It is unclear whether race played a role in the police response, but we have a duty to ensure that it did not. In addition to bringing a diverse call for accountability, the Trayvon Martin case has also reignited the charge against racial profiling – not only because it represents ineffective policing – but because it allows law enforcement to use stereotypes when making critical decisions about people’s freedoms. Law enforcement officers – whether they are local police, TSA officials or Border Patrol agents – must base their decisions on facts. Otherwise, American’s rights and liberties are unnecessarily discarded, and individuals are left to deal with the lifelong consequences.

We’ve seen the racial profiling that results from state and local officers enforcing immigration law, whether it’s because of state laws or federal cooperation programs. And the Department of Justice needs to respond with robust civil rights protections. Further, in addition to taking interim steps like - defunding and ending immigration enforcement initiatives that foster racial profiling of Latinos and other people of color, including the 287(g) and Secure Communities programs, urging the administration to strengthen the Department of Justice Guidance Regarding the Use of Race by Federal Law Enforcement Agencies, compelling the DOJ Inspector General to investigate FBI Privacy Act violations in retaining records on First Amendment protected activity, Congress should also pass the End Racial Profiling Act. ERPA would address the problem of racial profiling comprehensively by banning the use of racial profiling and provide training to help police avoid responses based on stereotypes and unreliable assumptions about minorities.

By following these recommendations, Congress can help law enforcement to direct its resources where they are truly necessary, ensure that our communities are safe, and reaffirm the core equal protection and due process principles of the Constitution.