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TESTIMONY

of

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National Second Vice President,

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on

“Ending Racial Profiling in America”

**before the
Subcommittee on the Constitution, Civil Rights and Human Rights
Committee on the Judiciary
United States Senate**

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—BUILDING ON A PROUD TRADITION—

Good afternoon, Mr. Chairman and distinguished members of the Senate Subcommittee on the Constitution, Civil Rights and Human Rights. My name is Frank Gale, I am a twenty-three year veteran of the Denver County Sheriff's Department and currently hold the rank of Captain. I am the National Second Vice President of the Fraternal Order of Police, which is the nation's largest law enforcement labor organization, representing more than 330,000 rank-and-file law enforcement officers in every region of the country. I am here this morning to discuss our strong opposition to S. 1670, the "End Racial Profiling Act," introduced by Senator Benjamin L. Cardin of Maryland.

I want to begin by saying very clearly that racism is wrong. It is wrong to think a person a criminal because of the color of his skin. But it is equally wrong to think a person a racist because of the color of his uniform. This bill provides a "solution" to a problem that does not exist, unless one believes that the problem to be solved is that our nation's law enforcement officers are racist and that our nation's law enforcement agencies, helmed by chiefs and sheriffs, are training their officers in racists policies. I do not believe this is true and do not believe that Senator Cardin or any of the cosponsors of this bill hold this view. Nonetheless, this bill, from start to finish, provides a solution to the problem of racist police officers and, speaking for the membership of the FOP, we find the bill highly offensive. The very title of the bill presumes that unlawful racial profiling is the norm in policing and Section 101 of Title I would outlaw this practice. I ask, is there anyone in this room that honestly believes there are agencies out there training their officers or allowing their officers to engage in racial profiling as a matter of policy or procedure?

The so-called practice of "racial profiling," hyped by activists, the media and others with political agendas, is one of the greatest sources of stress between law enforcement and the minority community in our nation today. The so-called practice of "racial profiling" is, in fact, only part of the larger issue. That larger issue is a mistaken perception on the part of some that the ugliness of racism is part of the culture of law enforcement. I am here today not only to challenge this perception, but refute it entirely.

We can and must restore the bonds of trust between law enforcement and minorities; to do so requires substantial effort to find real solutions. It requires that we resist our inclination to engage in meaningless "feel good" measures that fail to address the substance of our problem. It requires that we resist using hyperbole and rhetorical excess to place blame. This legislation does both of these things and we strongly oppose it. Open and honest communication builds trust--snappy sound bites and legislative proposals with the premise that law enforcement officers are racist do not.

I do not believe that S. 1670, the "End Racial Profiling Act," will help to repair the bonds of trust and mutual respect between law enforcement and minority communities. Quite the opposite--I believe it will widen them because it was written with the presumption that racist tactics are common tools of our nation's police departments. This is wrong and is a great disservice to the brave men and women who put themselves in harm's way every day and night to keep our streets safe.

Let me explain by addressing some of the bill's specifics.

First of all, we believe the legislation unnecessarily defines and bans "racial profiling." "Racial profiling" is not a legitimate police practice employed by any law enforcement agency in the United States. The United States Supreme Court has already made it very clear that "the Constitution

prohibits selective enforcement of the law based on considerations such as race,” and that “the constitutional basis for objecting to intentionally discriminatory application of the laws is the Equal Protection Clause.” (*Whren v. United States*, 517 U.S. 806, 813 (1996)). Further, as one Court of Appeals has explained, “citizens are entitled to equal protection of the laws at all times. If law enforcement adopts a policy, employs a practice, or in a given situation, takes steps to initiate an investigation of a citizen based solely upon that citizen’s race, without more, then a violation of the Equal Protection Clause has occurred.” (*United States v. Avery*, 137 F.3d 343, 355 (6th Circuit 1997)).

The United States Constitution itself prohibits “racial profiling,” making Federal legislation defining or prohibiting such activity unnecessary. I am sure that there is no one on this Subcommittee or in the United States Senate who would disagree that our Constitution prohibits the practice of “racial profiling.” And yet, here we have a bill that proposes to prohibit a practice that the highest court in the land has already ruled to be unconstitutional and which specifically calls for the “elimination” of the practice at the Federal level. The very premise of the bill seems at odds with common sense.

Further, the FOP contends that the legislation’s definition of “racial profiling” is far too broad. The bill prohibits the use of race “to any degree” in selecting individuals to be subject to even the most routine investigatory action, excepting only those situations in which race is used “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.”

This means we might as well disband the Behavioral Science Unit within the Federal Bureau of Investigation (FBI), whose work includes conducting high-impact research and presenting a variety of cutting edge courses on topics such as Applied Criminal Psychology, Clinical Forensic Psychology, Crime Analysis, Death Investigation, and Gangs and Gang Behavior. The unit’s personnel are primarily Supervisory Special Agents and experienced veteran police officers with advanced degrees in the behavioral science disciplines who focus on developing new and innovative investigative approaches and techniques to the solution of crime by studying the offender and his/her behavior and motivation. Sometimes, their profile of a suspect contains racial information, because race can and does have an impact on our psychology. In some cases, it may be the only physical description law enforcement has to go on. The profile provided by this unit in its work on the Unabomber case, for example, suggested that the suspect was a white male. Generally speaking, serial killers are much more likely to be white males than any other race or gender and investigations into serial killings generally begin with this presumption despite the fact that such a presumption is not “relevant to the locality and timeframe” of the crime.

Under this legislation, we would be unable to use information of this kind absent a “trustworthy” eyewitness or other description or evidence of a specific suspect’s race or ethnicity. This bill is very specific on this point: law enforcement officers can *never* use race as a factor—even if it would help them to pursue an investigation, identify a suspect, prevent a crime or lead to an arrest. The proposed legislation would therefore ban a whole range of activities beyond the already unconstitutional, purely race-based activity. The legislation would also apply to Customs and immigration-related enforcement activities, as well as criminal law enforcement efforts.

What does this mean to the officer on the beat? That no one will be stopped, searched or questioned no matter how suspicious the activity without a specific eyewitness account? How can good policing, pro-active policing, that deters and prevents crime occur under such a severe restriction? Perhaps you will recall the wave of national criticism following the enactment of Arizona Senate Bill 1070, the Support Our Law Enforcement and Safe Neighborhoods Act. Our members in Arizona were justifiably offended with some of the assumptions made by the media, pundits, and even elected officials who insinuated or stated outright that these professional law enforcement officers will use the law as a pretext to engage in unlawful racial profiling. Honest policy differences are both healthy and expected in the public forum, but some critics are making a real habit of crossing the line. We need to stop and think about how very insulting it is to assume that law enforcement officers will engage in biased policing, as if they do not understand the concept of reasonable suspicion or probable cause. Law enforcement officers are trained in the police academy to recognize reasonable suspicion and probable cause, not to identify and harass specific racial or ethnic groups.

I also want to question this legislation's proposal to use statistical data against law enforcement officers and agencies in court. This is a terrible precedent to set. This bill assumes that "racial profiling" has occurred solely on the basis of a statistical disparity. Section 102(c) of the bill provides that demonstrating that law enforcement activities disparately impact racial or ethnic minorities constitutes *prima facie* evidence of illegal activity. The effect of this presumption is not expressly spelled out in the legislation, but it is very clear to law enforcement. The resulting litigation burden on law enforcement agencies will be dramatic--after all, once a "disparate impact" is demonstrated, it will be up to the law enforcement agency to somehow prove itself innocent of engaging in the unlawful use of race, ethnicity or religion in its procedures and practices.

I have some data that I would like to share about "disparate impacts."

Statistics show that between 1976 and 2005, blacks, who comprise 12.6% of the population according to the last census, committed 52.2% of all homicides in the United States. Black Americans committed murder at about 7.33 times the rate of whites and Hispanics combined. According to the Bureau of Justice statistics, 10,285 blacks committed murders, and the vast majority of the 52.2% of U.S. murders committed by blacks are the work of the roughly 2% of the population who are black males between the ages of 15 and 25. In addition, most violent crime is intraracial--either white-on-white or black-on-black crimes. Given this, how can we adopt a measure that would prevent its use in solving homicides if we cannot consider the race of the suspect unless there is an eyewitness description?

These are astounding and sobering statistics. They are even more alarming when examining these trends through the lens of officer safety. As you can see from the chart included in my testimony, between 1980 and 2010, 44% of the felons that murdered a law enforcement officer were black. In 2010, 58% of cop-killers were black. If we exclude females, the very young and the elderly of all racial groups, the disparity is simply staggering.

A University of South Carolina study links the motivations for murders committed by black Americans as derivative of a sense of injustice, even if the crime was not political or conscious. The risk of being the victim of a homicide is statistically higher in cities where blacks have less political

and economic power. Others have argued that homicides are merely a by-product of ordinary criminal violence and crime and violence is higher in black communities.

Yet, I have not seen any Federal legislation which would tackle the huge problem of crime and violence among black Americans. The majority of homicides in this country are perpetrated by blacks against other blacks, yet there has been no serious legislative proposal to address this issue. I am not even sure what such a bill would look like, but as a black law enforcement officer, I sure would like to see a serious approach to the epidemic levels of violence that exist in far too many of our black communities. It certainly would be better than presuming law enforcement officers are racist and forcing them to collect sociological and racial data.

Consider this: in response to demands from the black community to step up enforcement against drug dealers in minority neighborhoods the local law enforcement agency institutes aggressive motor-vehicle checks, deploys “jump out” squads and cracks down on quality-of-life and property offenses in an effort to make dealers uncomfortable in the neighborhood. I am sure that any of you could cite, in your own home States, an agency which could have employed such strategy. After all, good policing means going after criminals and patrolling areas where crimes are committed. This is good police work--not racism.

Such strategies usually result in a quick, sharp decline of the targeted criminal behavior, earning the police deserved praise from the community as a whole. But this kind of policing strategy, which was devised in response to the disproportionate victimization of minorities by minorities, could generate a lot of data showing “disproportionate” minority arrests. If this bill were adopted, any of the minority criminals arrested and prosecuted could bring legal action against the local government, the department or the arresting officer. The criminal would be able to point to the “disparate impact” on the minority community and have evidence--*prima facie* evidence, mind you--in support of any action brought pursuant to Title I of S. 1670.

To use statistical data without an adequately sophisticated benchmark for analysis is bad policy. The law should not consider individual enforcement incidents or specifically targeted enforcement programs as racially motivated by using flawed data and reckless analyses establishing a “disparity.”

I also want to say a word about the police practice of criminal profiling. This is a legitimate and effective law enforcement tool which I believe is being unfairly maligned in the media and here on Capitol Hill because it is now associated with race. Race can be a factor in a criminal profile, but it is never the only factor, nor is it the most significant factor. It is simply one of many.

No one ought to be stopped solely on the basis of their race; this practice is wrong and does not serve the law enforcement mission. But to contend that the successful practice of profiling--*which does not consider race exclusively*--be abandoned when it has proved to be a successful tool to prevent crime and catch criminals is not the answer. If this practice is misused or misunderstood, then it must be corrected. To be very, very clear: Racism is *never* a legitimate law enforcement tool.

When any employer is considering applicants, they have an idea of not only the skills and abilities that the job requires, but also what kind of person would make the best fit--a "profile," if you will. Character matters, which is why law enforcement managers conduct--or ought to conduct--extensive background checks to ensure that the person who will carry the badge is of the highest caliber.

I ask the Subcommittee to also consider the practice of crime-mapping, which, for all intents and purposes, can also be referred to as geographic profiling. This, too, is proving to be an extremely useful crime-fighting and crime-prevention tool. It has evolved far beyond push pins on a wall map to become sophisticated computer models that allow law enforcement to "predict" crimes and establish more effective patrols to enhance public safety.

According to the National Institute of Justice, the research, development and evaluation arm of the U.S. Department of Justice, crime-mapping is allowing us to analyze crime data in a new way. The description of the 11th Crime Mapping Research Conference explained it like this:

Place-based initiatives are becoming a prominent approach to solving problems of crime and the delivery of criminal justice services at all levels of government. The focus on place seeks to simultaneously address the interconnected relationship between people and their environments to which multiple social ills are connected. These relationships and connections form real problems in specific places. Place-based initiatives can be more effective in the delivery and leveraging of services when attention is more specifically directed to the particular context in which people live. Specific benefits delivered to a particular area often have diffusion effects to adjacent neighborhoods, compounding their positive effects.

Crime mapping data can and does use such demographic factors such as population density, race and poverty levels. Crime is human activity and therefore has spatial relationships and characteristics that can be geographically plotted. The same profiling is also useful in crime prevention and crime fighting when applied to crime victims. Racial data is important here, too. If a crime map shows a preponderance of homicides occurring in minority-dominated neighborhoods, is this racial profiling?

What is also offensive to me as an American is that the legislation focuses on protecting racial, ethnic, and religious minorities, rather than protecting all individuals from discrimination on the basis of race and ethnicity. Unlike all other Federal antidiscrimination statutes, which generally protect *all* individuals from discrimination on the basis of race, portions of this legislation are geared to protecting *only* racial and ethnic minorities. For example, the "disparate impact" provisions found in section 102(c) of the bill are available only to racial and ethnic minorities. Any legislation that specifically targets only members of certain races, while excluding members of other races, presents very real equal protection problems.

To use Washington, D.C. as an example, the unfairness of the bill is plainly demonstrated. According to the most recent census, 38% of this city's population is white and 51% is black. If this bill were to become law, if 38% of all persons arrested in Washington were white, this "disparity" would not be evidence under Title I of the bill. However, if 52% of all persons arrested were black, this would be a "disparate impact" and could be used in any legal action taken against the Metropolitan Police Department. How does this help ease racial tensions in this city or across the country?

The legislation also threatens to penalize local and State law enforcement agencies by withholding Federal law enforcement funding unless these agencies prohibit racial profiling, provide all officers “training on racial profiling issues”, collect racial and other sociological data in accordance with Federal regulation, and establish an “administrative complaint procedure or independent audit program” to ensure “an appropriate response to allegations of racial profiling by law enforcement agents or agencies.”

Mr. Chairman, how do you eliminate a practice that the highest court in the land has deemed to be unconstitutional and is not used or condoned by any legitimate law enforcement agency in this country?

Further, at a time when local and State law enforcement agencies are so badly in need of operational funds, how can we justify adding an entirely new training regimen on “racial profiling issues” when the practice is unconstitutional and not used or condoned by any legitimate law enforcement agency in this country?

And then ask these same State and local governments to create another bureaucracy to handle “allegations” of racial profiling when the practice is unconstitutional and not used or condoned by any legitimate law enforcement agency in this country?

Mr. Chairman, the Fraternal Order of Police has fought at your side in the budgetary battles with the other body over Federal funding of law enforcement. We are deeply grateful for your leadership and tenacity on these issues. You know this, as do the other Members of this Subcommittee, because the FOP has testified before you about the dire and dangerous consequences of budget cutbacks for State and local law enforcement. We have communities in which law enforcement agencies cannot respond to every call for service and others who will no longer investigate “minor” crimes. This is a tragedy and I know we will have more battles ahead, but I must ask—how can we fight that battle if we are also going to deny these funds to agencies that need them because they cannot adequately train their officers or document allegations of “racial profiling issues?”

This makes absolutely no sense. And yet, the bill mandates that *all* State and local governments collect data, pursuant to Federally established standards, to determine whether “racial profiling” is taking place as a condition of receiving Federal monies--even if there is no evidence or complaint that a particular agency has engaged in such activity. Noncompliance with this mandate is punishable by the withholding of Federal funds. These provisions may even violate the constitutional limits of the ability of Congress to regulate State and local governments as a condition of Federal funding. On a number of occasions, the Supreme Court has expressed a narrow view with respect to Federal power to regulate State and local governments pursuant to Section 5 of the Fourteenth Amendment, absent substantial evidence that constitutional rights are being violated.

Mandatory data collection is also not sound policy from a public safety perspective, because it would require law enforcement officers to engage in the collection of sociological data. When you add to the list of things that police officers have to do, you are necessarily subtracting from the law enforcement mission. Police officers are supposed to prevent crime and catch crooks, not collect data for Federal studies.

How can we achieve a color-blind society if policies at the Federal level require the detailed recording of race when it comes to something as common as a traffic stop? Should the

passenger's race be recorded? Why not? Some traffic stops do result in the arrest of the passenger. What about the officer's race? Should that be recorded so that officers can be assigned to beats based on their ethnic background? And what if the officer is unable to determine the driver's race? Will police officers now be required to ask for "Driver's license, registration and proof of ethnicity, please?"

I submit to this Subcommittee that we do have a problem in our nation today--the lack of trust and respect for our police officers. Police officers also have a problem in that they have lost the trust, respect and cooperation of the minority community. This is tragic because, as we have already discussed, it is minorities in our country that are most hurt by crime and violence. This bill, however, is not the solution. It will make matters worse, not better.

Professor Jack Levin of Northeastern University once suggested a way to end racially-charged confrontations between police and minority communities. He said, "White police officers should never knowingly confront black suspects" (*USA Today*, 28 October 1996). This suggestion is as ludicrous as it is offensive. Professor Levin seems to think that individuals of different racial and ethnic backgrounds are simply unable to interact with one another without violence.

I reject that premise, Mr. Chairman. All of us should. And I submit that the premise of S. 1670 is similarly flawed.

Racial tensions here in Washington, D.C. are not atypical of any other urban area. Sixty-eight percent of the officers of the Washington D.C. Metropolitan Police Department are black in a city where the black population is only 51% black. Does this mean that 68% of the Metropolitan police officers should never confront white, Hispanic or Asian suspects? How does this make our streets safer? How is this good police work?

Law enforcement agencies should reflect the communities they patrol. As a profession, law enforcement has made great strides in achieving diversity. The FOP, in fact, has a national committee dedicated to diversity. To be effective, law enforcement officers should be part of the community—not occupiers.

Legislation like S. 1670 *emphasizes* racial differences. It will, in fact, make police officers much more aware of race when our objective should be to de-emphasize the race of the suspect. Consider this scenario: A police officer stops four drivers, all of whom are black. How is that officer to respond to allegations by the fifth driver--who may be white, Asian or Latino--that they were only stopped to inoculate the officer against charges of racism. Can a case be made that the officer's decision is racially motivated? This is the exact opposite of our intent.

This bill will actually *increase* the unfounded allegations of racism when drivers and officers are of a different race. Racial tensions will increase, not decrease, if this bill's measures are given the force of law. Supreme Court Justice Antonin Scalia reminded us, "To pursue the concept of racial entitlement--even for the most admirable and benign of purposes--is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race

privilege and race hatred. In the eyes of government, we are just one race here. It is American.” Instead of officers looking at someone as a human being, this bill would require them to make racial and cultural distinctions between the communities they serve because they know their choices will be scrutinized from that perspective by political leaders, police managers, and the Federal government.

A police officer who makes a stop or an arrest--no matter what that officer’s racial background--must balance the constitutional rights of the suspect with their duty to guard the public safety and preserve the peace. At a time when many citizens and lawmakers are concerned with protecting their privacy and personal information, be it concerns about the REAL ID Act, voter identification laws, or cybercrime, it seems at variance with common sense and sound public policy to ask yet another representative of government, in this case, a law enforcement officer, to collect racial or other personal data and turn that data over to the Federal government for analysis. Why something as simple and routine as a traffic stop require such an extraordinary imposition on a driver?

I also want to emphasize that no one seems to have considered that the officer is as much a citizen entitled to his or her rights as any suspect from any allegation. Unlike most professions, many rank-and-file police officers are not, particularly in employment and disciplinary matters, guaranteed their constitutional due process protections in this country. Too often, their rights are discounted. The United States Congress has actively considered legislation similar to S. 1670 for more than a decade. The last time that legislation protecting the due process rights of police officers was debated on the Senate floor? 1991.

I do not know if, let alone how, we as a nation can solve the problems of racism. But I do know what will and will not work in the profession of law enforcement. There is a mistaken perception that the ugliness of racism is part of the culture of law enforcement. It is incumbent on all of us to correct that perception. This bill was written with this mistaken perception in mind--and it reinforces it. This legislation is not good public safety policy and will not result in good policing. It will not help to rebuild the trust between law enforcement and the minority community. For these reasons, the Fraternal Order of Police strongly opposes the bill and I urge this Subcommittee to reject it.

Mr. Chairman, I want to thank you for the opportunity to appear before the Subcommittee today.