RACIAL PROFILING AND THE USE OF SUSPECT CLASSIFICATIONS IN LAW ENFORCEMENT POLICY

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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RACIAL PROFILING AND THE USE OF SUSPECT CLASSIFICATIONS IN LAW ENFORCEMENT POLICY

THURSDAY, JUNE 17, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:21 p.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Conyers, Scott, Johnson, Cohen, Jackson Lee, and Chu.

Also present: Representative Ellison.

Staff present: (Majority) David Lachmann, Subcommittee Chief of Staff; Keenan Keller, Counsel; and (Minority) Paul Taylor, Minority Counsel.

Mr. NADLER. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order.

I will begin by recognizing myself for an opening statement.

Today's hearing examines racial profiling and the use of suspect classifications in law enforcement policy. Racial profiling is a problem, not simply because it unfairly targets people for different treatment by law enforcement based on the immutable characteristics such as race, nationality or religion, but because it is bad policing policy. Looking for people of a certain race in the hope that this will make it easier to find criminals is simply not an effective way to identify and apprehend the bad guys and make us all safer.

It would be nice if all criminals and terrorists walked around with the mark of Cain on their foreheads, but the real world is not like that. Focusing on people who fit the profile of what some believe a criminal would or should look like distracts and diverts the attention of law enforcement in ways that can prove disastrous to public safety. So, in addition to being unfair, profiling does not deliver on its alleged benefits.

What makes the problem of racial profiling more complex and requires policymakers to think about it in a more careful and sophisticated manner, is that racial profiling cannot simply be attributed to a few races abusing their power. They, of course, are still with us. But just as it would be easier if every crook carried around a sign saying, "I am a bad guy," so, too, it would make our jobs a

lot easier if every law enforcement agent or officer who engaged in the practice looked like Bull Connor. But that also is not the case.

We need to deal with the fact that profiling is not always, and not necessarily, a result of racial or religious bigotry. It can be the result of poor training, flawed policing methods, or simply conventional wisdom, which may not be true, but which is commonly held—which is, of course, the definition of conventional wisdom.

This is not to say that bigots have not tried, sometimes successfully, to use the public's justifiable fear of crime and terrorism to malign entire groups or faiths. Racist demagoguery is still with us, and we have an obligation to confront it forcefully and effectively.

The facts, however, clearly belie the assertion that profiling is good or effective law enforcement. The view that it is appropriate law enforcement to go after certain groups is thankfully a marginal one in this day and age.

Today's hearing will look at all the dimensions of racial profiling and examine what actions Congress can take to protect individuals from being singled out by law enforcement for reasons based on characteristics having nothing to do with whether or not they are fairly suspected of committing some kind of wrongdoing.

The solution lies not just in enforcement of rules against profiling, but in education and training for our law enforcement personnel. Our law enforcement officers deserve our support and the tools they need to do their jobs effectively.

I want to thank the Chairman of the full Committee for his efforts over the years and for his continued leadership on this very important issue. The effort to eliminate racial profiling has never been a partisan one, and I hope that as we move forward we can consider solutions to this problem in a business-like manner. I look forward to working with the Chairman as the Committee moves forward with this very important effort.

I welcome our witnesses, and I look forward to their testimony. And I yield back the balance of my time.

At this point, I would normally say the Chair now recognizes the distinguished Ranking Member for an opening statement, but he is not feeling well. And so, without objection, we will admit his written statement into the record.

So, the Ranking Member's statement, without objection, will be admitted into the record.

[The prepared statement of Mr. Sensenbrenner follows:]

PREPARED STATEMENT OF THE HONORABLE F. JAMES SENSENBRENNER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN, AND RANKING MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Hearing Statement of Ranking Member F. James Sensenbrenner, Jr.
Subcommittee on the Constitution
Hearing on "Racial Profiling and the Use of Suspect Classifications in Law Enforcement Policy"
Thursday, June 17, at 2:00 p.m. in Room 2141 Rayburn

In June, 2003, the Justice Department released its official "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies." That guidance is still in force, and it is premised with the statement that "'Racial profiling' at its core concerns the invidious use of race or ethnicity as a criterion in conducting stops, searches and other law enforcement investigative procedures. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity."

However, that guidance goes on to say that "In investigating or preventing threats to national security or other catastrophic events (including the performance of duties related to air transportation security), or in enforcing laws protecting the integrity of the Nation's borders, Federal law enforcement officers may not consider race or ethnicity except to the extent permitted by the Constitution and laws of the United States.

What is permitted by the Constitution and laws of the United States was defined in part over thirty years ago by the Supreme Court in *U.S. v. Martinez-Fuerte*. In that case, Border Patrol officers manning a permanent, fixed checkpoint 66 miles north of the Mexican border in California apprehended several illegal immigrants following the

questioning of a driver in a secondary inspection area. The record revealed that all vehicles approaching the checkpoint were visually screened and that a small number were referred to a secondary inspection area for further questioning of the drivers. The Supreme Court upheld the constitutionality of the secondary inspection referral "even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry."

The Court made clear that probable cause and reasonable suspicion determinations should be based on the sum total of the information available to the police. The Court said probable cause is a determination of probabilities as they exist within particular factual contexts, and evidence must be "weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

The federal Guidelines reflect that practical approach to law enforcement. The guidelines state that officers "may consider race and ethnicity only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme, or organization." Moreover, the examples given in the Guidelines do not limit the consideration of race merely to cases of suspect descriptions that include race. Rather, they permit officers to take race into account when they possesses information or intelligence linking persons of a certain race to a particular criminal enterprise.

Of course, to the extent that any policy expressly permits law enforcement officers to consider suspect race or ethnicity in some contexts, those policies are potentially subject to the Supreme Court's strict scrutiny analysis. But carefully constructed policies will satisfy that analysis.

For example, in *Grutter v. Bollinger*, the Supreme Court upheld the admissions policy at the University of Michigan Law School under a strict scrutiny standard even though that policy expressly allowed for the consideration of applicants' race and routinely operated to admit minority applicants who scored lower on the LSAT than white applicants. If student body diversity in university law schools is a compelling governmental interest, then surely crime control is, too. Like the admissions policy approved of by the Court in *Grutter*, properly constructed law enforcement policies are narrowly tailored to effect the compelling government interest of controlling crime when they permit police to consider race only in conjunction with other evidentiary factors and only in the narrow circumstance where officers possess trustworthy information that links persons of a certain race or ethnicity to a particular incident, criminal enterprise, or organization.

I look forward to hearing from all the witnesses here today, and to their exploration of how policing policies can be administered in a practical and constitutional manner.

Mr. NADLER. And we will now recognize the Chairman of the full Committee for an opening statement.

Mr. CONYERS. Thank you, Jerrold Nadler, Chairman of Constitution.

Let me yield first to Bobby Scott, the Chairman of the current—of the Crime Subcommittee, with whom we have been working on this issue across the years.

Mr. SCOTT. Well, thank you. Thank you, Mr. Chairman.

And I thank the Subcommittee Chairman for calling the hearing. This is an important hearing.

And the focus really needs to be on this issue of profiling, as to what impact it has on law-abiding citizens and the harassment that they get by undeserved attention, and how this practice diverts attention and resources of law enforcement from those who are, in fact, truly dangerous to society, so we have people who are being focused on without any reason, and you have law enforcement resources being diverted at the same time.

So, I look forward to the witnesses in addressing those two issues, and yield back.

Mr. CONYERS. Thanks, Bobby Scott.

I would like to just acknowledge Steve Cohen of Memphis, Tennessee, who is going to be very important in this. He was a state senator for many years in his state prior to coming to Congress, as well as an attorney for all these years, as well.

Mr. COHEN. Thank you, Mr. Chairman. This is an important hearing, and I am pleased to participate.

We filed two bills on this subject: the Justice Integrity Act, which calls for a study of racial profiling, groups to come together and study the issues and try to come up with recommendations on racial profiling; and also a bill that deals with Byrne grants, and requiring recipients of Byrne grants to do statistical analysis and report back to us. So, there are important subjects we need to look into.

We passed a law like this in Tennessee to have the state highway patrol make such reports. And while I think it is important to get the reports, I think there is no question that the data is already in that there is racial profiling done by law enforcement.

I know that the professor from Texas State—and I was in San Marcos this weekend—is not necessarily a proponent of this. But the fact is, if you are Hispanic, if you are African American, or even if you are a hippie, it is likely you are going to get picked up. And those are not the right things, and they do not normally find—even find anything.

So, the statistics show it is a waste of law enforcement time, when they could be getting out and getting some real people that they ought to be getting and spend their time on the real criminals.

So, I thank the Chairman for recognizing me, the Chairman of the Subcommittee for the hearing, and all of our panelists, too. Thank you.

Mr. CONYERS. Thank you.

Chairman Nadler and I were working on the traffic stops act in 1997—that is driving while Black. And it passed the House; it did not pass the Senate. And we have had two things that have put emphasis on the nature of the discussion that we have before us with these seven distinguished witnesses.

One was Henry Louis Gates, the professor that was arrested for I do not know what, suspicion of what the actual facts were there. But it highlighted the issue that we are examining today.

The other, of course, was the Arizona law that has really made us think about this issue along the lines of the introductory remarks of Chairman Nadler.

We are trying to limit profiling. And it makes an interesting case. We have law enforcement people here. And it is one thing to

have a suspicion. It is another thing to be racially profiling, because you look like an Arab, you look like an African American.

And I think that distinction is going to come out of this discussion. So, I think we are on the verge of moving past what we did in 1997, 1998.

And I welcome the fact that you have called this hearing today. Thank you very much.

Mr. NADLER. I thank the gentleman.

In the interest of proceeding to our witnesses, and mindful of our busy schedules, I ask that other Members submit their opening statements for the record.

Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record. Without objection, the Chair will be authorized to declare a recess of the hearing, which hopefully will not be necessary.

We will now turn to our panel of witnesses. And our first witness is—I will introduce them—Hilary Shelton is the vice president for advocacy and director of the NAACP's Washington bureau. He previously worked as the Federal liaison and assistant director for the Government Affairs Department for the United Negro College Fund. Mr. Shelton received his B.A. from Howard University and M.A. degree from the University of Missouri in St. Louis.

Christopher Burbank is the chief of police of the Salt Lake City Police Department and has worked for the department since 1991. During the 2002 Salt Lake City Winter Olympic Games, Chief Burbank also served as the liaison with U.S. Secret Service. He is a graduate of the University of Utah and the FBI's National Executive Institute.

Brian Withrow is an associate professor of criminal justice at Texas State University San Marcos. He served one term as mayor of Bel Aire, Kansas, and worked for the Texas Department of Public Safety. Professor Withrow earned his B.A. from Stephen Austin State University, his M.P.A. from Southwest Texas State University, and his Ph.D. from Sam Houston State University.

Deborah Ramirez is a professor of law at Northeastern University Law School. She is the founder of the Partnering for Prevention and Community Safety Initiative and has been a consultant to the Department of Justice on racial profiling issues. Professor Ramirez received her B.A. from Northwestern University and her J.D. from Harvard Law School.

Amardeep Singh is the co-founder and program director of the Sikh Coalition, the Nation's largest Sikh American civil rights organization. In that role, Mr. Singh has represented dozens of Sikh victims of airport profiling, employment discrimination and hate crimes, and has helped shape guidelines governing the searches of Sikh passengers in U.S. airports.

David Harris is the distinguished faculty scholar at the University of Pittsburgh School of Law. He served as a member of the Civil Liberties Advisory Board to the White House Commission on Aviation Safety and Security. Professor Harris received a B.A. from Northwestern University and a J.D. from Yale Law School.

Farhana Khera is the president and executive director of Muslim Advocates. Ms. Khera was counsel to the U.S. Senate Judiciary Committee, Subcommittee on the Constitution, where she advised

Senator Russ Feingold on civil rights and civil liberties. Ms. Khera received her B.A. from Wellesley College and her J.D. from Cornell Law School.

I am pleased to welcome all of you. Your written statements will be made part of the record in its entirety. I would ask each of you to summarize your testimony in 5 minutes. To help you stay within that time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow, and then red when the 5 minutes are up.

Before we begin, it is customary for the Committee to swear in its witnesses.

Let the record reflect that the witnesses answered in the affirmative. You may be seated, all of you.

And our first witness is Mr. Shelton. And I recognize Mr. Shelton for 5 minutes.

TESTIMONY OF HILARY O. SHELTON, DIRECTOR, NAACP WASHINGTON BUREAU

Mr. SHELTON. Thank you, and good afternoon, Chairman Nadler, Ranking Member Sensenbrenner, Congressmen Scott, Johnson, Cohen and Members of the Subcommittee. Thank you so much for calling this important hearing and for asking me here today to share with you the NAACP's position on this crucial matter.

Let me also offer a special word of thanks to Chairman Conyers for his leadership on this issue over the years.

The NAACP currently has a membership unit in every state in the country, and I would wager that every NAACP unit has received numerous complaints of racial profiling.

For the record and to avoid confusion, the operational definition of the term "racial profiling" means the practice of a law enforcement agent or agency relying to any degree on race, ethnicity, national origin or religion in selecting which individuals to subject to routine or spontaneous investigatory activities or in deciding upon the scope and substance of law enforcement activities following the initial investigatory procedure.

Sadly, racial profiling is being used, even today, at all levels of law enforcement. Local, state and Federal agents have been shown to use racial profiling, a misdirected tool for policing. The fact that racial profiling is still a common tactic among so many law enforcement agents is, frankly, startling, given that this has been proven to be an inefficient, ineffective, offensive and counter-productive tool.

It also, sadly, undercuts our community's trust and faith in the integrity of the American judicial system. When one cannot drive down an interstate, walk down the street or even enter into our own homes without being detained for questioning by law enforcement agents merely because of physical characteristics such as the color of one's skin, there is indeed a big problem.

As a result of profiling practices, it becomes much harder for law enforcement—even those who do not engage in racial profiling—to do their jobs to prevent, investigate, prosecute or solve crimes.

Evidence to support the prevalence of racial profiling by law enforcement officials is as voluminous as it is varied. According to a 2004 report by Amnesty International USA, approximately 32 mil-

lion Americans—a number equivalent to the population of Canada—report that they have already been victims of racial profiling. And according to the Northeastern University Racial Profiling Data Collection Resource Center, there is an ongoing litigation involved in racial profiling in 33 out of 50 states. And we will hear more about that when Professor Ramirez speaks.

Furthermore, people speaking out against racial profiling from both political parties include former President Bill Clinton, who called racial profiling a "morally indefensible, deeply corrosive practice," and further stated that "racial profiling is in fact the opposite of good police work, where actions are based on hard facts, not stereotypes. It is wrong, it is destructive, and it must stop."

And George W. Bush, who on February 27, 2001, said that racial profiling is "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."

Since coming to the NAACP almost 14 years ago, I have had the honor of working with coalition partners, Members of Congress, varied Administration officials from both political parties, and folks on the street, to try to develop an effective approach to end racial profiling. There are a few steps that need to be taken at the Federal level to end racial profiling once and for all.

First, we need a clear definition of racial profiling, an unequivocal ban on its use by all law enforcement officials.

Secondly, we need data collection to truly assess the extent of the problem. In simple terms, our mantra must be, "in order to fix this problem, we must first measure it."

The only way to move the discussion about racial profiling from rhetoric and accusation to a more rational dialogue and appropriate enforcement strategies is to collect the data that will either allay community concerns about the activities of the police or help communities address the scope and magnitude of this problem. Furthermore, implementing a data collection system sends a clear message to law enforcement, as well as the larger communities they serve, that racial profiling is inconsistent with effective policing and equal protection.

Data collection also informs the third element of an effective racial profiling agenda, which is effective training. Law enforcement officials at all levels—from the cop on the beat, to the state police, to the Federal agent—should all be required to not only identify racial profiling, but also to put an end to it while increasing their effectiveness in serving and protecting our communities and our Nation.

Fourth, and last, is, an effective and aggressive anti-racial profiling agenda must enable citizens and the government alike to hold law enforcement agencies that continue to use racial profiling accountable—not to be applied in a "gotcha" dynamic, but in informed law enforcement administrators as a tool to improve their effectiveness. In order for anti-racial profiling actions to be effective and to rebuild the trust between law enforcement and the communities that they are charged with protecting, people must know that we are serious about eliminating this scourge.

Mr. Chairman, the vast majority of law enforcement officers are hard-working, courageous men and women whose concern for the safety of those that they have been charged with protecting is paramount—even when their own safety is, quite frankly, put on the line. In many cases, law enforcement officials are racial and ethnic minorities themselves, concerned about what happens when they, too, are out of uniform while traveling our Nation's highways, byways and walkways.

All will acknowledge that law enforcement agents should not endorse or act upon stereotypes, attitudes or beliefs that a person's race, ethnicity, appearance or national origin increases that person's general propensity to act unlawfully. The concept that we must somehow choose between public safety and the protection of our civil rights and civil liberties is misguided, at best, and woefully unconstitutional. Ending this deplorable practice of racial profiling is an effective and principled way forward.

I want to thank you again for the opportunity to be with you today, and I look forward to our questions and conversation.

[The prepared statement of Mr. Shelton follows:]

PREPARED STATEMENT OF HILARY O. SHELTON

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TESTIMONY OF HILARY O. SHELTON

DIRECTOR, NAACP WASHINGTON BUREAU &

SENIOR VICE PRESIDENT

FOR ADVOCACY AND POLICY

before the

HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES

on

Racial Profiling and the Use of Suspect Classifications in Law Enforcement

June 17, 2010

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SENIOR VICE PRESIDENT FOR ADVOCACY AND POLICY

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SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES

on

RACIAL PROFILING AND THE USE OF SUSPECT CLASSIFICATIONS IN LAW ENFORCEMENT

June 17, 2010

Good morning Chairman Nadler, Ranking Member Sensenbrenner and esteemed members of the Subcommittee. Thank you so much for calling this important hearing and for asking me here today to share with you the NAACP's position on this crucial issue.

My name is Hilary Shelton, and I am the Director of the NAACP Washington Bureau, the legislative and public policy advocacy arm of the NAACP. The NAACP currently has more than 2,200 membership units in every state in the country, and I would wager that every NAACP unit has, at some point, received at least one complaint of racial profiling. Many NAACP units report receiving hundreds, if not thousands, of complaints of racial profiling each year.

For the record and to avoid confusion, the operational definition of the term 'racial profiling' means the practice of a law enforcement agent or agency relying, to any degree, on race, ethnicity, national origin, or religion in selecting which individual to subject to routine or spontaneous investigatory activities or in deciding upon the scope and substance of law enforcement activity following the initial investigatory procedure, 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.

Sadly, racial profiling is being used, even today, at all levels of law enforcement: local, state and federal agents have all been shown to use racial profiling as a means of policing. The fact that racial profiling is still a common tactic among so many law enforcement agencies is, frankly, startling, given that it has been proven to be an inefficient, offensive and counter-productive tool.

It is sadly and unfortunately a tool that has further undercut our communities trust and faith in the integrity of the American judicial system. A system that must be challenged when we find cannot drive down an interstate, walk down the street, or even enter into our own homes without being detained for questioning by law enforcement agents merely because of the color of our skin and other physical characteristics. Racial profiling leads to entire communities losing confidence and trust in the very men and women who are meant to be protecting and serving them. As a result of racial profiling practices, it becomes much harder for law enforcement, even those who do not engage in racial profiling, to do their jobs to prevent, investigate, prosecute or solve crimes.

Evidence to support the prevalence of racial profiling by law enforcement officials is as voluminous as it is varied: According to a 2004 report by Amnesty International USA, approximately thirty-two million Americans, a number equivalent to the population of Canada, report they have already been victims of racial profiling[1]. And, according to the Northeastern University's Racial Profiling Data Collection Resource Center, there is on-going litigation involving racial profiling in 33 of the 50 states[2].

Furthermore, people speaking out against racial profiling include former Presidents Bill Clinton, who called racial profiling ""morally indefensible, deeply corrosive practice" and further stated that "racial profiling is in fact the opposite of good police work, where actions are based on hard facts, not stereotypes. It is wrong, it is destructive, and it must stop.[3]" and George W. Bush, who on February 27, 2001, said that racial profiling is ..."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.[4]"

It is clear that more can and must be done to eliminate racial profiling. Since coming to the NAACP Washington Bureau almost 14 years ago, I have had the honor of working with coalition partners, members of Congress, and various Administration officials from both political parties to try to develop an aggressive approach to end racial profiling in this country. From my experiences, both on the policy side and the anecdotal side – listening to NAACP members, branch presidents, and even members of our National Board – there are a few steps that need to be taken on a national level to end racial profiling once and for all.

First, we need a clear definition of what is racial profiling as well as an unambiguous and unequivocal ban on its use by all law enforcement officials.

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[1] Amnesty International USA, "Threat and Humiliation: Racial Profiling, National Security, and Human Rights in the United States" October, 2004, available at http://www.amnestyusa.org/racial_profiling/report/rp_report.pdf
[2] The Institute on Race and Justice at Northeastern University, Racial Profiling Data Collection Resource Center http://www.racialprofilinganalysis.neu.edu/legislation/litigation.php
[3] *Attorney General's Conference on Strengthening Police-Community Relationships, Report on the Proceedings*, Washington, DC: U.S. Department of Justice, June 9–10, 1999, at 22–23.
[4] Address to a Joint Session of Congress, February 27, 2001, President George W. Bush

Second, we need data collection to truly assess the extent of the problem. In simple terms, "in order to fix it, you must first measure it". The only way to move the discussion about racial profiling from rhetoric and accusation to a more rational dialogue and appropriate enforcement strategies is to collect the information that will either allay community concerns about the activities of the police or help communities ascertain the scope and magnitude of the problem. Furthermore, implementing a data collection system also sends a clear message to the entire police community, as well as to the larger community, that racial profiling is inconsistent with effective policing and equal protection.

If it is done right, data collection will also lead to the third element of an effective anti-racial profiling agenda: training. Law enforcement officials at all levels, from the unit commander to the desk sergeant to the cop-on-the beat and of all jurisdictions, from federal agents to state and local police, should all be required to be able to not only identify racial profiling, but also to know of its shortcomings and be able to put an end to it while increasing their effectiveness in protecting our communities and our Nation.

Fourth, and last, an effective and aggressive anti-racial profiling agenda must enable citizens and the government alike to hold law enforcement agencies that continue to use racial profiling accountable. In order for anti-racial profiling actions to be effective, and rebuild the trust between law enforcement and the communities they are charged with protecting, people must know that we are serious about eliminating the scourge racial profiling.

Mr. Chairman, we are all aware that the Constitution of the United States guarantees to all people equal protection under the law and the right to pursue life, liberty and happiness. Implicit in this guarantee is the ability to walk down the street, to drive one's car down the road, or to enter into our own homes without fear of arrest or interference.

The majority of law enforcement officers are hard working men and women, whose concern for the safety of those they are charged with protecting is often paramount, even when their own safety is on the line. However, if and when even one of their colleagues engages in racial profiling, whether it be conscious or subconscious, the trust of the entire community can be, and will be, lost. Law enforcement agents should not endorse or act upon stereotypes, attitudes, or beliefs that a person's race, ethnicity, appearance or national origin increases that person's general propensity to act unlawfully.

Not only is racial profiling morally wrong, and ineffective, but it is also a misuse of government resources and detrimental to effective policing. The concept that we must somehow choose between public safety and the protection of our civil rights is misguided, at best and woefully unconstitutional. There is no tradeoff between effective law enforcement and protection of the civil rights of all Americans; we can and must have both.

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Mr. NADLER. I thank you.

We will now recognize Chief Burbank for 5 minutes.

TESTIMONY OF CHRISTOPHER BURBANK, CHIEF OF POLICE, SALT LAKE CITY POLICE DEPARTMENT

Chief BURBANK. Thank you very much. It is an honor to be here.

The essential duty of modern law enforcement is to protect the civil rights of individuals, while providing for the safety of all members of the communities we serve—equally, without bias. Anti-im-

migration fervor, manifesting itself in the form of controversial laws in states throughout the Nation, jeopardizes this fundamental tenet and the principles upon which we base our profession.

Requiring local police agencies to enforce Federal immigration laws is contrary to our mission, marginalizes significant segments of the population, and ultimately harms effective community policing. We function best when we are a part of, not apart from, the community.

Police officers should enforce and uphold the law regardless of race, ethnicity, gender, religion or sexual orientation. The ideal that all people are created equal with certain unalienable rights is the basis upon which the United States of America was founded. However, we have labored with this notion from its inception over 230 years ago.

Unfortunately, law enforcement has been an effective tool of oppression throughout the history of our Nation. Biased laws and practices have forced officers to engage in institutional racism. It was barely a generation ago that law enforcement was charged with keeping water fountains separate and high schools racially segregated. We are still struggling to repair the mistrust and resentment that many communities continue to feel.

By increasing our civil immigration role, law enforcement is placed in the untenable position of potentially engaging in unconstitutional racial profiling, while attempting to maintain the trust within the communities we protect. Officers are forced to detain and question individuals for looking or speaking differently from the majority, not for their criminal behavior.

In Salt Lake City, approximately one-third of the population is Latino and subject to inappropriate police scrutiny. Often unrecognized in the immigration debate is the efficacy of enforcement and the adverse impact upon all individuals of color. How is a police officer to determine status without detaining and questioning anyone who speaks, looks or acts as if they might be from another nation?

The process moves us frighteningly close to regulations restricting free movement inside the country and mandating identification or citizenship papers for all people. Can you imagine a procedure similar to that of boarding an airplane to cross the borders of states within the union?

The strongest proponents of immigration enforcement are on record as saying Hispanics commit crime at a higher rate than other racial groups. There is no statistical support for this racist rhetoric. In fact, cities throughout the Nation have experienced dramatic reductions in crime across all categories, especially violent crime.

Salt Lake City had a record low four homicides in 2009. This is incongruent with the proponents' claims that illegal immigrants are flooding to Utah and that they are responsible for committing the majority of violent crime.

Recently, a Utah state representative publicly stated that a lack of proficiency with the English language amounted to reasonable suspicion to stop and detain an individual. Limited language skills are not indicative of criminal behavior. We are proud of the large number of immigrants living in the City of Salt Lake, many of

which are of Hispanic origin and speak Spanish as their primary language.

We also have immigrant residents from numerous other nations of the world. All are vital members of our community. We strive to provide those with limited English proficiency the same professional, quality police service as those who speak perfect English.

Requiring law enforcement agencies to engage in civil immigration activities diverts critical resources away from our central responsibilities during a time of budget cuts and staffing shortages. Currently, the Salt Lake County adult detention facility releases, on average, 900 criminal violators monthly due to overcrowding. Detainees held for reasons of civil immigration status alone will necessitate the release of an even larger number of criminals into our neighborhoods.

I firmly believe that we, as administrators and stewards of public trust, must have our voices heard. Dr. Martin Luther King, Jr., taught of social responsibility, "History will have to record that the greatest tragedy of this period of social transition was not the vitriolic and the violent agents of the bad people, but the appalling silence and indifference of the good. Our generation will have to repent not only for the words and actions of the children of darkness, but also for the fears and apathy of the children of light."

In conclusion, I recently attended the funeral services for Sergeant Franco Aguilar of the Sevier County, Utah, sheriff's office—the son of an immigrant family who lost his life in the performance of his duty. He was an individual, representative of so many that we employ, willing to sacrifice his personal safety and the well-being of his family to serve each of us.

I shudder to think that the children of this hero of the state of Utah might one day be inappropriately detained and questioned because of their ethnicity or the color of their skin. While all of us are entitled to freedom from persecution, I believe this family has earned it.

Thank you.

[The prepared statement of Chief Burbank follows:]

PREPARED STATEMENT OF CHRISTOPHER BURBANK

Chris Burbank
Chief of Police
Salt Lake City Police Department

Subcommittee on the Constitution, Civil Rights and Civil Liberties

Hearing on Racial Profiling and the
Use of Suspect Classifications in Law Enforcement Policy

Thursday, June 17, 2010
1:00 PM

Rayburn House Office Building
Room 2141

The essential duty of modern law enforcement is to protect the civil rights of individuals while providing for the safety of all members of the communities we serve, equally, without bias. Anti-immigration fervor – manifesting itself in the form of controversial laws in Arizona, Utah, and Oklahoma as well as in other states throughout the nation – jeopardizes this fundamental tenet and the principles upon which we base our profession. Requiring local police agencies to enforce federal immigration laws is contrary to our mission, marginalizes significant segments of the population, complicates and ultimately harms effective community policing. We function best when we are a part of, not apart from the community.

Police officers should enforce and uphold the law regardless of race, ethnicity, gender, religion, sexual orientation, or national origin. The ideal that all people are created equal with certain unalienable rights is the basis upon which the United States of America was founded. However, we have labored with this notion from its inception over 230 years ago. Unfortunately, law enforcement has been an effective tool of oppression throughout the history of our nation. Biased laws and practices have forced officers to engage in institutional racism. Prior to 1865, officers and deputies were tasked with protecting the property rights of slave owners by patrolling for runaway slaves and even detaining free Black Americans if they failed to carry the proper documentation. Local law enforcement played a similar role during World War II, when a number of police agencies were required to enforce curfew and detain suspected "enemy aliens," tantamount to the harassment and persecution of Japanese Americans. It was barely a generation ago that law enforcement was charged with keeping water fountains separate and high schools racially segregated. In these and countless other cases, legislators buoyed by public sentiment directed law enforcement to protect the predominant race against the contrived threat of others. We are still struggling to repair the mistrust, resentment and rage that many communities continue to feel.

By increasing our role in civil immigration action, state and local law enforcement is placed in the untenable position of potentially engaging in unconstitutional racial profiling, while attempting to maintain trust within the communities we protect. Officers are forced to detain and question individuals for looking or speaking differently from the majority, not for their criminal behavior. In Salt Lake City, approximately one third of the population is Latino and subject to inappropriate police scrutiny. Often unrecognized in the immigration debate is the efficacy of enforcement and the adverse impact upon all individuals of color. How is a police officer to determine status without detaining and questioning anyone who speaks, looks or acts as if they might be from another nation? The process moves us frighteningly close to regulations restricting free movement inside the country and mandating identification or citizenship papers for all people. Can you imagine a procedure similar to that of boarding an airplane to cross the borders of states within the union?

The strongest proponents of statewide immigration enforcement in the Utah Legislature are on record as saying: Hispanics commit crime at a higher rate than other racial or ethnic groups. There is no statistical support for this racist rhetoric; however, it receives cheers from certain fellow politicians and their constituents. It is unconscionable that

persons are attempting to misuse their elected office and law enforcement to advance an obviously xenophobic agenda. In fact, cities throughout the nation have experienced dramatic reductions in crime across all categories, especially violent crime. Salt Lake City had a record low, four homicides in 2009. This is incongruent with proponent's claims that, "Illegal immigrants are flooding to Utah and they're flooding to Salt Lake City" and that they are responsible for committing the majority of violent crime. Over the last many years, Washington has failed to repair a broken immigration system, and local police officers are being irresponsibly designated to pick up the slack. It is important to note that the foundation of our republic is not based on the rule of the majority. Democracy and those elected to serve must guard against the tyranny of the majority or of mob rule and ensure the well-being of the downtrodden or underrepresented.

In April 2009, I requested the Consortium for Police Leadership in Equity (CPLE) to assist the Salt Lake City Police Department in evaluating the consequences of state legislation encouraging the practice of cross deputizing officers for the purpose of immigration enforcement. The CPLE is a research consortium that pairs empirical social scientists with law enforcement agencies to conduct original research on equity related issues, at no cost to the law enforcement organization. The findings of this research reveal that providing municipal police the powers of federal immigration agents is likely to discourage cooperation with law enforcement and encourage contempt and suspicion. The report indicates that when local law enforcement officers act as immigration agents, civilians become less convinced of their legitimacy. As a result, undocumented and documented Latinos, Latino citizens and White residents are less willing to report crimes when they occur. In fact, One in three law-abiding citizens surveyed said they would not report certain serious crimes if police officers were empowered to determine citizenship status. Data from the report suggest that support of Utah's law is related more to fear and dislike of Latinos than principled objections to illegal immigration, concerns about public safety, or even a mistrust of undocumented immigrants.

Many law enforcement officials oppose immigration enforcement because doing so would discourage witness participation in criminal investigations. Currently, Salt Lake City, like many police departments in the country, has a policy against inquiring into the immigration status of a witness or victim of crime. Still, many undocumented residents are afraid to go to the police after witnessing a crime. A client of Casa Del Hispano in Lewisville, TX, for example, witnessed a murder but did not bring the information to local police for several months out of fear of deportation. Recent legislation has greatly exacerbated this fear. Police officers cannot effectively gather vital information from witnesses if individuals are afraid of the police.

Even more troubling, officers acting as immigration officials would make victims of crime reluctant to seek help from law enforcement. This opens the door to further victimization and exploitation of immigrants, increasing crime in our communities. We have already observed a chilling effect upon victims and witnesses of crime as well as a polarization within neighborhoods regarding recent immigration legislation.
In a recent debate, a Utah state representative publicly stated that a lack of proficiency with the English language amounted to reasonable suspicion to stop and detain an

individual. This clearly constitutes racial profiling. Limited language skills are not indicative of criminal behavior. We are proud of the large number of immigrants living in the City of Salt Lake, many of which are of Hispanic origin, and speak Spanish as their primary language. We also have immigrant residents from Bosnia, Somalia, Nigeria and numerous other nations of the world. All are vital members of our community. We strive to provide those with limited English proficiency the same professional, quality police service as those who speak perfect English.

Requiring law enforcement agencies to engage in civil immigration activities diverts critical resources away from our central responsibilities during a time of budget cuts and staffing shortages. Currently, the Salt Lake County Adult Detention Facility releases, on average, 900 criminal violators monthly due to overcrowding. Funding issues make the facility incapable of accommodating demand. Detainees held for reasons of civil immigration status alone will necessitate the release of an even larger number of criminals into our neighborhoods.

I firmly believe that we, as administrators and stewards of public trust, must have our voices heard. Dr. Martin Luther King Jr. taught of social responsibility, "History will have to record that the greatest tragedy of this period of social transition was not the vitriolic words and the violent actions of the bad people but the appalling silence and indifference of the good. Our generation will have to repent not only for the words and actions of the children of darkness but also for the fears and apathy of the children of light."

I am by no means a lone voice on this issue and I applaud my peers from across the nation for safeguarding policing throughout the country. I had the honor of participating in The Police Foundation national conference last year with more than 100 law enforcement administrators and executives to discuss issues relevant to immigration enforcement. The conclusions of that meeting as well as those of a yearlong study conducted by the Foundation, a research organization in Washington DC, are concise. Police officers should not engage in civil immigration enforcement. However, local law enforcement should continue to arrest serious criminal offenders and, as appropriate, refer dangerous criminals to federal authorities. Immigration enforcement is a federal responsibility, and it is paramount to the well-being of our neighborhoods that the federal government maintains accountability.

In conclusion, I recently attended the funeral services for Sergeant Franco Aguilar of the Sevier County, UT Sheriff's Office, the son of an immigrant family, who lost his life in the performance of his duty. He was an individual, representative of so many that we employ, willing to sacrifice his personal safety and the well-being of his family to serve each of us. I shudder to think that the children of this hero of the state of Utah might one day be inappropriately detained and questioned because of their ethnicity or the color of their skin. While all of us are entitled to freedom from persecution, I believe they have earned it.

Mr. NADLER. Thank you.

We will now hear from—I will now recognize Professor Withrow for 5 minutes.

TESTIMONY OF BRIAN L. WITHROW, Ph.D., ASSOCIATE PROFESSOR OF CRIMINAL JUSTICE, TEXAS STATE UNIVERSITY

Mr. WITHROW. Thank you, Chairman Nadler and Ranking Member Sensenbrenner and Members of the Subcommittee. I am honored to be here today.

During the past 15 years, I have been involved in the racial profiling controversy in a number of ways. As a scholar, I conduct a great deal of research into this area and publish books and articles like many of the men and women that are here with us today. And also as a consultant, I work with police departments who are struggling with this issue all over the country. I work with departments very large, and some very small, and even a few from overseas.

During this time, I have seen this controversy grow from an accusation following a routine traffic stop to an allegation in an airport, and now to a prediction on what might happen in a state that is somewhat committed to unilaterally enforcing Federal immigration laws.

I am a participant in this controversy, but I am not a pundit. I am interested in this issue and recognize it as its importance to American policing, but I am not at all ideological about it.

It is an important issue. It faces the policing community in a severe manner.

But despite my experience in a previous life as a police officer, I approached the controversy and the research without a preconceived notion or assumption. The results are what they are. And it is an important part that we ask questions.

One of the questions that we have today, as I understand, is to what extent should race or ethnicity influence decisions made by criminal justice actors? The answer lies on a continuum. At one extreme, race is an identifier; at the other, race is an indicator.

As an identifier, race and ethnicity are indispensible. Along with other physical, behavioral and demographic features, information about an individual's race or ethnicity—or, as it often is viewed, skin color—is often essential for accurate identification—for good reason. Racial and ethnic information are often included in published descriptions of criminal suspects, missing persons and potential witnesses. Such information about known or suspected individuals enables police officers to be more efficient and to be more accurate.

On the other side of that continuum is race as an indicator. Race and ethnicity as indicator are, at best, a distraction. There is no evidence at all—none at all—in the literature that race and ethnicity play any role in criminal propensity. The use of race and ethnicity in suspect classifications and profiles is far more than counterproductive; it is insidious.

Spectators of the racial profiling controversy point to arrests, convictions, incarceration rates as evidence that racial and ethnic minorities are more likely to be involved in serious criminal activity. And while these statistics are generally true, that racial and

ethnic minorities are over-represented in arrests, convictions and incarcerations, there is scant evidence—none at all, actually—that they are necessarily more likely to be involved in criminal behavior.

So, as an identifier, race and ethnicity are helpful. As an indicator, they are illegal.

Let me finish by saying that in the history of American policing, we have dealt—the industry of policing has dealt with some very serious issues. High-speed vehicular chases, civil rights issues—a lot of challenges have faced the profession over the last 100 years or so. And there are three things that we always turn back to that make a difference in whether or not the problem was solved.

The first thing is we measure it. We find out where it is, what is happening, what are the dynamics of it, where it is located and who is doing it.

The second thing we do is attention. High-speed chase is an example. In many communities in this country, if a police officer engaged in a high-speed chase, they must have permission before they begin that process, and they must regularly engage in a review of that high-speed chase while it is going on in order to make sure that it is valid.

So, we measure, we are attentive to it, and we train it.

It is important that we understand as police officers how our behavior is perceived by others, and that makes a difference in the outcome of things.

Again, I appreciate the opportunity to be here today and, certainly, at the appropriate time will be happy to answer any questions. Thank you.

[The prepared statement of Mr. Withrow follows:]

PREPARED STATEMENT OF BRIAN L. WITHROW

Statement by
Brian L. Withrow, Ph.D.

Associate Professor of Criminal Justice
Texas State University – San Marcos

Hearing on
Racial Profiling and the Use of Suspect Classifications in Law Enforcement Policy

Thursday, June 17, 2010
2:00 pm

2141 Rayburn House Office Building

Subcommittee on the Constitution, Civil Rights, and Civil Liberties
United States House of Representatives

Good afternoon, Chairman Nadler, Ranking Member Sensenbrenner, and members of the Subcommittee. I appreciate the opportunity to share with you my observations on racial profiling and the use of suspect classifications in law enforcement policy.

For the past 29 years it has been my privilege to work in the Criminal Justice industry. As a police practitioner and scholar I have witnessed, and in some cases participated in, enormous transformational change in American policing. Throughout this entire time, however, one thing has remained constant. Issues relating to race and ethnicity are as salient today as they were in 1981, when I took the oath of a Texas State Trooper, and I suspect as they were in 1959, when my father took the oath of a Dallas Police Officer.

The Status of the Racial Profiling Controversy

In the mid-1990's six seemingly unrelated factors coalesced to become what we now refer to as the racial profiling controversy (see Figure 1). Prior to this time when a police department was accused of racial bias it could legitimately respond that there was no evidence supporting such an accusation. They were right. There was no evidence at all. Prior to racial profiling research American policing simply did not have the information to respond to even the most rudimentary questions about the possible disparate impact of routine law enforcement programs.

It is different now. Hundreds of racial profiling and police stop studies conducted throughout the nation in all sorts of police departments provide an unprecedented body of literature. Indeed our understanding of routine police systems and practices has expanded more in the past fifteen years than at any other time in the history of American policing. We owe this to the racial profiling controversy.

Figure 1 – Factors contributing to the racial profiling controversy.

Yet, the more we know, the more we don't know. There is still more work to be done. The most important question in racial profiling research continues to be;

To what extent does an individual's race or ethnicity affect the probability of being stopped by the police?

Analytically, responding to this racial profiling research question is deceptively simple. There are only two numbers involved. These two numbers are presented in a fraction. The numerator is the percentage of individuals, by race or ethnicity, who are actually stopped by the police. The denominator is the percentage of individuals, also by race or ethnicity, who are available or likely to be stopped by the police (see Figure 2).

Figure 2 - The analytical structure of racial profiling research

$$\frac{\text{Percentages of individuals by race or ethnicity } \textbf{\textit{who are actually stopped}} \text{ by the police}}{\text{Percentages of individuals by race or ethnicity } \textbf{\textit{who are available to be stopped}} \text{ by the police}}$$

If these two percentages are equal then a researcher might conclude that no racial profiling is occurring. For example, if 12 percent of the drivers stopped by the police are Black and 12 percent of the drivers available to be stopped are Black then a researcher might conclude that police officers are not targeting Black drivers.

If on the other hand, 24 percent of the drivers stopped by the police are Black while only 12 percent of the drivers available to be stopped are Black then a researcher might conclude that Blacks are twice as likely to be stopped.

Either way, this researcher is likely wrong.

Racial profiling data are not able to measure discriminatory intent at the individual police officer level. Police stop data, the numerator, does not record the police officer's perception of the driver's race or ethnicity ***prior*** to the stop. With one notable exception[i], no researcher has collected information on whether police officers are able to accurately observe a driver's race or ethnicity prior to initiating a stop. This particular research confirms what police officers have told us anecdotally for many years. In the vast majority of enforcement contexts, particularly at night, it is exceedingly difficult for a police officer to know the race or ethnicity of a driver prior to the stop. Succinctly, it is not possible for us to conclude that an individual was stopped because of his or her race or ethnicity unless we can first establish whether the police officer was actually aware of this information prior to the stop. Furthermore, even if we were able to capture this information I am aware of no test that can look into the heart of a police officer to find a discriminatory intent.

The estimates used to measure who does not get stopped (i.e. benchmarks) are neither valid nor reliable enough to evaluate the overall disparate effect of an enforcement practice. While we are relatively confident of the accuracy in our measures of who is actually stopped, we have little confidence in the accuracy of our measures of who is ***not stopped***. Most benchmarks are based on residential populations, field observations or accident records. None are either universally reliable or generally acceptable as valid measures of the actual population of individuals at risk of being stopped by the police. Unless and until we are able to accurately estimate the racial and ethnic proportions within the population of individuals that are at risk of being stopped it is impossible for us to ethically calculate the effect race and ethnicity might have on the probability of being stopped. Two related factors further hamper our ability to determine the overall disparate effect of an enforcement practice.

- Probability is based, in part, on the assumption of random selection. We know that a police officer's decision to stop is not random. Not all drivers have an equal and non-zero chance of being stopped by the police.
- The probability of being stopped by the police is largely influenced by how much a person drivers, how well a person drives, where a person drives and, most importantly, where a police officer is assigned to work. While some benchmarks account for a few of these factors, none consider them all simultaneously.

The second most important question in racial profiling research is;

When stopped, are individuals of a particular racial or ethnic group treated differently?

The evaluation of events occurring during and immediately after traffic and pedestrian stops (e.g. searches and arrests, respectively) is usually not hampered by the type of measurement problems discussed in the previous section. There is no externally developed benchmark. The stop data themselves measure the actual racial and ethnic proportions within this population. The most important challenges in this part of the research are caused by a lack of detail in the data and an uninformed analysis of routine police procedures.

A lack of detail in police stop data threatens our ability to evaluate the quality of police officer decision making. The most instructive example of this is our inability to correlate (associate) the ***dangerousness*** of a driver's alleged behavior with the ***harshness*** of a police officer's response to it. Ideally, the more dangerous the driver's behavior the more likely it is he will be stopped and the more punitive the officer's response should be. In racial profiling research it is important for us to determine the correlation between these two factors so we can be sure that the driver's alleged behavior, not his race or ethnicity, influenced the police officer's enforcement decision to either warn, cite or arrest.

We expect that a Black and White driver suspected of committing the same violation would receive the same response from a police officer. Unfortunately, the data do not allow us to conduct this type of analysis. The attributes for the variable describing the harshness of a police officer's response can be ordered logically on a scale from verbal warning – written warning – citation – arrest. The attributes we tend to use for the variable describing the reason for the stop (e.g. traffic violation, equipment, etc.) are overly broad and cannot be ordered logically with respect to their relative level of dangerousness.

In far too many instances the analysis and interpretation of racial profiling data does not account for subtle, yet important, distinctions in routine police practices. The most serious mistake many analysts make is to not differentiate between the motivations or justifications for the types of searches. Some searches (e.g. incident to arrest and inventory) are required by law or department policy. Other searches (e.g. plain view and warrant based) are predicated on some level of articulated proof that a crime has or is being committed. Some (e.g. *Terry* or pat down) are allowed to enhance officer safety.

Within the context of racial profiling, the most important type of search is the ubiquitous consent search. These searches require no level of proof. Most people, when asked, will readily consent to a search. This discretionary authority, along with a traffic code that provides thousands of legitimate reasons to initiate a pretextual traffic stop, create an important power dynamic in favor of the police officer. The consent search, or more accurately the police officer's unbridled use of this discretionary authority, should be the focus of the analyst's attention.

In summary, we have come a long way in racial profiling research over the past fifteen years; however, there is still a long way to go.

The Appropriate Use of Race and Ethnicity in Policing Policy and Procedure

I am often asked about the appropriateness of information relating to an individual's race or ethnicity in police officer decision making. To what extent should race and ethnicity influence the decisions criminal justice actors make on a regular basis? Should race and ethnicity be a part of a suspect profile? The answer lies on a continuum from ***identifier*** to ***indicator***.

As an ***identifier*** race and ethnicity are indispensible. Along with other physical, behavioral and demographic features, information about an individual's race and ethnicity (or skin color) is often essential to accurate identification. For good reason, racial and ethnic information are often included in published descriptions of criminal suspects, missing persons and potential witnesses. Such information enables police officers to be more efficient and accurate.

As an ***indicator*** race and ethnicity are, at best, a distraction. There is no evidence, at all, that race and ethnicity play any role in criminal propensity. The use of race and ethnicity in suspect classifications and profiles is counter-productive. Spectators of the racial profiling controversy point to arrest, conviction and incarceration rates as evidence that racial and ethnic minorities are more likely to be involved in serious criminal activity. While it is generally true that racial and ethnic minorities are over-represented in arrests, convictions and incarcerations, there is scant evidence that they are necessarily more likely to be involved in criminal behavior.

For example, the findings from two important measures of criminal behavior are in stark contrast. The National Household Survey of Substance and Drug Abuse (2000) finds that the same proportion of Blacks and Whites (12 to 13 percent, respectively) say they use illegal substances. This same survey finds that among actual users of crack cocaine; 71.3 percent are White, 17.3 percent are Black and 7.9 percent are Hispanic. The United States Sentencing Commission (2000) reports that arrestees for crack cocaine are 5.7 percent White, 84.3 percent Black and 9.0 percent Hispanic. The National Household Survey of Substance and Drug Abuse finds that among users of power cocaine, 81.3 percent are White, 7.7 percent are Black and 8.5 percent are Hispanic. The United States Sentencing Commission reports that arrestees for powder cocaine are 18.2 percent White, 30.2 percent Black and 50.5 percent Hispanic. These disparities may lie in where these particular drugs are bought, sold and consumed. [ii] (see Table 1).

Table 1 – Percentage of (self-reported) users and arrestees by race for crack and powder cocaine.

	National Household Survey		U.S. Sentencing Commission	
	Powder cocaine users	Crack cocaine users	Powder cocaine arrestees	Crack cocaine arrestees
White	81.3 %	71.3 %	18.2 %	5.7 %
Black	7.7 %	17.3 %	30.2 %	84.3 %
Hispanic	8.5 %	7.9 %	50.5 %	9.0 %

Note: Percentages will not necessarily total 100% because not all racial/ethnic categories are represented

The perception that minorities are more likely to be drug couriers is also not supported by the empirical evidence. The reason more Blacks are arrested (proportionally) is that more are being searched.[iii] There is no credible or objective data that legitimizes police attention on one racial group.[iv] Arrest and convictions rates are not measures of criminality, they are measures of police activity.[v]

What Racial Profiling Research Must do to Remain Viable as an Agent of Change

The continued improvement and expansion of racial profiling research is essential to the professional and ethical development of American policing. The contribution of this research agenda to our understanding of policing systems and practices is unquestionably valuable. Beyond this, however, the value of this research will someday lie in its ability to fully document and describe the policing function. To insure this outcome researchers like me must do two things.

First, it is essential that the data we collect be of sufficient detail and quality to fully explain how the contexts of a police/citizen interaction affect police officer decision making. Our ability to isolate the influence of race and ethnicity on police officer decision making is dependent upon our ability to discount plausible alternative explanations. Our comparisons of stop events must truly reach the point where *all things are equal*, except for the race or ethnicity of the driver, before we will legitimately be able to allege racial bias.

Second, when presented with new enforcement challenges we must insist on learning from our past. There has been a great deal of talk lately about Arizona's new immigration law. I for one am not inclined to join in this melee by making a prediction on whether or not this new law might lead to racial profiling. It is, however, important to remind ourselves that we have been down a similar path. In the late 1980's the United States Drug Enforcement Administration published a series of drug courier profiles and offered training to local agencies on how to interdict illegal narcotics traffic. They said that interdiction should occur as a natural extension of a local agency's routine law enforcement process. When a police officer stops an individual for a routine violation and that individual looks or behaves consistent with the drug courier profile then, and only then, should the interdiction process begin. Unfortunately, there is compelling evidence that a few police officers truncated these profiles and used pretextual stops as a means of targeting suspected drug couriers. This practice contributed greatly to the racial profiling controversy. The Arizona immigration law, despite its amendments, does not preclude an officer from doing the same thing upon observing a suspected illegal alien, thereby putting the officer at risk of relying upon an individual's ethnicity in making the decision to stop. Again, let me be clear. I am not predicting an increase in racial profiling in Arizona. I am far more confident in the police than that. I am merely suggesting that we should consider the potential for this and similar outcomes while developing criminal justice policy.

Conclusion

About two years ago I had come to the conclusion that the racial profiling research agenda had run its course. I was convinced that I should move on and focus my scholarship into other areas like police officer decision making. I now know that I was wrong.

Racial profiling is as relevant today as it was fifteen years ago. In fact, the controversy has expanded considerably. We now regularly hear the term in 'racial profiling' in contexts far removed from traffic stops; like airport security, immigration, shopping and even medical diagnostics. The issues are the same, only the context has expanded.

I am encouraged, however, at what has changed. Nearly every day I meet with policing leaders, prosecutors and criminal justice policy makers who are concerned about the racial profiling controversy. Gone are the days when a police administrator merely scoffed at a racial profiling allegation as the musings of a malcontented citizen. I am encouraged by the fact that they take this issue very seriously. These leaders are making a difference, and these leaders are in the majority.

Again, I appreciate the opportunity to appear before you this afternoon. I would of course be pleased to respond to any questions you may have at the appropriate time.

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[i] Alpert, G.P., Dunham, R.G. and Smith, M.R. (2007). Investigating racial profiling by the Miami-Dade Police Departments: A multi-method approach. Criminology and Public Policy (6). 1. pp. 25-55.
[ii] Statistical Assessment Service (STATS). 1999. Race and Crime: Is "Profiling" Reasonable? Retrieved September 24, 2001, from http://www.stats.ort/newsletters/9904/profile.htm.
[iii] Ramirez, D., McDevitt, J. and Farrell, A. 2000. A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned. Washington, DC: United States Department of Justice, Bureau of Justice Assistance.
[iv] Covington, J. 2001. Round up the usual suspects: Racial profiling and the War on Drugs. In *Petit Apartheid in the United States Criminal Justice System; The Dark Figure of Racism*, ed. D. Milovanivic and K. K. Russell, 27-42. Durham, NC: Carolina Academic Press.
[v] Harris, D. A. 2002. *Profiles in Injustice: Why Racial Profiling Cannot Work.* New York: New Press.; Statistical Assessment Service (STATS). 1999. Race and Crime: Is "Profiling" Reasonable? Retrieved September 24, 2001, from http://www.stats.ort/newsletters/9904/profile.htm.

Racial Profiling

What We Know		*What We Don't Know*
Are minority drivers more likely to be stopped than non-minority drivers?		
When compared to benchmarks (estimates of the driving population by race and ethnicity) most studies show that minority drivers are stopped by the police in higher proportions. Some researchers conclude from this that minority drivers are more likely to be stopped by the police.	↔	No benchmark yet exists that accurately measures the populations of individuals that are not stopped, much less the racial and ethnic proportions of these populations. In the absence of such a measure no credible researcher can conclusively state that racial and ethnic minorities are more at risk of being stopped solely because of their minority status.
If so, does this constitute racial profiling?		
Most researchers and police administrators define racial profiling as any police initiated action that primarily relies on race or ethnicity rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been engaged, in criminal activity.	↔	Only one researcher has actually measured whether police officers are even aware of the race or ethnicity of suspects *prior* to the stop. Furthermore, no researcher has yet measured whether an officer's knowledge of an individual's race or ethnicity *actually influenced* the officer's decision to initiate a traffic stop.
Are there differences in the reason for the stop between minority and non-minority drivers?		
The stated reason(s) for a traffic stop do not differ between minority and non-minority drivers.	↔	The reason for the stop is measured very broadly so no relationships can be established between the race or ethnicity of the driver and the reason for the stop.
When stopped, are minority drivers searched more frequently than non-minority drivers?		
Searches are more likely during stops involving minority drivers.	↔	Many researchers do not consider the type of search (consent, incident to arrest, inventory, warrant, probable cause, etc.) when making this conclusion. When this factor (i.e. officer's discretion) is considered differences among racial and ethnic groups often disappear.

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Mr. NADLER. Thank you.

I will now recognize Professor Ramirez for 5 minutes.

TESTIMONY OF DEBORAH RAMIREZ, PROFESSOR OF LAW, NORTHEASTERN UNIVERSITY LAW SCHOOL

Ms. RAMIREZ. Thank you, Chairman Nadler, Representative Conyers and esteemed Members of this Subcommittee, for giving me this opportunity this afternoon to testify.

I would like to share with you some of the lessons that I have learned over the past 10 years in working on racial profiling issues.

And I am going to speak first about racial profiling in the context of national security.

The first and most important lesson that I have learned is this. Racial profiling is not an effective component of a counter-terrorism strategy. It is a sloppy and lazy substitute for the kind of strategic and intelligent law enforcement that we need to keep our homeland safe. And while it may be tempting to target Arabs and Muslims, using race, religion or ethnicity as a proxy for involvement in crime is both too broad and too narrow.

It is too broad, because the vast majority of Arabs in this world are non-violent, law-abiding people, not dangerous terrorists.

And it is too narrow, because there is no such thing as a "Middle Eastern look." Arabs come in all colors and sizes, and numerous Americans who trace their heritage to Mexico, Spain, Greece, India, Italy all share a "Middle Eastern look."

Moreover, most of the accused terrorists are not Arab. They are John Walker Lind, a White American; Zacarias Moussaouri, an African with a French passport; Richard Reid, a half-West Indian, half-Englishman with a British passport; Jose Padilla, Latino; David Hicks, Australian; and Colleen LaRose, also known by most of us as Jihad Jane, a blond, middle-aged, White American; and Daniel Patrick Boyd, a middle-aged, White American male from North Carolina.

All of these people accused of terrorism do share one characteristic. They are Muslim. But Muslims are 20 percent of the world's population and can be of any nationality or origin, including African and Asian. Moreover, adding Muslims would now broaden the profile to the point of uselessness, because it creates an array of characteristics too widely shared to be meaningful.

Second, I have learned that whenever we profile terrorists or criminals, they are going to respond by modifying their behavior and recruitment practices. If we target Middle Eastern-looking males, they will respond with someone like Jihad Jane.

The second lesson I have learned is this, and I learned this from counter-terrorism agents. They tell me the key to effective counter-terrorism is information. And much of the information they need to thwart terrorism, especially home-grown terrorism and radicalization, resides within the Arab, Muslim and Sikh communities. When law enforcement officers partner with these communities, the communities are more likely to share information with them about suspicious behavior or newcomers.

We know that potential terrorists often try to evade law enforcement by exploiting the cultural and linguistic characteristics they share with these communities. By working with law enforcement to make their communities immune from terrorism, they can become a critical component of a national deterrence strategy. This approach not only produces stronger community relationships, it also results in more effective counter-terrorism.

The third, very important lesson I have learned is this. We cannot indiscriminately target, arrest, profile, detain, fingerprint and harass this community in the morning and then ask them to partner with us to thwart terrorism in the afternoon. If we need community tips to thwart terrorism—and we do—particularly home-

grown terrorism, then we cannot continue to engage in racial profiling, a practice which alienates and angers the communities.

The fourth lesson I have learned is that truly smart policing involves the strategic and intelligent use of information to target individuals based on their behavior. Successful behavioral assessment systems have been developed and used in a variety of settings.

The fifth lesson I have learned is this. To prevent profiling, you need to collect data on the race and ethnicity of those stopped and searched. I urge this Committee to support Federal legislation that would require law enforcement agencies to collect data on the stops and the seizures they conduct. This would allow agencies and officials to monitor their own conduct and evaluate whether a department, or officers within it, are engaged in profiling. Why? Because we cannot possibly manage what we do not measure.

And the final lesson I have learned is that effective community-oriented policing and data collection efforts need to have a proper infrastructure to succeed. Thus, we need congressional funding for an academic center to guide and implement these ideas that will improve the quality of policing in this country.

Thank you. I welcome your comments.

[The prepared statement of Ms. Ramirez follows:]

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Hearing on Racial Profiling and the Use of Suspect Classifications in Law Enforcement Policy

June 17, 2010

Testimony of

Ms. Deborah Ramirez

Professor of Law

Northeastern University Law School

Thank you for allowing me to testify this afternoon about racial profiling. Having worked on this issue with community groups and law enforcement for over ten years, I would like to share with you some of the lessons I've learned. I am going to speak first about racial and religious profiling in the context of national security.

The first and most important lesson is this: racial or religious profiling is neither a necessary nor effective component of a comprehensive law enforcement and/or counterterrorism strategy. It is a sloppy and lazy substitute for the kind of strategic and intelligent law enforcement that we need to keep our homeland safe. While it may be tempting to target Arabs and Muslims, using race, religion or ethnicity as a proxy for involvement in crime is both too broad and too narrow.

Targeting Arabs is too broad because most of the Arabs in this world are non-violent, law-abiding people not dangerous terrorists.

It is too narrow because there is no such thing as a "Middle Eastern" look. Arabs come in all colors and sizes. Egyptians can be blue-eyed and blonde. Numerous Americans who trace their heritage to Mexico, Spain, Greece , India and Italy all share a "Middle-Eastern" look. Indeed, many of the most famous accused terrorists are not Arab. They are: John Walker Lind, a white American; Zacarias Moussaouri, an African with a French passport; Richard Reid, a Half-West Indian, half Englishman with a British passport; Jose Padilla, a Hispanic American; David Hicks, an Australian; Colleen LaRose,(aka Jihad Jane) a blonde, middle-aged, white American; and Daniel Patrick Boyd, a middle-aged white American male from North Carolina.

Many of them share one characteristic: They are Muslim. But adding Muslim to the profile also complicates matters. Muslims can be of any nationality or origin, including African and Asian. Moreover, it would broaden the category to the point of uselessness because it is a characteristic shared by 20 percent of the world population. It is simply too widely shared a characteristic to be meaningful.

Second, whatever profile we create, terrorists and criminals will respond by modifying their behavior and recruitment practices. If we target " Middle-Eastern" looking males, they will respond with a Jihad Jane - - a blonde , white, middle-aged woman who does not fit the profile.

The second lesson I learned is this: The key to effective counterterrorism is information. Much of the information needed to thwart terrorism, including homegrown terrorism and radicalization resides within the Arab, Muslim and Sikh communities. When law enforcement officers partner with these communities, the communities are more likely to share information about any suspicious activity or unusual newcomers. Through these partnerships law enforcement agencies can also obtain the cultural and linguistic insights that might help them to better understand and evaluate the information they receive. Moreover, potential terrorists often look to evade law enforcement by exploiting the cultural and linguistic characteristics they share with certain American communities. By working with law enforcement to make their communities immune from enemies within and enemies outside of their neighborhoods, they can become a critical component of a national deterrence strategy. This approach not only produces stronger community relationships, it also results in a more effective counter- terrorism strategy.

The third lesson I have learned is this: We cannot indiscriminately target, arrest, profile, deport, fingerprint and harass this community in the morning and then ask them to partner with us to thwart terrorism in the afternoon. If we need community tips to thwart terrorism, particularly homegrown terrorism, then we cannot continue to engage in racial profiling, a practice which alienates and angers community members who feel that they are being unjustly targeted.

The fourth lesson I've learned is that smart policing involves the strategic and intelligent use of information to target individuals based on their behavior. Successful behavioral assessment systems have been developed and use in a variety of settings.

The fifth lesson I've learned is that to prevent profiling, you need to collect data on the race and ethnicity of those being stopped and searched. I urge this committee to support federal legislation that would require that as a condition of receiving federal funds, law enforcement agencies begin to collect data as to each stop conducted, identifying the name of the officer, the name, race, and ethnicity of the person stopped, and the reason for the stop. This would allow law enforcement agencies and reviewing officials to monitor their own conduct and evaluate whether a department, or certain officers within the department, are engaging in racial profiling.

The final lesson I have learned is that effective community-oriented policing and data collection efforts need to have the proper infrastructure to succeed. Thus, Congressional funding for an academic center to guide and implement these ideas will improve the quality of policing in this country.

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Mr. NADLER. Thank you.
I will now recognize Mr. Singh for 5 minutes.

TESTIMONY OF AMARDEEP SINGH, PROGRAM DIRECTOR, SIKH COALITION

Mr. SINGH. I would like to wholeheartedly thank the leadership of this Committee, Chairman Conyers and Chairman Nadler, and the Members of this Committee, for the opportunity to appear before you today.

The topic we discuss today has vital implications for the safety of all Americans and our freedom as Americans. To be direct, my humble submission today is that the use by law enforcement of classifications based on race, national origin, religion or ethnicity has severely undermined both our liberty and our safety. As the experience of the Sikh American community makes clear, profiling is invariably inaccurate, inevitably misused and ultimately detrimental to the important work of our men and women in uniform.

In short, we profile, we lose.

By way of background, I am the co-founder and director of programs at the Sikh Coalition. The Sikh Coalition was founded on 9/11 in the wake of the ugly torrent of hate crimes and misguided discrimination against our community. I say Sikh Americans have endured misguided discrimination, because our community has had no association whatsoever with the people and the organization that attacked our country on 9/11.

Yet, since 9/11, hundreds of thousands, if not millions, of Sikhs have endured enhanced screening at airports across America. These screenings occur after a Sikh has already successfully passed through a metal detector. They are conducted in full public view, usually in a segregated glass box. It involves a public pat-down of a Sikh's turban, and at times even its removal.

One Sikh who was affected by this enhanced screening is Narinder Singh, a member of the Sikh Coalition's board of directors. Narinder was born and raised in Cincinnati, Ohio. He is a Wharton School of Business MBA who co-founded a technology company in the Silicon Valley which employs hundreds of Americans. His wife is a doctoral student at Harvard. He is also a frequent air traveler. He has flown this year over 30 times alone for business.

By his estimate, he has been pulled aside for enhanced screening more than 27 times. Amazingly, the TSA expends time and effort on these screenings of Sikhs, even though there are no Sikhs who are considered a threat to the security of the United States. Rather than better focus our efforts, the Sikh Coalition has found that at some airports, Sikhs are pulled aside for extra screening 100 percent of the time.

Yet, experience tells us that there is no reliable profile of a terrorist who would do our country harm. Consider the picture that I have put up there for your consideration and in my testimony. With the exception of the Sikh gentleman who is pictured, all four of the other people have either completed or have been accused of engaging in terrorism against the United States in the past 2 months.

The Sikh picture here is an enlisted officer in the United States Army. Sadly, none of this matters to the TSA officers who have subjected this Sikh Army officer and patriot to multiple enhanced screenings across the country. Perhaps this is why NYPD Police

Commissioner Ray Kelly; former Department of Homeland Security secretary, Michael Chertoff; former director of the CIA, General Michael Hayden; and the chief of security for Ben Gurion Airport in Tel Aviv, Israel, have all declared profiling to be ineffective and even dangerous to the security of our country.

Yet despite these declarations, profiling occurs rampantly, as the Sikh experience demonstrates. Unfortunately, like many law enforcement officers, TSA officers have extremely wide discretion to pull aside whoever they choose, with little to no oversight and accountability. Should it surprise us then that from February 2003 to September 2003, Nathaniel Heatwole, a White college student, was able to smuggle box cutters, matches, bleach and razor blades onto planes in the United States.

This is what happens when we lose our focus on behaviors and instead focus on external appearances. We profile, we lose. We are tired of hearing from law enforcement that profiling is ineffective, while their officers often engage in profiling every day. This doublespeak needs to end.

What is necessary to combat profiling is an effective law that allows for two simple yet powerful means of addressing profiling directly: one, a system of data collection that provides the public with insight into who is being stopped and whether the stop yields an arrest; and two, an individual right of action in a court of law to bring claims of profiling. Without these protections we end up with what is effectively collective punishment for minority communities in the United States.

What do I mean by collective punishment? Consider the picture to my left. This is a picture of my 18-month-old son, Azaad. His name means "freedom." He is a third generation of Americans in our family.

This past April, my family and I were coming back to the United States from a family vacation. At Fort Lauderdale Airport, not only was I subjected to extra screening, but so was my son. I was sadly forced to take my son Azaad into the infamous glass box so that he could be patted down. He cried while I held him.

He did not know who that stranger was who patted him down. His bag was also thoroughly searched. His Elmo book number one was searched. His Elmo book number two was searched. His minimail truck that he loves was searched.

The time spent waiting for me to grab him as he ran through the glass box was wasted time. The time going through his baby books was wasted time.

I am not sure what I am going to tell him when he is old enough and asks why his father and his grandfather and soon him—Americans all three—are constantly stopped by the TSA 100 percent of the time at some airports.

It is not fair. It is not safe. It is not American. There is something wrong with a system that will allow a Sikh baby and his bag to be searched for 15 minutes, but allows Nathaniel Heatwole to pass through security six separate times with box cutters and dangerous liquids.

This Subcommittee and this Congress has the power to stop this Groundhog's Day dynamic of profiling by enacting landmark legis-

lation to address this. In the process, we will make America not only safer, but better.

I thank you for your time and consideration.

[The prepared statement of Mr. Singh follows:]

PREPARED STATEMENT OF AMARDEEP SINGH

Testimony of Amardeep Singh

Director of Programs

The Sikh Coalition

before the

House Judiciary Committee

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

on

Racial Profiling and the Use of Suspect Classifications in Law Enforcement

June 17, 2010

I would like to wholeheartedly thank the Judiciary Committee and the Subcommittee on the Constitution, Civil Rights, and Civil Liberties for the opportunity to appear before you today. I am also thankful for Chairman Conyer's leadership of the Judiciary Committee and Chairman Nadler's leadership of this Subcommittee and to the Ranking Member of the Subcommittee, Congressman Jim Sensenbrenner.

The topic we discuss today --- racial profiling and the use of suspect classifications in law enforcement --- has vital implications for the safety and freedom of all Americans.

To be direct, it is my humble submission today that the use by law enforcement of classifications based on race, national origin, religion, or ethnicity has severely undermined both our liberty and our safety. As the experience of the Sikh American community makes clear, the use of these classifications by law enforcement is invariably inaccurate, inevitably misused, and ultimately detrimental to the important work of our men and women in uniform. In short, we profile, we lose.

By way of background, I serve as the Director of Programs at the Sikh Coalition. The Sikh Coalition is the largest Sikh American civil rights organization. I co-founded the Sikh Coalition on the night of 9/11 in the wake of an ugly torrent of hate crimes and misguided discrimination against the Sikh American community.

Like all Americans, Sikh Americans have contributed richly to our country. The largest federal court security contractor for the U.S. Marshals Service is a Sikh American-owned company. The inventor of fiber optics is a Sikh American. The newly installed CEO of Mastercard is a Sikh. America's largest peach grower is a Sikh American. Sikhs proudly serve in the United States Army. And last, but not least, one of the first doctors to arrive on the scene to treat victims at Ground Zero on 9/11 is a Sikh.

However, when my fellow Americans look at me or any other Sikh, they don't always see a fellow American. Sadly, some associate the turban, which is a mandatory article of faith in the Sikh religion, with terrorists such as Osama bin Laden. I can say with great assurance that 99 percent of the persons who wear turbans in this country are Sikh Americans, and there lies the very cruel irony of the Sikh American experience since 9/11.

Not only have Sikhs in the United States endured "backlash" discrimination, but we have also been the victims of great ignorance about our background. As a result, while the vast, vast majority of Americans continue to welcome and embrace Sikhs as neighbors, co-workers, and friends, there have sadly been too many Sikhs who have suffered verbal harassment, damage to property, beatings, workplace discrimination, school bullying, and humiliating and invasive profiling at airports since 9/11.

It is this last piece --- the Sikh American experience at our nation's airports --- that I would like to discuss more with this Subcommittee. I believe the Sikh community's experience at airports around the country makes clear the use of suspect classifications by law enforcement – race, national origin, religion, or ethnicity --- is misguided at best and dangerous at worst.

As you may be aware, since 9/11, hundreds of thousands, if not millions, of Sikhs have endured "enhanced" screening at airports across America. Such screening requires officers of the Transportation Security Administration ("TSA") to expend unnecessary time and energy to pull aside Sikhs for additional screening after they have already cleared a metal detector.

These screenings are conducted in full public view, usually in a segregated glass box. The screening usually involves a public pat down of a Sikh's turban (many do not know that they have the option of a private screening) and at times even its removal. Airline passengers who are about to travel with Sikh passengers often view Sikhs being pulled aside for extra screening by officers, thereby undermining their confidence in their fellow Sikh passenger.

This enhanced screening affects Sikhs both young and old, well-settled third and fourth generation Sikh Americans, and newer immigrants to our country. This enhanced screening occurs despite the fact that each day Sikh Americans are at the forefront of making America stronger and more prosperous.

One such Sikh is Narinder Singh, a member of the Sikh Coalition's Board of Directors. Narinder was born and raised in the heartland of America, near Cincinnati, Ohio. He is a Wharton School of Business M.B.A., who co-founded a technology company in the Silicon Valley which now employs hundreds of Americans. His wife is currently a doctoral student at Harvard University.

Narinder is also a frequent air traveler. He has flown over thirty times this year alone. By his estimate, he has been pulled aside for enhanced screening more than 27 times. In February, Narinder was even told that he would have to remove his religiously-mandated turban for inspection if he wanted to travel out of Dallas Forth Worth Airport.

Amazingly the TSA expends time and effort on these screenings of hundreds of thousands of Sikhs like Narinder even though there are no Sikhs who are considered a threat to the security of the United States.

Though the TSA has a policy that officially bars its officers from engaging in profiling, in truth the officers of the TSA (like many law enforcement officers whether they be at the border, highway, or airport) have extremely wide discretion to pull aside whoever they chose with little to no oversight and accountability. The result is what I believe to be a colossal waste of time and violation of the fundamental constitutional rights of law-abiding Americans.

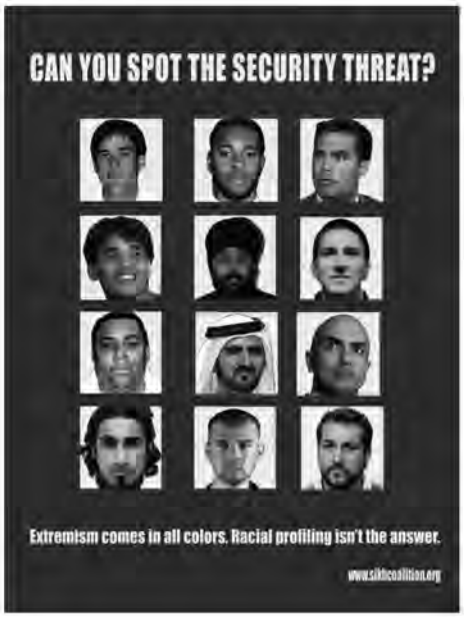
Indeed, experience tells us that there is no reliable profile of a terrorist who would do our country harm. Consider the following picture:

The first man pictured on the left, John Patrick Bedell, started shooting at police officers at the Pentagon Metro Station stop in Arlington, Virginiaearlier this year, as a result of his extremist anti-government views. The second man, Joseph Stack, flew an airplane into an IRS building in Austin, Texas earlier this year, again because of his extremist anti-government views. Both men are considered "martyrs" by their supporters online. The two women pictured here --- Collen LaRose and Jaime Paulin-Ramirez --- were both accused by the federal government of planning terrorist killings last March.

The Sikh pictured here is an enlisted dentist in the United States Army. He recently volunteered to be deployed in Afghanistan. Sadly none of this matters to the many law enforcement officers who possess unchecked discretion and have used it to subject this U.S. Army soldier to enhanced screenings at airports across the country.

The law enforcement resources wasted on these misguided searches of Sikhs – which again number in the millions --- is highly troubling. It is especially troubling considering that our experience since then tells us terrorists are determined to circumvent any and every profile we create.

Consider also the following picture:



Can you spot who may be a threat to our national security here? Some of the people pictured here — and they span every race and religion — have committed acts of terrorism around the world. On the other hand, some of persons depicted include a Bush Administration official, a current Saturday Night Live comedian, and a former member of the rock band *NSYNC.[1]

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1 The persons depictured in order are: Eric Robert Rudolph (Atlanta Olympics 2006 bomber; Germaine Lindsay (London subway 7/7 bomber); George P. Bush (son of Governor Jeb Bush); Amrozi (convicted Bali 2003 bomber); Captain Kamaljeet Singh Kalsi (U.S. Army doctor); Timothy McVeigh (Oklahoma City bomber); Keenan Thompson (comedian); Sheik of Dubai; Neel Kashkari (former U.S. Treasury Department official); Shehzad Tanweer (London bomber); John Walker Lindh (former Taliban soldier); Joey Fatone (NYSNYC)

Are you confused? So am I. Perhaps that is why New York City Police Commissioner Ray Kelly declared profiling to be "just nuts."2 In an interview, Commissioner Kelly went on to declare:

> "We [the NYPD] have a policy against racial profiling… it is the wrong thing to do, and it's also ineffective. If you look at the London bombings, you have three British citizens of Pakistani descent. You have Germaine Lindsay, who is Jamaican. You have the next crew, on July 21st, who are East African. So whom do you profile?"

Commissioner Kelly is not alone. In response, to the failed Christmas Day attack this past December, General Michael Hayden, former Director of the Central Intelligence Agency and former Director of the National Security Agency, stated,

> "[H]e [the accused Christmas Day bomber] would not have automatically fit a profile if you were standing next to him in the visa line at Dulles, for example. So it's the behavior that we're attempting to profile. And it's the behavior, these little bits and pieces of information that were in the databases, that we didn't quite stitch together at this point in time. But it wasn't a question of ethnicity or, or religion… it's what people ***do*** [emphasis added] that we should be paying attention to."3

Agreeing with General Hayden, former Department of Homeland Security Secretary Michael Chertoff stated that:

> "I think relying on, on preconceptions of stereotypes is, is actually kind of misleading and arguably dangerous… what I would say is you want to look at things like where has a person traveled to, where have they spent time, what has their behavior been. But recognize, one of the things al-Qaeda's done is deliberately tried to recruit people who don't fit the stereotype, who are Western in background or appearance. Look at a--like a guy like an Adam Gadahn, who grew up in California, who's one of the senior level al-Qaeda operatives but does not fit the normal prejudice about what a--an extremist looks like."

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2 See, "Troublemakers: What pit bulls can teach us about profiling," New York Magazine, February 6, 2006. Accessible at: http://www.newyorker.com/archive/2006/02/06/060206fa_fact?currentPage=all
3 See, Meet the Press Transcript, January 3, 2010. Accessible at: http://www.realclearpolitics.com/articles/2010/01/03/john_brennan_michael_chertoff_michael_hayden_on_meet_the_press_99758.html

I am sure the members of the Committee and I hope most Americans respect the service and expertise of General Hayden, Secretary Chertoff, and Commissioner Kelly on issues like profiling.

Indeed, profiling simply does not withstand empirical scrutiny. As we have heard or will hear today, the numbers just do not add up.

Last month the New York Times reported that Blacks and Latinos were nine times as likely as whites to be stopped by the New York City Police Department, but, once stopped, were no more likely to be arrested.[4] In other words while Blacks and Latinos were stopped and frisked 490,000 times compared to 53,000 times for whites in New York City last year, the number of stops that led to arrest --- or what is known as the "hit rate" --- was slightly above 6% for whites and slightly less than 6% for Blacks. That's a great deal of trouble for little law enforcement reward.

And what's more amazing about New York City is that we've been here before! Ten years ago, the New York State Attorney General found that while Blacks and Latinos made up almost 3/4s of the persons stopped by police, the rates at which the stops led to an arrest was less for both Blacks and Latinos than whites.

Again the numbers in New York City --- though more than ten years apart -- match up and they again make crystal clear: profiling does not work.

Should it surprise us then that from February 2003 to September 2003, Nathanial Heatwole (pictured on the left), a white college student, was able to smuggle box cutters, matches, bleach, and razor blades onto planes in the United States?[5] The TSA only discovered that he had been able to do so once he emailed them to say so.

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4 See, "New York Minorities More Likely to be Frisked," New York Times, May 12, 2010. Accessible at: http://www.nytimes.com/2010/05/13/nyregion/13frisk.html.

5 See, "Student Who Hid Box Cutters on BWI Flight Gets Probation," Washington Post, June 25, 2004. Accessible at: http://www.washingtonpost.com/wp-dyn/articles/A3739-2004Jun24.html.

This is what happens when we lose our focus on behaviors and instead focus on external appearances. While Nathaniel Heatwole was able to smuggle dangerous items onto airplane six separate times, innocent Sikhs were likely subjected to extra scrutiny for no other reason than their appearance. We profile, we lose.

Perhaps this is why Rafi Ron, who was chief of security at Ben Gurion airport in Tel Aviv, Israel, stated in response to the thwarted Christmas Day 2009 attack:

> One of the problems with racial profiling is that there's a tendency to believe that this is the silver bullet to solve the problem. In other terms, if you're a Middle Eastern or if you're a Muslim, then you must be bad. And if you're a European and Christian, then you must be good.
>
> But back in 1972, Ben Gurion Airport in Tel Aviv was supposed to be attacked by a Palestinian, was never attacked by one. It was attacked by a Japanese terrorist killing 24 people. And it was attacked in the mid-'80s by a German terrorist answering to the name Miller.[6]

So if the law enforcement experts — Ray Kelly, Michael Chertoff, Rafi Ron — tells us racial profiling does not work and the numbers do not add up, why do we continue to profile?

In part there is a Generals-Soldiers problem. In other words, while leadership states that profiling is not the policy of their Departments, their frontline officers engage in the type of crude profiling that is ineffective.

While Commissioner Ray Kelly says profiling is "nuts," we know the mere fact that you are Black or Latino in New York City makes you more susceptible to stops and searches even if the stop or search is less likely to lead to an arrest than a similar search of someone who is White.[7]

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6 See, "Challenge: Airport Screening Without Discrimination," National Public Radio, January 14, 2010. Accessible at: http://www.npr.org/templates/story/story.php?storyId=122556071.

7 See, "New York Minorities More Likely to be Frisked," New York Times, May 12, 2010. Accessible at: http://www.nytimes.com/2010/05/13/nyregion/13frisk.html.

While Secretary Napolitano says that profiling is not the policy of the TSA, the Sikh Coalition has found that Sikhs are pulled aside for enhanced screening 100% of the time at some airports in the country.[8]

So we know that there is a Generals-Soldiers problem when it comes to profiling. But there are also systemic problems that this Committee must address.

If I as a Sikh, believe that I have been subject to unfair scrutiny simple on the basis of my appearance again and again, what remedy do I have?

The answer is quite simple: There are no effective remedies. The current legal frameworks that exist, allow profiling. Take for example the 2003 United States Department of Justice Guidance on Racial Profiling.

First it should be noted that the Guidance itself is merely a Guidance, it does not have the force of law.

That being said, even as a mere Guidance, it is ineffective. It contains a gaping "national security" loophole which effectively states that the protections against profiling contained in the Guidance may be cast aside for vague and undefined reasons of national security.

It is this loophole ridden Guidance that forms the basis of the TSA's own anti-profiling Guidance. In this context it should come as no surprise that the TSA's anti-profiling guidance actually empowers TSA screeners to misguidedly profile Sikh passengers in the name of an undefined and unchecked national security exception.

Similarly, the administrative complaint systems in place are largely ineffective. Our organization has filed complaints of profiling to the Department of Homeland Security and the Transportation Security Administration on behalf of dozens of Sikh airline passengers over the years.

These administrative complaints are usually answered more than a year after they are filed and they inevitably find that TSA screeners did not engage in any unlawful conduct.[9] Many

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8 See The Sikh Coalition, The TSA Report Card: A Quarterly Review of Security Screenings of Sikh Travelers in U.S. Airports, Q2 2009 (Aug. 2009), accessible at https://salsa.wiredforchange.com/o/1607/images/2009%20Q2%20Report%20Card.pdf.

9 It should be noted that the relatively new head of the DHS Office of Civil Rights and Civil Liberties, Margo Schlanger, is working to reinvigorate the DHS Civil Rights Complaint process.

community members have come to the conclusion that the complaint process at DHS and TSA is like submitting complaints down a black hole that never sees the light of day.

Let's keep in mind that the Supreme Court has played a significant role in undermining the possibility of effective redress. In 1975, in United States v. Brignoni-Ponce, the Court held that "Mexican appearance" combined with other factors was enough to allow the United States Border Patrol to lawfully stop a vehicle. Similarly in 1996, the Court effectively held in Whren v. United States that the Fourth Amendment allows police to make pre-text stops or stops based on a genuine traffic violation but are often really a method of profiling in an attempt to discover a great infraction.

So from the Supreme Court to the law enforcement agencies themselves there exists a system that allows profiling and a huge vacuum of inaction by Congress. How can we fill this void?

What is necessary to combat profiling is an effective law that allows for two simple yet powerful means of addressing profiling directly: 1) a system of data collection that provides the public with insight into who is being stopped, how often, and whether the stops yielded an arrest; and 2) an individual right of action similar to long-standing civil rights protections that allow individuals to make statutory claims of a rights violation in a court of law.

Without these protections, we end up with what is collective punishment for minority communities in the United States but no means of addressing it. What do I mean by collective punishment? Consider this final picture:

Testimony of the Sikh Coalition Before the House Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
June 17, 2010

This is a picture of my 18 month old son Azaad. His name means "freedom." He is the third generation of Americans in our family. Hopefully, like his father, he'll be a New York Yankees fan.

Two months ago, my family and I were coming back to the United States from a family vacation in Playa Del Carmen, Mexico. At Fort Lauderdale Airport, not only was I subjected to extra screening, but so was he. I was sadly forced to take my son, Azaad, into the infamous glass box so that he could patted down. He cried while I held him. He did not know who that stranger was who was patting him down. His bag was also thoroughly searched. His Elmo book number one was searched. His Elmo book number two was searched. His mini-mail truck was searched.

The time spent waiting for me to grab him as he ran through the glass box was wasted time. The time spent going through his baby books was wasted time. I am not sure what I am going to tell him when he is old enough and asks why his father and grandfather and soon him --- Americans all three ---- are constantly stopped by the TSA 100% of the time at some airports.

It's not fair. It's not safe. It's not American. My son and my community are being collectively punished and there is no actual law enforcement benefit in exchange for this collective punishment. There is something wrong with a system that will allow a Sikh baby and his bag to be searched for 15 minutes but allows Nathanial Heatwole to pass through security six separate times with box cutters and dangerous liquids. We're profiling Sikhs and we're losing as a result.

We need this Subcommittee and this Congress to put an end to this senseless and dangerous dynamic if our law enforcement leaders who profess an aversion to profiling cannot. Without action, ten years from now we will engage in the exercise of again reviewing NYPD traffic stops and for a third time finding that while Blacks and Latinos make up 75% of those stopped, the rate at which they are arrested is less than whites.

This Subcommittee and this Congress has the power to stop this Groundhog's Day dynamic of profiling with no benefit from occurring again by helping to enact landmark legislation to address it. In the process we will make America not only safer, but better.

I thank you for your time and consideration.

Mr. NADLER. Thank you.
And I now recognize Professor Harris.

TESTIMONY OF DAVID A. HARRIS, PROFESSOR OF LAW, UNIVERSITY OF PITTSBURGH SCHOOL OF LAW

Mr. HARRIS. Good afternoon, Chairman Nadler, Chairman Conyers, Members of the Subcommittee. It is a great honor for me to be here to speak with you today.

We have to end racial profiling in this country, because doing so will help us create a sustained public safety gain and at the same time protect the civil rights of all the people in this country.

Now, some people will tell you that those two things do not go together, that one must trade civil rights for safety. That is wrong. That is not the American way. And it is not correct on any dimension.

We talk about racial profiling. We have had a number of definitions today. Mine is this: Racial profiling is the use of race or ethnic appearance as one factor among others—not the only factor, but one factor among others—in deciding who to stop, search, frisk or question.

Now, the reason that some proponents of this practice think this is a good idea, they think it will give police a boost. They think it will give them an edge. They think that it will target the "right" people, because, after all, we know who the criminals are. We know who the terrorists are, what they look like, what demographic groups they come from. And therefore, it gives them a way to target the right people.

Therefore, that will make our police and our national security efforts much more effective. We will hit more often. We will find more drugs and more guns.

But the data across the country—different departments, different studies—the data is quite clear; that is incorrect.

When race or ethnic appearance are used as one factor among others in deciding who to stop, frisk, search, or whatever, when that is done, the rate of hits, the rate of success for police goes down. It does not go up. It does not even stay the same. It goes down. It drops off, and measurably so.

Why is this? It goes back to one of the comments from another member of the panel.

If you want to find people who are busy committing, or might commit serious crime or terrorism, you want to know who is in the car with the drug load, or who has got the weapon in the airport, the only thing that predicts that is behavior. Behavior is what the police and the security services must focus on like a laser beam. Anything that takes their attention off of that is a net loss.

Now, they may still look at behavior as they pay attention to race, but race is, as Professor Withrow said, a distracter. You want to describe a person who has been seen by a witness, great. Race is a good way to describe somebody. It does not predict anything worthwhile.

Now, what are the public safety implications of this? Number one, if we can move our police departments away from profiling race and ethnicity and toward things like behavior profiling, like using intelligence and information in a smart way, like community policing, we will increase public safety.

So, this is not simply a matter of being nice to people. This is about everybody's public safety from crime and terrorism.

Number two, return to the idea of community policing—words that get said in every city and town around the country—central principle of community policing. The central principle is that communities and police work together as partners, as Professor Ramirez said. That is it. That is ground zero for that tactic, and it has been incredibly successful across the country.

Now, if you want to have a partnership, you have to trust each other. And if you trust each other, you exchange information. The community can give police information, can give anti-terrorism forces information. This is exactly what happened in Lackawanna, New York. That is the way that case was broken.

If, on the other hand, you put the focus on the community by using profiling, if everybody is a suspect, what will happen is that trust will be replaced by fear. And fear cuts off communication. No communication, no information, less successful law enforcement, less public safety.

Now, what is the part of civil rights enforcement in this whole scheme of things? There is no reason that we should have to give up or be told that we need to give up our civil rights in order to have public safety.

National legislation is needed on this to increase public safety, and because not all states or all police departments have come to grips with this, frankly. And plenty of Americans are living in towns and in states that do not have effective anti-profiling laws or anti-profiling policies.

On top of that, the United States Supreme Court has behind it two decades of decisions which vastly increased the discretion of police as far as drivers of vehicles, passengers in vehicles, pedestrians—police have vast discretion in situations like this.

Now, there is nothing wrong with our police officers having discretion. They have to have it. We want them to have it, but we want them to use it fairly.

And the lesson of the last 20 years is, when discretion is wide open, as the Supreme Court has charted the course for, you get profiling—not in every police department and not every police officer, but some places you get profiling. So, national legislation is necessary on this.

Its time has come, and it is a great honor to talk to you about it today. I look forward to your questions. Thank you.

[The prepared statement of Mr. Harris follows:]

PREPARED STATEMENT OF DAVID A. HARRIS

U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY

HEARING OF THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

ENDING RACIAL PROFILING: NECESSARY FOR PUBLIC SAFETY AND THE PROTECTION OF CIVIL RIGHTS

TESTIMONY OF

DAVID A. HARRIS

PROFESSOR OF LAW, UNIVERSITY OF PITTSBURGH

Author, *Good Cops: The Case for Preventive Policing* (2005), and *Profiles in Injustice: Why Racial Profiling Cannot Work* (2002)

Room 2141, Rayburn House Office Building

June 17, 2010, 2:00 p.m.

I thank Subcommittee Chairman Nadler and Ranking Member Sensenbrenner for convening this important hearing today and for allowing me to address this Subcommittee. The American people need to know that ending racial profiling is necessary for *both* the enhancement of public safety *and* the protection of civil rights. The use of racial or ethnic appearance as a way to target law enforcement efforts does not help police catch more criminals; rather, racial targeting nets fewer criminals, and in the bargain turns the public against police efforts. Protecting civil rights by ending racial profiling will help make us safer, and honor our country's commitment to equal justice under law.

The Connection Between Racial Profiling and Public Safety

The practice of racial profiling—defined as using racial or ethnic appearance as one factor (among others) in deciding who to stop, question, search, frisk or the like—has a very direct impact on the quality of the work police officers can do. In a nutshell, police departments that use racial or ethnic targeting do a poorer job at finding lawbreakers than departments that do not use this method. Just as important, departments that use racial targeting cut themselves off from the communities they serve, making their jobs more difficult and dangerous.

From those who advocate racial profiling, one frequently hears what we may call the profiling hypothesis: we know who the criminals are and what they look like, because we know what societal groups they come from; therefore using racial or ethnic appearance will allow police to better target their enforcement efforts; and when police target those efforts, they will be more effective, because they will get higher rates of "hits"—finding guns, drugs, criminals—than when they do not use racial targeting. Many people both inside and outside law enforcement have long assumed the truth of this idea. But the data produced in study after study

since the late 1990s prove otherwise. When a police department uses race or ethnic appearance to target its enforcement efforts—and to be sure, not all police departments do this—the rate of hits for the targeted group does *not* go up; it does not even stay the same. In fact, the rate of hits *drops*, by a statistically significant, measurable amount. This has proven true across multiple studies, in numerous locations, and in many different kinds of police agencies. Therefore, whatever people may believe, the data do not support the profiling hypothesis; the data contradict it. It is not, in fact, an effective crime-fighting strategy.

The reasons for these results originate with what profiling is supposed to be: a predictive tool that increases the odds of police finding the "right" people to stop, question, or search. Using race or ethnic appearance as part of a description of a person seen by a witness is absolutely fine, because that kind of information helps police identify a particular individual. On the other hand, using race as a predictor of criminal behavior, in situations in which we do not yet know about the criminal conduct—for example, when we wonder which of the thousands of vehicles on a busy highway is loaded with drugs, or which passenger among tens of thousands in an airport may be trying to smuggle a weapon onto an airplane—throws police work off. That is because using race or ethnic appearance as a short cut takes the eye of law enforcement off of what really counts. And what really matters in finding as-yet-unknown criminal conduct is the close observation of behavior. Paying attention to race as a way to more easily figure out who is worthy of extra police attention takes police attention off of behavior and focuses it on appearance, which predicts nothing.

The other reason that racial or ethnic profiling interferes with public safety is that using this tactic drives a wedge between police and those they serve, and this cuts off the police officer from the most important thing the officer needs to succeed: information. For more than two

decades, the mantra of successful local law enforcement has been community policing. One hears about community policing efforts in every department in every state. The phrase means different things in different police agencies. But wherever community policing really takes root, it comes down to one central principle: the police and the community must work together to create and maintain real and lasting gains in public safety. Neither the police nor the public can make the streets safe by themselves; police work without public support will not do the whole job. The police and those they serve must have a real partnership, based on trust, dedicated to the common goal of suppressing crime and making the community a good place to live and work. The police have their law enforcement expertise and powers, but what the community brings to the police—information about what the real problems on the ground are, who the predators are, and what the community really wants—can only come from the public. Thus the relationship of trust between the public and the police always remains of paramount importance. This kind of partnership is difficult to build, but it is neither utopian nor unrealistic to strive for this kind of working relationship. In other words, this is not an effort to be politically correct or sensitive to the feelings of one or another group. Thus these trust-based partnerships are essential for public safety, and therefore well worth the effort to build.

When racial profiling becomes common practice in a law enforcement agency, all of this is put in jeopardy. When one group is targeted by police, this erodes the basic elements of the relationship police need to have with that group. It replaces trust with fear and suspicion. And fear and suspicion cut off the flow of communication. This is true whether the problem we face is drug dealers on the corner, or terrorism on our own soil. Information from the community is the one essential ingredient of any successful effort to get ahead of criminals or terrorists; using profiling against these communities is therefore counterproductive.

Protecting Civil Rights

When police use racial or ethnic targeting, we put a government-created burden on the targeted communities. We effectively say to them that being frisked on the way to the grocery store or thoroughly searched in the airport, on the basis of their racial or ethnic appearance, is only "a minor inconvenience" they have to tolerate so that we can all be safe.

Surely, being frisked or having one's belongings searched in public is more than just a minor inconvenience, even if these actions do not amount to arrest. The Supreme Court itself has said that being stopped and frisked is in fact not a minor annoyance but an intrusion on one's Fourth Amendment rights, no matter how brief the incident may be. *Terry v. Ohio*, 392 U.S. 1 (1968). But even assuming for the sake of argument that the intrusion is minimal, it is a far greater problem when such an intrusions is based on race or ethnic heritage. To say our law frowns on government imposition of burdens on just one racial or ethnic group is far too gentle; as the Supreme Court has said, "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect…[C]ourts must subject them to the most rigid scrutiny." *Korematsu v. U.S.*, 323 U.S. 214 (1944). The federal government—our ultimate guarantor of constitutional rights in this country—must do all it can to assure that people in every state and local jurisdiction enjoy the right to equal protection at the hands of their police, and that is the goal that legislation against racial profiling will advance. Equal protection of the law is one of the highest ideals of our constitutional republic, and a worthy goal for that reason alone. But the assurance that government actors (such as police officers) will obey the law as they enforce it not only honors our highest principles; it helps assure that every person will obey the law in his or her everyday conduct. Research has demonstrated the connection between law-abiding behavior

by police, and the feeling among citizens that they should obey the law as well. Conversely, when people see the police disregard the law, they see less reason to follow it themselves.

The Continuing Need for National Legislation

Some may ask whether any need exists for national legislation on racial profiling. More than half the states have passed some kind of law against racial profiling or mandated some kind of study of the problem, and many police departments have, on their own, adopted policies and procedures designed to combat the practice. Nevertheless, a strong need for federal legislation persists.

First, many states have not acted, and far more police departments have done less than they might have, on this problem. Therefore many Americans have not had the benefits of improvements in this area, though they deserve good law enforcement and equal treatment as much as those who live in places where the law or police practice has not changed. This makes passage of the national legislation a continuing priority.

Second, the passage of national legislation against racial profiling would serve as a clear and unambiguous statement that the American people deserve fair and equal treatment under the law. We have heard Attorney General Eric Holder and his deputies announce to the country that the Department of Justice's Civil Rights Division is open for business. The passage of anti-profiling legislation is of a piece with that focus. That makes this the right time for this effort.

Third, in a series of decisions dating back more than a decade, the Supreme Court has created great police power and discretion to engage in traffic enforcement based on pretexts, and we have seen time and again, in state after state, how this discretion easily morphs into the tactic of profiling. These cases allow police to stop any driver violating any observed traffic offense,

even if the goal of the stop has nothing whatsoever to do with traffic enforcement (*Whren v. U.S.* 517 U.S. 806 (1996)); to order the driver (*Pennsylvania v. Mimms,* 434 U.S. 106 (1977)) and the passenger (Maryland v. Wilson, 519 U.S. 408 (1997)) out of any vehicle the police stop, without any evidence of danger or wrongdoing; and to ask for consent to a search of a driver's car without informing the driver that he or she has a right to refuse (*Ohio v. Robinette*, 519 U.S. 33 (1996)). In addition, the Court has allowed police to arrest drivers for traffic offenses even when the penalties for these infractions do not include imprisonment (*Atwater v. Lago Vista* 532 U.S. 318 (2001)), and has decided that police do not violate the Fourth Amendment even if their search or seizure conduct violates state law (*Virginia v. Moore*, 553 U.S. ___ (2008)) . There is no sign from the Supreme Court that it plans to change direction, and we must therefore anticipate that in some police departments, racial and ethnic profiling will go on. This means that national legislation to end racial profiling is needed now as much as it ever has been.

Fourth, we have recently seen the passage of a law in Arizona that *requires* police officers to inquire about immigration status based on the reasonable suspicion that a person they encounter may be present in the country illegally. See S.B. 1070, State of Arizona, Forty-ninth Legislature, Second Regular Session (enacted April 23, 2010). Amending legislation, passed just days later, H.B. 2162, State of Arizona, Forty-ninth Legislature, Second Regular Session (enacted April 30, 2010), purported to prohibit any police activity under the law based on race or ethnicity, but simply saying this will not change the reality. Police officers without extensive training in immigration law will be forced to make judgments based on ethnic appearance and the use of the Spanish language. They will have no alternative, since immigration status cannot be determined by any other observable means before questioning begins. Therefore, those who "look Latino" will be targeted by this law, even American citizens whose families have lived

here for generations. And according to numerous reports, "copycat" versions of S.B. 1070 have now been introduced in the legislatures of multiple states. David Weigel, Arizona Law Inspires Copycats in Texas, Georgia, Colorado, *Washington Post,* April 29, 2010, accessed June 14, 2010 at http://voices.washingtonpost.com/right-now/2010/04/arizona_bill_inspires_copycats.html; Alan Gomez, Arizona Immigration Policy Sets Off Polarizing Debate; Opponents of Law Plan Boycotts While Other States Propose Copycat Bills, *ABC News*, May 3, 2010, accessed June 14, 2010, at http://abcnews.go.com/Politics/arizona-immigration-law-sets-off-polarizing-debate/story?id=10539061; Andy Birkey, Minnesota Republicans Offer Arizona-style Immigration Bill, *Minnesota Independent,* May 7, 2010, accessed June 14, 2010, at http://minnesotaindependent.com/58565/minnesota-republicans-offer-arizona-style-immigration-bill. Thus passing national legislation against racial and ethnic profiling has become more important than ever.

Conclusion

I thank the Subcommittee for the opportunity to share my views, and I look forward to answering any questions you may have.

Mr. NADLER. Thank you.
And finally, I recognize Ms. Khera for 5 minutes.

TESTIMONY OF FARHANA KHERA, PRESIDENT AND EXECUTIVE DIRECTOR, MUSLIM ADVOCATES

Ms. KHERA. Thank you. Mr. Nadler and Members of the Committee, good afternoon.

I appreciate this opportunity to testify on a very important topic of racial and religious profiling. I will focus my comments on FBI and Customs and Border Protection activities that target American Muslims.

As we heard Chief Burbank testify, law enforcement has a solemn duty to not only protect the American people, but to do so consistent with the rights and protections guaranteed by the Constitution for all Americans regardless of race, ethnicity or religion, and Congress must ensure that they do so.

American Muslims today, however, face less than equal treatment by Federal law enforcement in our everyday lives when we travel, log on to the Internet or enter a mosque to pray. We worry that we will be monitored, interrogated—or worse, arrested and detained—by government agents for no reason at all.

Let me be clear. I am not referring to legitimate investigations of criminal activity. I am referring to sweeping questioning, searches and other investigative activities that target innocent Americans in groups.

Our Nation has not seen such widespread abuse since J. Edgar Hoover era. It is wrong, it is counterproductive, and it must end.

So, how did we get here? In 2001, after the horrific attacks on our Nation, Congress was understandably eager to help law enforcement do its job. The USA PATRIOT Act was enacted, but it went too far. It granted new, overly broad powers to the FBI to not only investigate criminal activity, but to snoop on innocent Americans.

That same year, the FBI launched the first in a series of so-called voluntary interview programs targeting Muslim and Arab Americans for questioning. Director Mueller also instructed each of the FBI's 56 field offices to count the number of mosques and Muslim charities in their area and create a demographic profile.

The word was out. From here on, agents would not be promoted based on their investigations of drug trafficking, mortgage fraud or other criminal cases. No. Whether you were an agent in Iowa or New York, the paramount focus would be counter-terrorism, and you would sink or swim in the bureau based on cultivating forces and informants, opening investigations and developing cases targeting the Muslim community.

In December 2008, the FBI memorialized this new way of doing business in a revised set of investigative guidelines.

Where did this lead us? By the end of 2005, Michael Rolince, the former head of the Washington office of the FBI, said that the FBI had conducted nearly 500,000 interviews of Arab and Muslim Americans, and not a single one of these interviews yielded information that would have led the FBI to get in front of the 9/11 attacks.

Undeterred, the FBI was well on its way to aggressively developing informants and infiltrating mosques and community organizations.

Today, the FBI also monitors Facebook and the Internet.

Can you imagine attending your church or synagogue and wondering whether the FBI is peering over your shoulder while you pray? Can you imagine thinking twice before posting a news article on your Facebook, because it just might prompt an FBI visit to your home or workplace? That is the reality for many Muslims today.

Muslim Advocates hears from American Muslims on a regular basis who are seeking guidance, because they have received a surprise visit at their home or workplace by the FBI with questions about their religious practice, political views or involvement in community organizations.

These actions, which create fear, stigmatize individuals in groups, chill First Amendment protected activities and sometimes even jeopardize jobs, have been taking place, not based on any evidence of wrongdoing, but based on race, religious and ethnic discrimination, plain and simple.

But the FBI is not the only problem. If you have the misfortune of being Muslim at the border, there is a good chance you will be stopped by a Customs and Border Protection agent before returning home and asked questions that have nothing to do with the purpose of your international travel—such as, what mosque do you attend, how often do you pray?

Can you imagine being asked what church or synagogue you attend, or how often you pray, by a Federal agent? You are probably thinking, that is none of the government's business—and it is protected by the First Amendment. In the America I grew up in, that certainly would have been the case.

But for me and countless other Muslim Americans today, it is not as simple as telling an agent it is none of their business. The consequences of being Muslim at the border are frightening and fraught with peril.

Take, for example, the case of one prominent community leader returning home from Canada at a land crossing near Detroit. He and his wife were dragged from their car, handcuffed and detained in front of their young daughters, who were 1 and 3 years old at the time. To this day, his eldest daughter recoils in fear when she sees someone in uniform, afraid that he or she will do harm to her family.

Is this the kind of relationship we want law enforcement developing with Muslim Americans young and old, one based on fear and mistrust? More importantly, is this the country we aspire to be? I certainly hope not.

Members of the Committee, racial and religious profiling is not only contrary to our Nation's guarantee of equal justice under the law, it also yields negative results. Discriminatory policing diverts valuable resources from legitimate investigations. It erodes trust between the community and law enforcement, jeopardizing the vital relationship needed to counter actual criminal activity.

Simply put, racial and religious profiling is bad policing.

Thank you for the opportunity to present the views of Muslim Advocates. I look forward to your questions.

[The prepared statement of Ms. Khera follows:]

PREPARED STATEMENT OF FARHANA KHERA

Written Testimony of

Farhana Khera
President & Executive Director
Muslim Advocates

Hearing on
Racial Profiling and the Use of Suspect Classifications
in Law Enforcement Policy

U.S House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

June 17, 2010

Introduction

Muslim Advocates submits this testimony to the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, regarding racial profiling and the use of suspect classifications in law enforcement.

Muslim Advocates (www.muslimadvocates.org) is a national legal advocacy and educational organization dedicated to promoting freedom, justice and equality for all, regardless of faith, using the tools of legal advocacy, policy engagement and education and by serving as a legal resource to promote the full participation of Muslims in American civic life. Founded in 2005, Muslim Advocates is a sister entity to the National Association of Muslim Lawyers, a network of Muslim American legal professionals. Muslim Advocates seeks to protect the founding values of our nation and believes that America can be safe and secure without sacrificing constitutional rights and protections.

Law enforcement has a solemn responsibility to protect the American people consistent with the rights and protections guaranteed by the Constitution to *all* Americans, regardless of race, religion, or ethnicity. And Congress must ensure that they do so.

Muslim Americans, who number about six million today, are an important and vital part of our nation and its history. The first Muslims arrived in America on slave ships from Africa. Over time, some Americans have converted to Islam, and other Muslims have come as immigrants. We serve our country as lawyers, teachers, police and firefighters, members of our armed forces, and even as members of Congress. Our research and innovation adds to the progress of our nation in science, medicine, business and technology. We also keep America humming, staffing factories, driving taxis, and running corner shops.

Muslims have also embraced our nation's promise of life, liberty and the pursuit of happiness. But since 9/11, these hopes and dreams have been dashed, and fundamental rights infringed. Today we face government discrimination in our everyday lives – whether we enter a mosque to pray, get on a plane, cross the border, or log onto the Internet. We worry that we will be interrogated by government agents, or worse, arrested and detained, for no reason at all. Our nation has not seen such widespread abuse, discrimination and harassment by federal law enforcement since the J. Edgar Hoover era.

Muslim Americans are also affected by biased policing practices at the state and local levels. African-Americans and Latinos, some of whom are Muslim, are unfairly targeted for stops by law enforcement when driving or walking down the street. The New York Police Department recently released arrest data showing that stops and frisks of African-Americans and Latinos remain at disproportionate levels,

reminding us that racial profiling remains an urgent challenge.[1] The state of Arizona recently enacted a law that requires state and local police to demand proof of immigration status, raising fears of discriminatory policing. At the state, local and federal levels, racial profiling is wrong and counter-productive and must end.

As discussed in detail below, Muslim Advocates describes the problem and provides specific examples of innocent Americans who have been unfairly targeted by federal law enforcement. Muslim Advocates concludes with recommendations for steps Congress should take to protect Americans from being targeted for law enforcement scrutiny based on their race, ethnicity, religion or national origin.

Racial & Religious Profiling of Muslim Americans

Since 9/11, Muslim Americans and those perceived to be Muslim – including Arabs, South Asians, Middle Easterners, and Sikhs – have been subject to heightened scrutiny by federal law enforcement. Such discriminatory targeting includes: FBI interviews conducted in the community without suspicion of wrongdoing; extensive and invasive questioning and searches at the border; the surveillance of community organizations and the use of informants and undercover agents; and data gathering and mapping of the community based on cultural and ethnic behavior.

These discriminatory law enforcement policies and practices are contrary to our nation's promise of equal protection and equal treatment under the laws. President William J. Clinton, President George W. Bush, and President Barack H. Obama have all said racial profiling is wrong and should not take place in America. Indeed, President Bush pledged to end it and took an important step when the U.S. Department of Justice in 2003 issued guidance banning racial and ethnic profiling by federal law enforcement in certain contexts. But more must be done to end racial profiling by federal, state, and local enforcement in all investigatory activities.

Not only is racial profiling wrong, it is ineffective. Discriminatory policing practices divert valuable resources from legitimate investigations, increase fear and suspicion within the Muslim community towards law enforcement and make individuals more reluctant to call the authorities when needed. They also erode the trust between the community and law enforcement agencies, jeopardizing a vital relationship needed to counter actual criminal activity.

The following are examples of the type of discriminatory policing tactics practiced by federal law enforcement across the country.

FBI Interviews

Since 9/11, the FBI and other federal law enforcement agencies have been increasingly targeting Muslim Americans for questioning with no individualized suspicion of wrongdoing. These law-abiding citizens – who range from public

[1] *See* Al Baker, *New York Minorities More Likely to Be Frisked* (May 12, 2010), *at* http://www.nytimes.com/2010/05/13/nyregion/13frisk.html.

servants to students to professionals – are frequently approached by law enforcement not because they are the subject of an investigation, but, rather, because of a perception that – by virtue of their religion, ethnicity, race, or national origin – they are either engaged in, or will be able to provide evidence of, criminal activity.

These interviews are intimidating and cause immense fear within the community. FBI agents approach individuals for uninvited questioning in their homes and at work. Such unannounced, public interviews cast suspicion over a person's activities and jeopardize their personal and professional relationships.

Some examples of individuals who have been contacted by the FBI, with no apparent evidence of wrongdoing, and reported to Muslim Advocates:

- A young computer programmer and Muslim American in Northern California was approached for questioning, in his workplace, by the FBI after posting political articles from mainstream news sources on his Facebook page. His Facebook page had privacy settings limiting viewers of his posts to only those in his circle of Facebook friends. Although this young man had no criminal background and was not the subject of an investigation, the FBI contacted him because the articles were interpreted as threatening because of his religious and ethnic background. By approaching him at work, in front of his colleagues and managers, the FBI intimidated this young man and jeopardized his job.

- A physician of Pakistani descent in New England was contacted by the FBI for questioning after peaceful, non-violent comments he made about the political situation in Pakistan were published in his local newspaper. This physician is a law-abiding and civic-minded member of his community and was not under investigation. The FBI's interest in him appears to be motivated primarily by his ethnic and religious background.

Surveillance of Mosques & Community Events & Organizations

The FBI's asserted broad authority to target individuals, without reasonable suspicion, is codified in the latest version of the FBI's Domestic Investigations and Operations Guide (DIOGs), which was updated in December 2008. Specifically, the DIOGs allow for unprecedented, massive data gathering on racial and ethnic communities and for the use of informants or undercover agents to infiltrate houses of workshop and religious and political groups and gatherings. The FBI asserts the power to open an investigation and send undercover agents and undisclosed participants into organizations with no factual predicate that criminality is afoot. These activities result in chilling First Amendment protected activities, as law-abiding Muslim Americans and community institutions across the country, including mosques, non-profits, and social service organizations, are subject to such surveillance tactics.

Furthermore, the DIOGs authorize the collection of racial and ethnic demographic data and cultural and behavioral information of racial and ethnic communities, without any evidence of wrongdoing. This type of data collection is based on perceived characteristics and activities of racial and ethnic communities, not individualized suspicion of criminal activity. The DIOGs allow for this racial and ethnic information to be mapped, heightening the concern that this information will be used by law enforcement agencies to unlawfully target innocent Muslim-Americans for further investigative activities.

Examples of the FBI's surveillance activities across the country:

- In Orange County, California, the FBI used an ex-felon as an informant to infiltrate a local mosque and spy on congregants. There was no evidence that there was criminal activity at the mosque. In fact, mosque leaders became alarmed when the informant began espousing violent ideas, and reported him to the local FBI office. This incident has resulted in fear within the American Muslim community and had the effect of limiting speech and decreasing attendance at mosques in Southern California and arguably across the country.

- FBI agents routinely attend cultural events hosted by an Arab American organization in the San Francisco Bay Area, without invitation, and interview employees and participants, sometimes without disclosing their identity. The FBI has also sought to meet with the organization's employees outside regular business hours and without consulting with the executive director or other leadership. The FBI's tactics have the effect of intimidating community members and leaders, who are afraid that speaking out about the surveillance will result in increased targeting and scrutiny of the organization, its members and activities.

- Muslim community leaders in Houston, Texas, were recently invited to a meeting with the FBI. During this meeting, FBI agents told community leaders that they were seeking information on the Muslim community in the area, and asked leaders to report any Muslims in their communities who were espousing conservative ideologies or adopting conservative religious practices for observation by the FBI. These requests appear to have been made based on generalized suspicion toward an entire faith and ethnic community, not in response to a particular investigation nor based on evidence of wrongdoing in that community.

Given the constitutional rights and freedoms implicated and the enormous power being wielded by the FBI, the FBI should be forthcoming about the guidance it has given its agents to infiltrate First Amendment protected gatherings and activities. Despite repeated informal requests, a (formal) Freedom of Information Act (FOIA) request, and later a FOIA lawsuit by Muslims Advocates, however, the FBI has failed

to disclose the DIOGs fully.[2] In particular, the FBI refuses to disclose Chapter 16 of the DIOGS in their entirety. Chapter 16 apparently describes the guidance to agents to surveil and send informants into houses of worship and other religious and political gatherings. Congress should urge the FBI to disclose Chapter 16 of the DIOGs without further delay.

Border Interrogations

Muslim American travelers returning home from international travel are being targeted for additional and extensive questioning by CBP, based on no more than their religion, ethnicity, race or national origin. Innocent Americans from all walks of life have been interrogated about their political views and activities, religious beliefs and practices, and associations with organizations, friends and relatives – all without any reasonable suspicion that the individuals were engaged in unlawful activity. Muslim travelers have been frequently asked questions such as, "what mosque do you attend?," "how often do you pray?," "why did you convert?," "what is your view of the Iraq war?" They have also been asked about donations to, or affiliations with, lawful, U.S. charitable entities and mosques. This type of questioning suggests that racial, ethnic or religious profiling is taking place at the borders and airports. Muslim Advocates chronicled the stories of almost three dozen travelers in its report, *Unreasonable Intrusions: Investigating the Politics, Faith & Finances of Americans Returning Home.*[3]

A few recent examples of individuals who have been questioned at the border:

- An Asian-American Muslim man traveling back from Canada across the land border near Buffalo, New York, was stopped and questioned for approximately 3 hours about his political and religious beliefs, including his conversion to Islam. This young man is a law-abiding citizen and was not the subject of any investigation. He was targeted for detention and questioning because of his religion, causing him great humiliation and fear about openly practicing his faith.

- A respected Arab-American leader in Detroit, Michigan, returning home from a family trip to Connecticut and passing through Canada, was stopped at the Port Huron border crossing, north of Detroit. He and his wife were dragged from and thrown against their car by federal agents, in front of their two young daughters, and were handcuffed, detained, and separated from each other and their children. They were then aggressively interrogated for hours about lawful organizations they support, their work and political activities, and the names of family members and their locations. On subsequent trips, this man has experienced similar intensive and invasive questioning about his ethnicity and country of origin, confirming that he is being targeted for questioning because of his religious and racial background.

[2] The partially disclosed DIOGs can be viewed on our website at www.muslimadvocates.org.
[3] *Available at* http://www.muslimadvocates.org/documents/Unreasonable_Intrusions_2009.pdf.

Border Searches

Muslim Americans returning home from international travel are subject to invasive searches at the border of their person and belongings, including electronic devices, without any individualized suspicion of wrongdoing. CBP agents look through pictures on digital cameras, documents on computers, and contacts and information in cell phones, Blackberries and iPhones, for no reason at all. CBP also asserts that they have the authority to seize these devices, including the data contained within the devices, without probable cause. The invasive nature of these searches – and the ability of the government to target individuals without any individualized suspicion – highlights the broad, abusive power being asserted by CBP agents.

Examples of individuals whose personal belongings, including electronic devices, were subject to search at the border include:

- A Muslim-American of South Asian descent who is an engineer in Silicon Valley had his personal belongings, including his checkbook and cell phone, searched and seized when returning home after an overseas business trip. His cell phone was confiscated from him during the search, and returned to him five months later in inoperable condition. He was never given a reason as to why he was subjected to such an intensive search of his belongings, but the questions asked by the CBP officer conducting the search – including questions about donations he had made to specific, lawful charitable and religious organizations – indicate that he was targeted because of his religion.

- A Californian businessman, who has been searched on numerous occasions upon his return to the United States, had his computer removed from his presence for several hours. During that time, all of his files, including letters from his wife and children, were reviewed. He was not informed as to why his computer was seized. However, the questions asked of him by the CBP agent during his detention, including questions about his recent Hajj pilgrimage to Saudi Arabia, suggest that his religious identity played a role.

Despite repeated requests to DHS by Muslim Advocates and other civil rights organizations to disclose CBP's policies for selecting individuals for secondary searches, DHS has not been fully candid and forthcoming, nor has it revealed the extent to which individuals are being targeted based on their race, religion, ethnicity or national origin. CBP should prohibit questioning about First Amendment protected beliefs and activities and should be required to collect data on individuals targeted for interrogations so that Congress and the public can fully understand how CBP is conducting questioning at the border. A Civil Liberties Impact Assessment solely on its electronic devices searches policy, ordered by the Secretary of Department of Homeland Security, has yet to be released, nearly six months after its completion.

Recommendations

Muslim Advocates urges Congress to enact legislation to:

1. Ban racial, ethnic, religious and national origin profiling by federal, state and local law enforcement:
2. Require training of federal, state and local law enforcement, to ensure that discriminatory policing does not take place;
3. Establish an effective redress mechanism for those aggrieved, to ensure accountability;
4. Require federal, state and local law enforcement to collect data on stops, interviews and all investigatory activities to allow the agency and the public to monitor whether racial, ethnic and religious profiling is taking place; and
5. Require the Attorney General to report to Congress on the implementation of such a law.

Legislation previously introduced by Congressman Conyers and Senator Feingold, the End Racial Profiling Act (ERPA), is a good place to start. ERPA should contain language that explicitly prohibits profiling in the types of law enforcement activities described above, specifically:

- Interviews, including FBI interviews and those by CBP agents at the border;
- Searches of persons and/or property; and
- Data collection and analysis, assessments, and predicated investigations.

ERPA should also contain a provision that requires data collection of individuals who are targeted by law enforcement activities. Such data is necessary to monitor the problem and determine whether policies, practices and training are preventing and ending racial, ethnic and religious profiling.

Conclusion

Racial, ethnic and religious profiling affects millions of Americans, including African American, Latino, Muslim, Arab and South Asian communities. Racial profiling is wrong and produces negative results. It erodes trust that the public should have in law enforcement. Simply put, racial and religious profiling is bad policing. It is time for Congress to act to ensure that all Americans, regardless of race, religion, ethnicity or national origin, are treated fairly and equally by law enforcement at the federal, state and local levels.

Mr. NADLER. I thank you very much. And I will recognize Members for 5 minutes of questioning apiece in the order in which they are here.

I will begin with myself for 5 minutes.

First of all, Mr. Shelton, New York City faced a class action lawsuit alleging racial profiling during Terry stops conducted in the 5-year period from 2004 to 2009. Among the nearly three million Terry stops during that period, about one-and-a-half million were of African Americans, nearly 900,000 were Hispanics and under 300,000 were of non-Hispanic Whites.

Do you believe that that statistical disparity alone is indicative of the presence of racial profiling? Or do you need some more evidence to say that there is racial profiling?

Mr. SHELTON. Well, you certainly need more evidence than that. One of the issues you would want to look at is the hit rate; that is, how often those stops resulted in some kind of a paraphernalia or other illegal substance being found on people.

What we find is that, when you have this kind of massive approach to stops, that you see that the number of hits actually declined. That is, look at the number of stops versus the number of hits. You find that it is even more discriminatory.

The issue that we need to look at a little closer, and actually, we need to have legislation to actually collect data on how often those stops result in the actual commission of a crime. In this case, I think you will find in the case of New York City, it was abysmal.

Mr. NADLER. Thank you.

Chief Burbank, is there any way for an officer to differentiate a documented immigrant from an undocumented one without checking their papers?

Chief BURBANK. Absolutely not. And that is the question behind this whole thing. There is no way that I can perceive, and especially teaching a new recruit, this is an individual that is documented, and this is one that is not, and——

Mr. NADLER. Without looking at the papers.

Chief BURBANK [continuing]. Absence of asking for documents——

Mr. NADLER. So, you believe that there is a danger that any immigrant could be singled out under these new laws, since there is no way to determine short of checking papers who is documented or undocumented?

Chief BURBANK. Not only any immigrant, but any U.S. citizen who is of a different race or ethnicity will be questioned. There is no way that a law enforcement official, especially as we talk about fairness, can conduct that business without.

Mr. NADLER. So, in the Southwest, Hispanic immigrants will be disproportionately affected, for example.

Chief BURBANK. Absolutely.

Mr. NADLER. And obviously, you believe, since you testified to it, that cooperation between the police and the community is very important.

Chief BURBANK. There are stories across the country. The impact on my community alone, just from the thought of immigration laws going into effect that officers would enforce, have diminished the

relationship that exists between the Salt Lake City P.D. and the communities that we serve——

Mr. NADLER. And obviously, it breaks down the trust between a community and the law enforcement personnel when a law instructs the police essentially to single out a group because they are slightly more likely to be in the country without documentation?

Chief BURBANK. Absolutely.

Mr. NADLER. Now, given the study co-authored by Professor Goff and yourself on attitudes toward SB81 in Utah, is there reason to believe that co-deputizing police to act as immigration officials will negatively affect community cooperation with police, both inside and outside the immigrant community?

Chief BURBANK. Yes. And in fact, the research conducted by Dr. Goff indicates that not only would Latino individuals be less likely to report crimes and participate with the police, but also, our White residents are less likely to report crimes, especially involving drug crimes, if they perceive that the police are biased or interjecting bias into their operations.

Mr. NADLER. Thank you.

Now, as I mentioned a moment ago, New York City has recently come under fire for the volume of Terry stop and frisk that they have carried out in recent years, and particularly for the overwhelming percentage of these stops that are devoted to African American and Hispanic people.

Some have argued that judicious use of police resources necessitate the higher law enforcement presence in high crime neighborhoods, which often happen to be lower income and primarily minority areas, and, therefore, that the higher percentage of African American and Hispanic stops does not indicate racial profiling, but simply that the police are putting their resources where the crimes are.

Do you think this—what would you observe of this observation?

Chief BURBANK. I agree with Mr. Shelton on this. More research needs to be conducted.

And that is really what our aim was with Dr. Goff and the CPLE, was, in fact, to get to the underlying fact. We need to move from racial profiling to biased policemen, because it is not just a matter of do we stop people at an unequal rate or inappropriate rate, but what are the actions that we take afterwards as far as arrests, citations, search, seizure—all those things that are involved. It takes much more than population benchmarking to determine the action, whether appropriate or not of police officers.

Mr. NADLER. Thank you.

Now, Professor Ramirez, you have advocated for a requirement that police departments catalogue their stops of citizens. New York City, as I mentioned, has done so. And over the last 5 years, they have disproportionately stopped African American and Hispanic people, and they have documented that they have done that.

Is this, by definition, enough to cause—is this by definition cause to accuse the NYPD of racial profiling, or is simply to indicate the necessity of more research?

Ms. RAMIREZ. By itself, disproportionate stopping does not indicate racial profiling. But as others have said, you want to look at

the hit rate. You want to look at what happened after the stop. Was there a search? Was there arrest? Were there seizures?

And also, you want to know what the demographics were of the underlying population. If they are Terry stops on the street, you want to know what was the street population like. What percentage of people who were on the street were Latino, White, Black and Hispanic?

And if you are doing these studies with the police, as opposed to doing them as historical documenting of activity that occurred in the past, you can disaggregate for particular initiatives that the community wants.

For example, if you are doing a data collection system with the community, and the community says, look. We have a problem with Sunday mornings. There are races among Latino youth drag racing in a particular part of town, and we want you to be stopping those people. Or there is an African American bar that gets out at midnight, and we want you to stop drunk drivers at the White bars that get out at midnight, as well as the African American bars.

You can disaggregate that and come up with a meaningful measure of whether it is profiling, by looking at what was the purpose of the law enforcement initiative, what were the racial demographics.

When we have done this, even disaggregating for those instances where there was a need in high crime areas, or in predominantly Latino or Black areas, for special enforcement efforts, we still found evidence of racial profiling. And what I have been advocating for is a national center focused on how do you train statisticians to do appropriate statistical analysis.

How do you get the research done to get appropriate benchmarks for the data, whether it is disproportionate stopping or not? And how do we create best practices and promising practices for the research that needs to be done in this area?

Mr. NADLER. Thank you. My time has expired.

I will now recognize the distinguished Chairman of the full Committee, the gentleman from Michigan.

Mr. CONYERS. Thank you, Chairman Nadler.

We have in the audience Professor Richard Winchester from the Thomas Jefferson Law School in San Diego. And we are pleased that he is with us for this important hearing.

And we also have our former Judiciary Member, Keith Ellison of Minnesota, with us. And with your permission, I would like to yield him my time.

Mr. NADLER. Without objection.

Mr. ELLISON. Let me thank the Chairman of the Judiciary Committee. It is certainly a pleasure to be back at the Judiciary Committee.

And Chairman Nadler, I thank you, as well as the Ranking Member.

I will just take just a few questions—not take, ask—a few questions.

What do you think some of the essential features of proposed legislation would include? What do you think needs to be in there to address this issue of profiling?

I ask anyone on the Committee.

Mr. HARRIS. My thoughts, congressman, would be data collection, provisions for best practices in policing. We know a lot that we did not know 15 years ago about what works in policing. And we want to give incentives for those things to be done, requirements that there be a policy in each department, that there be training centers for that training, funds for that training. I think those would be good starting points.

I want to make clear that what we are looking for is a national set of standards and practices. We are past the point, I think, when the debate is about whether this ever happens. Now, it is about what we do and how we go forward. And I think all those things could contribute.

Mr. SHELTON. If I might add, in addition, certainly, the reporting mechanism needs to be one that is independent of the police departments themselves. We have run into problems that people wanted to report the misbehavior of police officers and actually being punished in that process, as well.

So, I certainly strongly agree with Professor Harris and would offer it for your additional——

Ms. RAMIREZ. If I could also just add to that, I totally agree with my colleagues. And I would just also add, a meaningful redress mechanism in terms of a right of action, I think is absolutely required, as well, in terms of seeking injunctive relief so that people who are aggrieved can go to the courts, do have a way to go to the courts eventually, if need be, to actually seek redress.

And if I might add, in addition to legislation, the End Racial Profiling Act, I think Congress can also play an important job in helping to hold law enforcement, especially at the Federal level, accountable, too. And there is certainly a need for greater transparency in terms of the authority Federal law enforcement is using, whether it is by the FBI or Customs and Border Protection.

What is happening with the information that is being collected? How is it being stored? How is it being shared? And there are a lot of questions and not enough disclosure.

Mr. ELLISON. There sometimes is a problem between what police leadership, or any leader might agree to and want to see, and how it is actually carried out on the ground. If we were to pass legislation regarding racial profiling, we may well get leaders of law enforcement throughout the country to agree with everybody on the panel.

How do we make sure that it gets really—it really gets to the officer who is going to be facing that motorist or that passenger?

Mr. HARRIS. Training—the mantra in police work. If you want things to change, it will come down to training. But it is not only training. You have to have a policy that reflects what the department is really about. There has to be supervision on the job of what people are actually doing on the street. People must be trained in the policy and know what is expected of them. And then there has to be accountability.

You put those four elements together, and the leadership makes clear that it means it, they are going to hold people accountable, I would not say you can change all the hearts and minds, but I will take their behavior. That would be enough.

Mr. ELLISON. Mr. Singh?

Mr. SINGH. I would just add that, in terms of getting this to the front-line officers, it is critical that we, as Farhana had said, have a private right of action.

I think the beauty of the Civil Rights Act of 1964 is that it actually took the enforcement mechanism straight to the people. The people had an ability to bring a suit in court and say that I have been discriminated against in the workplace, I have been discriminated against at a place of public accommodation. That we have that private right of action, I think it creates a very strong incentive for police departments to comply, because the people actually are able to enforce the promise of an End Racial Profiling Act.

Mr. ELLISON. I like the idea of a private right of action tool. But I also am curious about whether or not—how we can get officers on the line to really embrace this, because again, it does enhance public safety.

How do we—I mean, a private right of action is, I think, necessary, but it is adversarial. What about the other way around, to get officers on the line saying, "You know what? It is better for me to just deal with behavior, rather than just ethnic and religious factors, because it makes me a better cop."

Ms. Ramirez? Professor Ramirez, excuse me.

Ms. RAMIREZ. I think the training piece has to be focused exactly on the issue that you are presenting, not just educating officers, but showing them, based on the research, why it is in their interest to do this. And that means you have to expand the training to include community policing.

What do they get out of this? How can they be more effective officers? How can it improve their safety, in traffic stops, particularly, something they are interested?

And the demographics and the research that we have been talking about at this table have not been widely disseminated to officers on the street. They need to see the statistics.

And when you actually work with the police department and show them what they are doing, in what ways it is counterproductive and how they can improve, and then you continue to collect data to show them what happens when they switch, for example, from a race-based profile to behavioral profiling, that is when I think you get them engaged in the process.

But the kind of profiling study that is going to get police engaged is not a "gotcha" historical study, but a study that they are engaged with from the beginning. You sit down with them and together you collaboratively decide what data you are going to collect, how you are going to collect it, how you are going to analyze it, and have a conversation around that. And that conversation has to be a non-public conversation.

Mr. ELLISON. Thank you very much.

Mr. NADLER. Thank you.

I will now recognize the gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman, for holding this very important hearing.

Yesterday I was reading about a multi-count Federal indictment against some White guys who ride around on motorcycles and they wear leather vests. Probably most of them have beards and probably shaggy hair. And based on that Federal indictment, multi-

state, I hope, I sincerely hope that we do not have a period where every White guy riding around on a motorcycle wearing a leather vest is stopped to find out whether or not he is a legal citizen or whether or not he is guilty of some kind of criminal offense.

But unfortunately now in this country, we have a situation that has arisen under Federal law. The Immigration and Nationality Act, section 287(g), authorizes the Federal Government to enter into agreements with state and local enforcement agencies, permitting designated officers to perform immigration law enforcement functions.

So in short, they are, since it is against the law to be in the country illegally, if a law enforcement officer operating under 287(g) has a reasonable suspicion that someone is an illegal immigrant, then that officer has a constitutional right to stop that person, because they are violating the law.

Now, you stop them whether or not they are in a car or walking down a public street, or behind a house barbequing, or even if the law enforcement officer is legally at a location where he can peer into a window, say, at the local barbershop, and you see someone who looks like they could be an illegal immigrant. Then you can go and pull the person out of the barbershop and say, "Look, show me proof that you are a legal immigrant." Now, that is kind of scary under 287(g).

And it is exacerbated by the Arizona law that has been signed into effect, which requires people to walk around—or again at the barbershop—have proof of citizenship. So, police in Arizona, if they think that you are—if they feel that they have a—if they have a reasonable suspicion that you may be an illegal immigrant, they can stop you and ask you for your papers.

And, you know, this is where we have come as a society. Because if it can happen to the Latino, to a person such as you, Professor Ramirez, who—you look like you could have some Indian blood. You look like you could be Honduran. You look like you could perhaps be from Mexico or Colombia, you know, someplace—you know, I feel like you speak Spanish.

So, I think that you would be a prime target to be jacked up, just like you have been, Mr. Singh, but not just at the airport, but on the street doing your own business, taking care of your business, walking the dog.

And so, this is where we are as a society. And so, that is what makes this hearing so very important, because we are used to freedom. We are used to non-discrimination.

And so, when you can single out someone based on a characteristic, a visible characteristic—well, that person is obviously Black right there, or that person is obviously a White boy riding on a motorcycle wearing a vest, or this person is obviously a Muslim, or this person is obviously Hispanic—when we start doing these things, it hurts us all, because the White boys riding a motorcycle do not think it is going to happen to them. But if we allow it to happen to one segment, then it certainly can mushroom into something that hurts us all.

And so, I guess my question would be, chief, what kind of impact does the 287(g) program have on the ability of law enforcement officers to protect citizens in areas populated by Latinos?

Chief BURBANK. Well, sir, the points that you made go to my reason for not being cross-deputized as a civil immigration enforcement. And that is the important thing here.

Immigration law at the Federal level is a civil penalty. You can detain and deport. Nowhere else in law does local law enforcement get involved in civil enforcement. So, one, that is the first problem that exists.

The other is the fact, this notion that reasonable suspicion to stop somebody—I do not know how you get reasonable suspicion without action. That is what we base our profession on. And when you talk about status, immigration status, about the only thing that comes to mind that I can think of rises to reasonable suspicion is to stand on the border and watch somebody run from the border. That gives you reasonable suspicion, based on their actions.

Absent race or ethnicity, you cannot get to reasonable suspicion that somebody is undocumented in this country. And that is where police officers should not move. And it is very problematic for us to engage in that sort of behavior, because we lose sight of criminal action, we lose sight of actions that generates probable cause to make good criminal cases, when we rely on race and ethnicity as the basis for our stop.

Mr. JOHNSON. Thank you.

If there is a rapist and a child molester running amongst and running amok in a Latino neighborhood, would a program such as 287(g) have a chilling effect on a resident reporting criminal activity such as that?

Chief BURBANK. Absolutely. And we have seen that time and time again across the country.

There are examples of individuals that failed to report criminal activity, or failed to report that they are the victim of criminal activity, for fear of deportation, or fear of deportation for family members. And so, it does have a chilling effect.

Mr. JOHNSON. Thank you, and——

Mr. NADLER. Before the gentleman yields back, would he yield to me for a moment?

Mr. JOHNSON. Certainly.

Mr. NADLER. Thank you.

Chief Burbank, you said that aside from standing at the border and seeing someone run away from it, there would be nothing that you could think of that would yield reasonable suspicion that someone is an undocumented immigrant. If someone was stopped for legitimate—if someone driving a car was stopped for legitimate reasons, whatever—and have no documents whatever on him or her, this would also not be grounds for reasonable suspicion.

Chief BURBANK. Well, if someone is stopped, the privilege to drive requires a driver's license.

Mr. NADLER. And let us assume he did not have the driver's license or anything else.

Chief BURBANK. Well, okay. But then you have suspicion to believe that that individual has committed a crime of driving without a driver's license, and that warrants further investigation.

And so, potentially, and in the state of Utah currently, if someone is booked into the jail, they check the status of individuals. But the officer should not rely on the color of their skin unless we are

moving—and again, this is what is scary—if we are moving to the point that every single person in society is going to carry a card that said, I am this, right, then we do not have the basis to do that.

Mr. NADLER. We do not want to see the thing we see in the movie, "papers, please."

Chief BURBANK. Absolutely not.

Mr. NADLER. Thank you.

Mr. JOHNSON. And I yield back.

Mr. NADLER. Thank you.

And I now recognize the gentlelady from Texas.

Ms. JACKSON LEE. Chairman, thank you very much.

It is only in a place as hallowed as this Judiciary Committee that a Chairman such as yourself will be willing to hold a hearing on what mostly is an unpopular topic. And some would argue that we finished that work and we need to move on. And I believe it is evident that we cannot move on.

Some of us will be celebrating Juneteenth. And in some remarks about the history of that particular time, I commented that the work continues. And if in the instance of 1865, General Granger had ceased to be persistent and determined, a whole body of people would still be, some might imagine, not free.

So, I think it is important for this Committee to continue, as Chairman Nadler and Chairman Conyers has granted us the privilege of doing. And certainly, I note my colleagues on the other side of the aisle have a definitive interest in their absence. I am sure they are very committed. And we look forward to providing the leadership for them to follow on what may necessarily be changes.

If I might quickly ask questions. And thank you, Mr. Shelton, for the NAACP's continued persistence in going all over the country, a personal appreciation to President Jealous for accepting the call to Texas, that was proclaimed free in 1865, but the board of education for the state determined we were not by recharacterizing our history books.

Personally, I hope that we will be in a posture to file suit. But convey again to Mr. Jealous of my appreciation.

Can you quickly reconcile the tension between the ability of an officer to take advantage of a complicated traffic law to create an escalating encounter with a driver and develop probable cause, which did not exist at the time of the stop, and the protections extended by the Fourth Amendment against unreasonable search and seizure? It is a complicated question, but if you can be as quick as possible. And it somewhat refers to the Arizona law that is abominable.

Mr. SHELTON. Absolutely. If there is a display of misbehavior, that indeed the law has been infracted, then indeed there is a probable cause to pull one over. And certainly, part of that process is asking for a driver's license. Most if not every state in our country requires a driver's license in your possession at the time you are operating a motor vehicle.

Ms. JACKSON LEE. And that is existing law——

Mr. SHELTON. Exactly.

Ms. JACKSON LEE [continuing]. Without the Arizona law.

Mr. SHELTON. That is exactly right.

So, if you are going to the issue of the Arizona law, the Arizona law is not only not helpful at all, as a matter of fact, it is even more problematic. Indeed, if we talk about the Arizona law, what the NAACP has learned over our years is that, in order for law enforcement to be effective, they must first have the trust and a perception of integrity by those they serve. I think Chief Burbank did an excellent job of outlining much of that.

Whether I have talked to Attorney General Janet Reno under the Clinton administration, Attorney General John Ashcroft under the Bush administration, or Attorney General Eric Holder under the Obama administration, they all agree on one central fact. And that is, in order for law enforcement to be effective in preventing crime or solving crime after it has been committed, then indeed they must have the trust of the communities they serve.

If you will not talk to them before a crime is committed, then you cannot prevent it from happening. If people in the communities do not trust you, after a crime has been committed you cannot gather the evidence necessary to prosecute.

Ms. JACKSON LEE. And there may be the potential of unreasonable search and seizure inasmuch as you can stop a person not for the basic law that we have, you have a traffic infraction, but because of the color of your skin or the car you are driving, or maybe the music that is on your radio. And so, the probable cause is questionable.

Mr. SHELTON. Yes, indeed. Yes, it would be. As a matter of fact, it is an amazing thing——

Ms. JACKSON LEE. And I am not going to cut you off, but I have other questions, so if you want to finish your final sentence.

Mr. SHELTON. No, I will let you go on. I will take all of your time if you let me.

Ms. JACKSON LEE. Thank you for that basic answer.

This is going to go to Professor Ramirez and Mr. Singh and Ms. Khera.

Ms. Ramirez, I think—I am on Homeland Security. And one of the things that we have talked about is the whole question of behavioral versus the racial profiling. If you can quickly answer the value of that, because I begin to look at Mr. Singh, and I look at Ms.—I am trying to get it right here, my paper is away—Khera. And I would imagine there would be Muslim prayers, his attire, and I hope he will speak to that, not because I have asked.

And so, the question is, is behavior the right way? I think behavior is good for the terrorist design, meaning that behavior connected to terrorists overseas, what is on your computer, et cetera, there are no other problems with that. But the question is, how do you work with that tension, so that behavior also is not profiling?

Ms. RAMIREZ. I know that at Logan Airport they have been experimenting with a series of behavioral profiles and assessments, very successfully. And they have used it in tandem with a random number generator. And the random number generator just generates random numbers, and if your number comes up, you are searched.

No criminal or terrorist organization can beat a random number generator, because it is random. So, that is part of what their success is. And the other part is focusing on behavior.

Behavior can be abnormal travel plans, an abnormal travel agenda. It can be the way the person is conducting themselves. But it is not focused on race, ethnicity or religion. They are really moving away from that.

Ms. JACKSON LEE. Can I get the last two witnesses, just quickly, to answer the thought of behavior and the whole issue of racial profiling? Is that an option?

Mr. Singh?

Mr. SINGH. Sorry, congresswoman——

Ms. JACKSON LEE. Is behavior an option, behavioral——

Mr. SINGH. Profiling——

Ms. JACKSON LEE [continuing]. Their behavior? Or does that incorporate actions of people who are attired differently, or doing their prayers, public prayers? Is that also a dangerous prospect?

Mr. SINGH. If the behavior that is focused on is simply my religious practice, wearing a turban or praying, then I would find that very problematic. The behaviors that have to be the focus of law enforcement scrutiny is criminal behavior, actions that actually would indicate that you are about to do something, or in the planning stages of doing something that is terrible.

But merely wearing religious dress, or merely praying, in and of itself is not a crime. In fact, it is protected by the First Amendment of our Constitution. And I would hope that by behavior profiling we do not mean behavior being Muslim or being Sikh.

Ms. JACKSON LEE. Ms. Khera?

Ms. KHERA. Thank you for that question, congresswoman.

We support a behavior focus. But I think the devil is in the detail, so, which I think gets to the point of your question. And I would say, where it is really important is in training and having an audit mechanism. So, ensuring that those officers are understanding, so that they are not singling people out based on religious practice, prayer, speaking Arabic, et cetera.

And also what is really important is the audit mechanism. And that is where the data collection piece is absolutely critical, so that the higher-ups, the supervisors, the heads of agencies can determine whether the policies they have enacted to actually focus on behavior is actually being played out on the ground.

Ms. JACKSON LEE. So, as I yield back, racial profiling is active and alive, and it needs a frontal attack that is balanced and responsive to extinguishing it as it discriminates against people, simply because they exist.

Thank you. I yield back.

Mr. NADLER. Thank you.

And finally, I recognize the gentlelady from California.

Ms. CHU. Thank you so much, Mr. Chair.

First, before I begin, I would like to submit the testimony of United Sikhs for the record, which is another Sikh advocacy organization that I work with closely on the racial profiling issue.

[The information referred to follows:]

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UNITED SIKHS

Recognise the Human Race as One

To transform underprivileged and minority communities and individuals into informed and vibrant members of society through civic, educational and personal development programmes.

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TESTIMONY PRESENTED BEFORE THE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

May 19, 2010

by

UNITED SIKHS

Hearing on Racial Profiling

This testimony is being given on behalf of UNITED SIKHS, a UN-affiliated international civil and human rights advocacy and humanitarian relief organization.

UNITED SIKHS engages primarily in civil rights advocacy on behalf of the Sikh community in the United States, as a result of which we are often approached by members of the Sikh community regarding racial profiling here in the United States. While profiling exists in many arenas, this testimony will focus on TSA screenings, arrivals screening by CIBP, the lack of proper redress for complaints around both of these issues (TRIP), and finally, generalized profiling by law enforcement.

I. The Profiling of Sikhs by TSA

UNITED SIKHS has received complaints from Sikhs all over the country regarding poor treatment at airports by TSA officials. While the TSA implemented screening procedures where a self pat down of the turban was to be given as an option, the failure to implement this option at airports around the country has consistently led to continued complaints and growing dissatisfaction in the Sikh community. These complaints include airports in highly Sikh populated areas such as in the Oakland,San Francisco, and Houston areas, as well as in less populated areas, such as Phoenix, Boston, Dallas, and Omaha.

The profiling of Sikhs is already apparent in the way that the current TSA screening procedures are implemented. We cannot say as they are written, as we have not been able to obtain a copy of the policy that governs this procedure. The current procedures single out

turbans as an item of clothing that should be searched for chemical residue, if the TSO determines that the individual is to be secondarily screened. We have gleaned from conversations with TSA that this may be based on a TSO's determination of what constitutes a "bulky item" of clothing. In light of the recent and thankfully, failed, underwear bombing incident, it is of particular concern to the Sikh community that turbans are being screened as suspicious, at all. There has been no incident that points to turbans as anymore suspicious of an item of clothing than any other item, be that pants, shirts, or underwear. In fact, cargo shorts/pants or other such clothing with pockets arguably carry much more of a risk, yet Sikhs are singled out every day to have their hands swabbed for chemical residue after patting down their turbans --

And that's if the screening itself is implemented in the nicest manner. If the policy is implemented incorrectly, it means that the Sikh can face a variety of treatment -- from mildly offensive at having a TSO pat the turban down, to Sikhs being asked to take their turbans off, being told that they would be arrested unless submitting to a search, or having their turbans seriously mishandled by the TSO while patting down; despite the fact that the turban is a sacred and very personal item. The current procedures challenge the basic decency of individuals being screened: in one example, a Sikh passenger at Oakland International Airport was told that secondary screening for the turban is mandatory and was subjected to secondary screening over thirty times during a two-month period of travel. Another Sikh reported overhearing other people while waiting in the security line stating that they should take another line, as to not to be held up by his screening. Upon discussion with the other people, the Sikh reported that the other people agreed it was absurd that all the parties knew he would be selected for "random screening," and that the turban should be treated in any other manner. The turban is an inextricable part of the Sikh identity. As Americans we wholeheartedly support the need for increased measures for national security, however, to single out individuals based on appearance alone does not result in increased security. We cannot forget that heinous criminal activities have been propagated by all sorts of individuals, and the best security is the kind of security that will equally screen all individuals, based upon intelligence rather than xenophobia, in a manner that does not violate their dignity.

II. Profiling of Sikhs Based on Country of Birth or Previous Country Visitation
There have been a number of cases where Sikhs have been incorrectly detained and face profiling and harassment when entering the United States.

An example of incidents such as these follows:
The individual exits a plane and upon disembarking the plane is immediately identified and escorted from the gate by two CIBP officers in public view. They then take the individual through immigration (if flying in internationally) and then onward to baggage claim. After the luggage is picked up, the individual is taken to a private location where their baggage and person is searched, all documentation with the individual is photocopied, and the individual's phone is taken and information from the phone stored by the officers. The individual is questioned in detail about their trip, and then the individual is left alone between 20-45 minutes, and then released. Throughout the entire experience officers treat the individual rudely, asking pointed questions in a loud and a manner that is threatening as if the person is a suspect, and the experience lasts approximately two hours. Certain individuals have

reported being treated in this manner repeatedly.

We believe that this is due to profiling based on country of birth or previous visitation to a country of interest. Many Sikhs were born in what is now Pakistan, prior to the partition of India and Pakistan in 1947; these individuals' passports reflect their birth in Pakistan, though they haven't been there since 1947. Also, when the partition happened, approximately half the Sikh historical sites and places of worship ended up in what is now Pakistan, including the birthplace of Guru Nanak, the founder of the Sikh faith. Many Sikhs travel for the purpose of religious pilgrimage to these sites, for short stays, often no longer than 3-4 days. Pakistan is a country of concern for the United States in terms of security, and there is no denying that we must be vigilant. However, the concern is that these individuals are not only subjected to additional investigation upon arrival for the time immediately following their trip to Pakistan, but are being subjected to this kind of harassment, every time they re-enter the United States from any other country.

With over of a quarter of a million people of Pakistani origin in the United States, it is clearly a waste of resources and is poor security to have to clear these individuals six, seven, and eight times. Criminal and terrorist activity originates amongst all sorts of individuals, and in so many different countries; again, we must base our security on intelligence rather than xenophobia.

III. The Lack of Redress Available

The proper procedure for individuals to report difficulties they experience during air travel is to file a Traveler Redress Inquiry Program (TRIP) complaint, where the Secure Flight component would address any security or misidentification concerns and prevent unnecessary screening for the individual during future travel. UNITED SIKHS has filed several TRIP complaints with the TSA over the years. However, there has been a complete lack of response by TSA on the vast majority of them. Some cases have been pending for as long as three years and the inquiries for status updates from the TSA have gone unanswered. The legal team has also not been able to get a time frame for the turnaround on these cases from TSA Authorities. There is a serious lack of due process for these redress procedures, and it only serves to further the frustrations of those who face this treatment.

IV. Racial Profiling By Law Enforcement

Sikhs also report being profiled by individuals in law enforcement. This includes reports of being stopped by police without cause, and on occasion being subjected to arrest without cause being established, only to be released later.

To illustrate with two examples:

In the first, Nirvair Singh, a Sikh visiting from India, fell ill and went into a bank to ask for assistance. Due to the language barrier, he was unable to effectively communicate with bank employees, and he sat down to take rest due to his illness. Bank employees, observing that he had a turban, beard, and luggage with him, assumed that he was dangerous and called

police, after which police also assumed, rather than investigating, that the man was a threat and used severe tactics including attacking him with a police dog.

The second is a case where a Sikh family in Houston called the police when their house was robbed. Police proceeded to arrest all the family members, and began questioning them regarding the terrorist attacks this year in Mumbai, India.

UNITED SIKHS believes that incidents like these come from xenophobia and a lack of education. The Sikh community, and many other minority communities are willing to engage with government and law enforcement to provide education to circumvent profiling, but access is often not available nor encouraged. As Americans, we must remember that our government is a "government of the people, by the people, and for the people."

Thank you for your attention to UNITED SIKHS views on the matter of racial profiling, and we welcome the opportunity to be of service to our fellow Americans.

Submitted by:
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Ms. CHU. Well, I am—thank you—I am from California. I have talked to so many Sikhs who have had experiences similar to you, Mr. Singh. And I thank you for talking about the situation so eloquently. Racial profiling is a significant problem in connection to airport security and border crossings, because of the mistaken impression that Sikhs are connected to terrorism because of the turban.

Do you know of any documented case of terrorism from the Sikh community?

Mr. SINGH. Not against the United States, Representative Chu.

Ms. CHU. And can you tell me what are the officials policies of TSA regarding Sikhs and inspection of the turban, versus what the actual experience is?

Mr. SINGH. In theory, the TSA has an anti-profiling policy. I would note—and this is where I think legislation is so important—the TSA's anti-profiling policy is based on the Department of Justice's 2003 racial guidance on profiling. The Justice Department in 2003 guidance on racial profiling first is merely a guidance. It does not have the force of law.

But second, it has a gaping national security loophole that is vague and undefined. So, for reasons of national security, the anti-profiling protections can literally be thrown away, and in fact, they are. At many airports around the country, Sikhs are literally screened 100 percent of the time.

And again, as you have noted in your questions, given that our community has literally no—has not been—had any accusation of wanting to engage in terrorism against the United States, it shows you how foolish racial profiling is, that officers have so much discretion that they can just pull aside anyone who they want to pull aside, based simply on their appearance, with no oversight and no accountability.

Ms. CHU. In fact, there are supposed to be three options. For instance, one, it is supposed to be a private area, but that is not followed. Is that correct?

Mr. SINGH. That is right. Most air traveler passengers do not know that they have—Sikh air travel passengers—have a private option if they want to be screened in private.

But to be honest, it is silly that they need to have to even ask for a private screening. They should not be secondarily screened in the first place.

Ms. CHU. Do you know how many cases of discrimination or complaints have been filed with TSA regarding handling of Sikh passengers?

Mr. SINGH. You know, our organization has filed more than 50 individual complaints with the TSA. We have also sent them an Excel spreadsheet where more than 200 members of our community have complained of being profiled at the airports in the United States.

Sadly, the TSA mechanism for reviewing these complaints is shoddy, at best. Usually, it takes more than a year to receive an acknowledgement that you even filed a complaint. And the disposition of the complaint usually comes 2 years later with a finding of no profiling in that individual case.

We are disturbed that the TSA does not look at the complaints we have filed as part of a larger pattern or practice, but just keeps adjudicating each single case on its own.

So, again, the mechanisms in place to hold the TSA accountable are literally nonexistent. They are written on paper and do not mean much on the ground. And that is why, again, I think legislation is so critical to address this issue in a way that is meaningful.

Ms. CHU. Has TSA ever acknowledged that there has been any racial profiling with regard to Sikhs?

Mr. SINGH. The TSA's constant position—and it is extremely frustrating for our community—is that we do not profile, and profiling is against the policy of the TSA. I am so glad the TSA says that profiling is against their policy. But we would like to actually see that implemented on the ground.

Ms. CHU. So, what recommendations would you have for improving TSA policies regarding Sikhs?

Mr. SINGH. I think the recommendation has to be actually a recommendation from this Congress. We need an End Racial Profiling Act that has a private right of action and has meaningful data collection.

The public should actually have the information available to it to actually see who is being stopped and whether those stops are actually resulting in an arrest, or some indication of criminal activity. And then that way, the public can actually weigh the costs and benefits in an enlightened way of whether the actions our government is taking are actually keeping our country safe and how they square with our rights as Americans.

Ms. CHU. Mr. Chairman, I am very concerned with the way TSA has handled complaints and requests from the Sikh community regarding racial profiling. Not only is it discriminatory, but it has the potential to make the Sikh community even more skeptical and less trusting of our law enforcement officials. And we need the full trust of all passengers in order to maintain the safety and security of our airports and planes.

So, I would like to send a letter to TSA asking for an audit and additional data on the racial profiling of Sikhs by TSA employees. Actually, I would like to in fact get overall information—a racial breakdown, basically—of the complaints that have been filed with regard to the inspections by TSA employees, and urge them to review their policies and improve their training to limit this kind of discrimination.

And Mr. Chairman and Members of the Subcommittee, I hope you can join me in that effort.

Mr. NADLER. We will be happy to work with—the staff will work with your staff on that.

Ms. CHU. Thank you.

Mr. NADLER. Would you yield to me for a second?

Ms. CHU. Yes.

Mr. NADLER. Thank you.

I want to ask Mr. Singh, as terrible as racial profiling is, I think we understand the mistaken psychology of some people who engage in it.

From your knowledge of the TSA, since there is no history of Sikhs engaging in terrorism or attacks on the United States, or

anything else, why does the TSA racially profile the Sikh community?

Mr. SINGH. I believe because their officers are given so much discretion, that there are no proper controls for the officers to actually review whether they are engaged in profiling and how that affects their law enforcement functions. There really is no great system——

Mr. NADLER. No, no. I understand all that.

Mr. SINGH. Yes.

Mr. NADLER. But why the Sikh community?

Mr. SINGH. Why the Sikh community? You know, Chairman Nadler, I really do not know, given what you have just said, given that Sikhs have not had any sort of terrorist accusation against the——

Mr. NADLER. You would have to say just ignorance, then.

Mr. SINGH. Yes, I believe it is ignorance. I believe it is ignorance. And it goes a lot to what my distinguished panelists have said with regard to police training and education.

Mr. NADLER. Thank you. I yield back to the gentlelady, who was going to yield back.

Ms. CHU. Yes, I yield back.

Mr. NADLER. I thank you.

We have no further Members to ask questions.

So, without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward, and ask the witnesses to respond as promptly as they can, so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

I want to thank the members of the panel. I want to thank the Members generally.

And with that, this hearing is adjourned.

[Whereupon, at 3:55 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Congressman Henry C. "Hank" Johnson, Jr.
Statement for the Hearing on
Racial Profiling and the Use of Suspect Classifications in
Law Enforcement Policy

June 17, 2010

Thank you, Mr. Chairman, for holding this important hearing on racial profiling and the use of suspect classifications in law enforcement policy.

Racial profiling occurs when law enforcement officers target people for interrogations, searches and detentions based not on evidence of criminal activity, but on an individual's perceived or actual race, ethnicity, or nationality.

The terrorist attacks of September 11, 2001 and the ongoing immigration debate have complicated the racial profiling issues our country faces.

While traditionally thought of as targeting African-Americans, profiling affects a broad range of people in the United States, including Native Americans, Latinos, Arabs, Muslims, and South Asians.

In my home state of Georgia, some local law enforcement officials have taken advantage of the 287(g) program and used it as a license to profile and deport individuals.

Section 287(g) of the Immigration and Nationality Act authorizes the federal government to enter into agreements with state and local law enforcement agencies, permitting designated officers to perform immigration law enforcement functions.

A March Two Thousand and Ten American Civil Liberties Union of Georgia Report details how 287(g) has torn families apart and threatened safety in Gwinnett County.

While 287(g) was intended as a measure to combat violent crime, such as felonies and drug trafficking, 287(g) agreements have come to undermine police work as immigrant communities, fearful of being deported and leery of local de facto immigration officers, hesitate to report crime.

The 287(g) program and Arizona's new immigration law have exacerbated racial profiling concerns. Arizona Governor Jan Brewer signed Senate Bill 1070 into law in April.

The law makes it a state misdemeanor crime for immigrants to be in Arizona without carrying legal documents. The law was modified within a week of its signing with the goal of addressing some criticisms that the law encouraged racial profiling.

Serious questions remain about the constitutionality of the law and whether it will lead to increased racial profiling.

No American should be made to feel like a second-class citizen. All Americans have the right to be treated equally and to be free from discrimination. Racial profiling is an unacceptable patrol tactic that cannot be tolerated.

Not only is racial profiling humiliating and degrading for the people subjected to it, it is unconstitutional, and an ineffective law enforcement practice.

Racial profiling is inconsistent with basic fundamental constitutional principles. The Fourth Amendment guarantees all people the right to be free from unreasonable searches and seizures without probable cause.

The Fourteenth Amendment's Equal Protection Clause requires that all people be treated equally under the law, providing that no state shall deny to any person equal protection of the laws.

Racial profiling undercuts people's trust and faith in the American judicial system. Because of racial profiling, some communities do not trust law enforcement officers.

As a result, members of these communities become less likely to assist with criminal investigations or seek protection from police when they themselves are victimized, which makes everyone less safe.

We must do what we can to end this cycle of mistrust.

I am eager to hear any suggestions our witnesses may have regarding ways to track racial profiling, and most importantly, to prevent racial profiling.

I thank the witnesses for being here today and yield back.

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QUESTIONS FROM CHAIRMAN CONYERS:

1. ***What types of training programs does the NAACP Advocate for police officers?***

   The NAACP endorses the law enforcement official training programs as developed by the National Organization of Black Law Enforcement Executives (www.noblenational.org) for law enforcement executives as well as those developed by National Black Police Association, Inc. (www.blackpolice.org) for rank-and-file law enforcement agents.

2. ***Currently, the main recourse for racial profiling incidents is a pattern and practice suit that must be initiated by the Department of Justice pursuant to 14 USC §14141. What type of remedy, other than a civil lawsuit like the class-action pending against New York, do you envision as being useful in deterring racial profiling?***

   The NAACP supports an administrative remedy which allows citizens, either independently or as a group, to file a complaint with an independent agency or bureau which can in turn investigate, subpoena and make recommendations for settlement of and corrective processes to address the citizens' concerns. Such an agency or bureau must be able to recommend the retraining of police officers and law enforcement agencies. Citizens should also be allowed a private right of action to ensure their rights are not infringed upon.

QUESTIONS FOR CONGRESSMAN HENRY C. "HANK" JOHNSON, JR.:

1. ***Please explain how racial profiling has undercut the trust of communities in the faith and integrity of the American judiciol system.***

   The first responders in the American criminal justice system, as well as any other participants, suffer when whole communities cannot drive down an interstate, walk down the street, or even enter into our own homes without being detained for questioning and seemingly harassed by law enforcement agents merely because of the color of our skin and other physical characteristics. Racial profiling leads to entire communities losing confidence and trust in the very men and women who are meant to be protecting and serving them. As a result of racial profiling practices, it becomes much harder for law enforcement, even those who do not engage in racial profiling, to do their jobs to prevent, investigate, prosecute or solve crimes, because of, among other reasons, they lose trust and integrity.

2. ***Please explain how the mistrust of low enforcement officers has hurt communities of color.***

   As I said earlier, racial profiling leads to entire communities losing confidence and trust in the very men and women who are meant to be protecting and serving them. This is especially harmful in low-income communities and communities of color which may have higher incidents of crime and other altercations in which law enforcement officials can and should serve a useful purpose. When there is a lack of trust in law enforcement, members of the community are less willing to call on law enforcement to report a crime or to assist in solving the crime.

3. ***What should Congress do to prevent racial profiling?***

Congress should begin by enacting, as quickly as possible, the end Racial Profiling Act. H.R. 5748, the *End Racial Profiling Act* attacks the insidious practice of racial profiling by law enforcement on four levels: first, it creates a federal prohibition against racial profiling; second, it mandates data collection so we can fully assess the true extent of the problem; thirdly, it provides funding for the retraining of law enforcement officials on how to discontinue and prevent the use of racial profiling; and fourth, it authorizes grants for the development and implementation of best policing practices, such as early warning systems, technology integration, and other management protocols that discourage profiling. The legislation also requires the Attorney General to provide periodic reports to assess the nature of any ongoing discriminatory profiling practices.

4. ***What is the most common complaint you receive about racial profiling?***

The NAACP currently has more than 2,200 membership units in every state in the country, and I would wager that every NAACP unit has, at some point, received at least one complaint of racial profiling. Many NAACP units report receiving hundreds, if not thousands, of complaints of racial profiling each year. Specifically, NAACP units receive complaints about not being able to drive down an interstate, or walk down a street without being stopped and questioned by law enforcement officers for no good reason.

5. ***Please explain why data collection is an effective tool in combating racial profiling.***

As I have said consistently, "in order to fix it, you must first measure it". The only way to move the discussion about racial profiling from rhetoric and accusation to a more rational dialogue and appropriate enforcement strategies is to collect the information that will either allay community concerns about the activities of the police or help communities ascertain the scope and magnitude of the problem. Furthermore, implementing a data collection system also sends a clear message to the entire police community, as well as to the larger community, that racial profiling is inconsistent with effective policing and equal protection.

6. ***Please explain how racial profiling is harmful as terrorists and criminals can respond by modifying their behavior, and recruitment practices.***

First, racial profiling is a distraction of resources in that if law enforcement officers are busy pursuing needless investigations based solely on appearance, they do not have the time or energies to pursue genuine leads. Secondly, if terrorists or criminals wish to infiltrate a target or perpetrate a crime, and they are smart, they will modify their behavior or recruitment practices to enlist co-conspirators who will not attract the attention of law enforcement agents who are busy picking out the wrong people through racial profiling.

7. ***Please explain how racial profiling interferes with public safety.***

First, as previously discussed, racial profiling results in a loss of trust and confidence between communities and the law enforcement agents who are intended to protect and serve them; this

in turn erodes public safety. Secondly, as previously discussed, racial profiling is a distraction of resources which also leads to an erosion of public safety.

The fact of the matter is that prevention of crime should be the primary goal of law enforcement , and when they engage in racial profiling they cannot effectively prevent or protect the communities they are intended to serve. If and when a crime does unfortunately occur, the lack of communities' trust and the reduction of genuine crime-solving resources again hobbles law enforcement's abilities to solve the crime.

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Hearing on Racial Profiling and the Use of Suspect Classifications in Law Enforcement Policy

June 17, 2010

Chief Burbank's Response to Questions Submitted by Congressman Henry C. "Hank" Johnson, Jr.

1. Please explain how state and local law enforcement is placed in the untenable position of potentially engaging in racial profiling with Section 287(g) and the new Arizona immigration law.

    a. Police officers use the standard of reasonable suspicion and probable cause as the basis for interjecting themselves into the lives of the public. Both reasonable suspicion and probable cause are standards of law based upon observable behavior. Officers must articulate the actions of suspects, justifying detainment or the restriction of free movement. There is no behavior associated with citizenship status short of running from the border that can be identified by a police officer. This leaves only race or ethnicity as the basis for police intervention. Race is not nor can it be used as an indicator of criminal behavior.

2. Please explain how instituting data collection policies would be beneficial to law enforcement officers.

    a. Biased policing goes far beyond racial profiling, the practice of stopping individuals, based upon race or ethnicity. To truly understand and reduce bias, statistical observations must delve deeper than population density versus traffic stop comparisons. Data collection should look at search incidence and hit ratios, Terry stops, consent searches as well as accurate arrest documentation. Frustration in the recent immigration debate has centered around the lack of accurate ethnicity statistics concerning arrest and crime rates. Accurate information on deportation efforts by ICE has also been unavailable.

3. Please explain how racial profiling has made it difficult for law enforcement officers to do their jobs and engage in community policing efforts.

    a. When community members view police officers or the agencies they represent as biased or racist, they are less inclined to participate at all levels including crime prevention and detection. Individuals are less likely to be forthcoming or come forward at all with information or crime tips when they feel their personal status may be questioned. We rely upon eye witness accounts of crime to achieve successful prosecution.

4. In your written testimony, you state that one in three law-abiding citizens surveyed said they would not report serious crimes if police officers were empowered to determine citizenship status. Please explain how Section 287(g) and the new Arizona law can have the unintended consequence of making communities less safe.

    a. Our recent successes in crime reduction throughout the country can be attributed in part to the success of community oriented policing. Neighborhoods have embraced collaboration with local law enforcement contributing to dramatic crime reductions especially in violent crime. As communities become weary of police motives as described in questions 1 and 3, they become less inclined to participate and turn inward in the face of problems. This is very similar to attitudes of the late eighties and early nineties which contributed greatly to the dramatic increase in criminal street gang violence. As cooperation decreases, the ability of law enforcement to proactively solve or prevent crimes is diminished.

5. Please explain how racial profiling interferes with public safety.

    a. Profiling in any circumstance other than for criminal behavior is unconstitutional and diminishes the legitimacy of law enforcement. Race is not a predictor of criminal behavior and should not be looked upon as such. We, as a society, have made this mistake far too frequently in the past. It is time we learn from those errors.

David Harris
Answers to Questions from Chairman Conyers

Chairman John Conyers, Jr.

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Hearing on Racial Profiling and the Use of Suspect Classifications in Law Enforcement Policy

June 17, 2010

Answers to Additional Questions from Chairman Conyers for Mr. Harris

1) Suppose that in a given city, the highest concentration of violent crime occurs in an area that happens to be heavily populated by racial and ethnic minorities. What are the implications of some tactics used by the police in areas perceived to be high crime zones?

   ANSWER: While it is true that in many cities, areas with concentrations violent crime have heavily minority populations, this does not dictate that, as some say, members of minority groups that live in these areas must simply "put up" with any particular approach to crime, such as arrest or stop and frisk sweeps, checkpoints, or heavy reliance on pretext traffic stops. While any police department may choose to use these tactics, the fact to remember is that this is a choice. A variety of methods may be used to fight crime, and some of these methods may have greater negative impacts on those living in these neighborhoods than other methods. For example, a police department may choose to use frequent pretext traffic stops in a high-crime neighborhood; while this may be effective in combating crime, it may also lead to resentment of police and difficulties in obtaining cooperation from law-abiding members of the community who are caught up in these stops. In contrast, a department may attempt to address the high rate of violence with a "call in" program, such as Operation Cease Fire in Boston in the 1990s (a program implemented successfully in many American cities since). This approach, which was highly effective, brought police and communities together in common cause against violence, instead of engendering distrust.

2) Do you think that the prevalence of racial profiling is more directly attributable to the methodology of police departments in allocating resources, or to the behavior of individual officers?

   ANSWER: The prevalence of racial profiling has much more to do with methodology, training (or lack thereof), and an institutional culture of police departments than it does with the behavior of individual officers. The behavior of outliers among officers is easily tracked, given the will to do so, and can be addressed. When methodology and institutional culture either legitimize or do not address a practice like racial profiling, it

can take root without anyone noticing. It is no less insidious or damaging when this happens than if it happens through the conscious effort of individuals. Getting rid of it on the institutional level takes an organizational effort.

3) What has been the trend in Supreme Court decisions when it comes to police power and discretion to engage in traffic enforcement based on pretexts? Does the Court lean more toward allowing greater or lesser discretion?

ANSWER: The trend for at least the past two decades, and arguably longer, has been to increase police power over vehicles and drivers through traffic enforcement based on pretexts. The chief decision in this area, *Whren v. U.S.*, 517 U.S. 806 (1996), allows police to use pretext-based stops to investigate any crime, whether any evidence-based suspicion exists or not, as long as a traffic offense of any kind has been committed. The Fourth Amendment, the Court said, simply does not apply in such circumstances. A host of other decisions both before and after *Whren* give police the power not just to pull drivers over virtually any time, but to search them in almost any (though not every) instance. The Court pulled back just a bit on this wide-open police discretion in *Arizona v. Gant*, 556 U.S. ___ (2009), when it said that, contrary to an earlier decision, police must have some reason to think evidence of a crime or a weapon is present to do a search of a vehicle when someone from the vehicle is arrested. But *Gant* remains an aberration, and there is no sign that the Court has changed overall direction on this question.

4) Based on this trend, do you predict that the Court will give greater or lesser discretion to law enforcement to engage in racial profiling?

ANSWER: I predict that the Court will not materially limit the discretion of law enforcement to engage in racial profiling. *Gant* is a good example: while it narrows the rule for searches performed incident to arrests of drivers or passengers in vehicles, police remain more than adequately empowered to use discretion to stop almost any driver, question the driver, and to search the driver and the vehicle with minimal or no justification that comes from observed criminal conduct. I cannot foresee the Court ever giving out-and-out approval to racial profiling as such, but they will not change the basic legal landscape of police power and discretion in any way that would keep officers from engaging in this practice.

5) How would you respond to critics who might argue that requiring every police department to catalog every police stop would be too onerous a requirement?

ANSWER: This assertion is not supported by the facts. Some police departments in the U.S. have been cataloging stops of vehicles for ten years; none have found it more than a

minimal burden. In my research, I found that the effort of a major police department using a series of radio signals to collect data added only thirty seconds per stop to record this information. Today, with so many patrol cars utilizing in-car data terminals, officers need only check a few additional boxes on electronic forms. It is worth pointing out that in New York City, police officers have recorded data on pedestrian stops and frisks for years, even as the use of these stops has ballooned; while there are complaints about stop and frisk *practices* both from the public and from police officers themselves, there have been no complaints about keeping the records involved.

6) Would you expect such a requirement to discourage officers from pretext stops, and would you expect that to have a deleterious effect on the prevention of crime?

ANSWER: Required reporting on stops may discourage some use of pretext stops, but it will not be enough by itself to substantially limit or curtail the tactic. For example, state law has required reporting of stops in Missouri for almost ten years, but pretext-based stops and searches remain higher for minorities than for whites. To curtail these practices, police leadership must a) point out that they are counterproductive, b) explain that these stops violate state law or department policy, and 3) hold officers accountable for violating these standards.

Congressman Henry C. "Hank" Johnson, Jr.

Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Hearing on Racial Profiling and the Use of Suspect Classifications
in Law Enforcement Policy

June 17, 2010

MUSLIM ADVOCATES RESPONSE TO
QUESTIONS SUBMITTED BY CONGRESSMAN JOHNSON

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1. Please explain how racial profiling has undercut the trust of communities in the faith and integrity of the American judicial system.

The Muslim American community, estimated at approximately six million people nationwide, has been subjected to heightened scrutiny by federal law enforcement since 9/11, resulting in:

- FBI interviews that are conducted without any suspicion of wrongdoing;
- Extensive and invasive questioning of First Amendment-protected beliefs and activities at the border;
- Broad surveillance of community organizations conducted without reasonable suspicion of any wrongdoing;
- Use of informants and undercover agents to infiltrate houses of worship, political gatherings, and religious gatherings; and
- Massive cultural- and ethnic-based data gathering and mapping of the Muslim American community.

When innocent, law-abiding Americans are targeted by law enforcement not because they are engaged in criminal activity, but rather, because of their race, ethnicity, or religious affiliation, individuals, and in turn entire communities, develop a sense of frustration, fear, and mistrust towards law enforcement. Such biased policing practices may also have the unintended effect of leading some community members to infer that the authorities, or even the judicial system, are inherently opposed to their religion or way of life, further isolating and marginalizing a group of Americans. Moreover, when a community fears law enforcement and lacks confidence that they will be treated fairly, they are more likely to be reluctant to come forward to report crimes, act as witnesses in an investigation or at trial, or encourage their community members to pursue law enforcement as a career. These harms threaten public safety and a well-functioning judicial system.

Racial, religious, and ethnic profiling is not only contrary to our nation's guarantee of equal justice under the law, it yields negative results, diverts valuable resources from legitimate investigations, and jeopardizes a vital relationship between the Muslim American community and law enforcement needed to counter actual criminal activity.

2. Please explain how the mistrust of law enforcement officers has hurt communities of color.

Discriminatory policing practices threaten the trust between communities of color and law enforcement, a necessary relationship for countering actual criminal activity. Community members who are intimidated, fearful, or distrustful of law enforcement will be less likely to approach law enforcement in the future to report crimes or assist in investigations of actual criminal activity. This ruptured relationship undermines the safety and security of communities of color and all Americans.

3. What should Congress do to prevent racial profiling?

Congress has a responsibility to ensure not only that law enforcement protects the safety of the American people, but that they do so in a manner that is consistent with the Constitution. The rights and protections of the Constitution are guaranteed to *all* Americans, regardless of race, religion, ethnicity, or national origin.

Congress must address this problem by working to ensure the passage of H.R. 5748, the End Racial Profiling Act of 2010 (ERPA). ERPA would prohibit law enforcement agencies from targeting individuals on the basis of religion, race, ethnicity or national origin for stops, searches and other investigative activities. Specifically, ERPA would:

1. Ban racial, ethnic, religious and national origin profiling by federal, state and local law enforcement;
2. Require training of federal, state and local law enforcement to ensure that discriminatory policing does not take place;
3. Establish an effective redress mechanism for those aggrieved to ensure accountability;
4. Require federal, state and local law enforcement to collect data on stops, interviews and all investigatory activities to allow the agency and the public to monitor whether racial, ethnic and religious profiling is taking place; and
5. Require the Attorney General to report to Congress on the implementation of such a law.

ERPA is a good place to start but should be strengthened to include *all* biased law enforcement investigatory activities, specifically, racial and ethnic data collection and analysis, assessments, and predicated investigations by the FBI pursuant to its Domestic Investigations and Operations Guide (described briefly in response to Question #1 above).

Congress should also exercise its oversight authority to ensure that the FBI, Customs and Border Protection, and other federal agencies with law enforcement and intelligence-gathering powers are using their broad, unprecedented authority to focus on legitimate leads and credible intelligence of actual criminal activity and threats, not innocent individuals and groups based on generalized suspicion, fear and bias.

4. Please explain why data collection is an effective tool in combating racial profiling.

Comprehensive data collection allows law enforcement and the public to fully understand the scope and extent of racial, ethnic and religious profiling. For instance, arrest data recently released by the New York Police Department demonstrated the disproportionate levels at which African Americans and Latino Americans are being frisked. This data was an important reminder to law enforcement authorities and the public that racial profiling remains an urgent challenge. Unless law enforcement authorities are required to collect data on all investigatory activities, including stops, interviews, and investigations, the agencies and the public will be unable to monitor the scope and extent to which racial, religious, and ethnical profiling is taking place. Such data is necessary to monitor the problem and determine whether policies, practices and training are preventing and ending racial, ethnic and religious profiling.

5. Please explain how racial profiling is harmful as terrorists and criminals can respond by modifying their behavior, and recruitment practices.

Policies that target individuals on the basis of race, religion, national origin, and ethnicity are inherently flawed because there is no fail-safe, generalized physical description of what a criminal or terrorist looks like. For example, a recent directive by the Transportation Security Administration (since rescinded), which targeted individuals traveling from 14, primarily Muslim, countries for enhanced screening measures, would not have succeeded in apprehending Richard Reid, the shoe-bomber, a British citizen of Jamaican descent.

Instead, law enforcement should focus on suspicious behavior, legitimate leads, and credible intelligence of actual threats. Indeed, a standard recently adopted by Director of National Intelligence (DNI) for use in its Information Sharing Environment (ISE)-Suspicious Activity Reporting (SAR) system seems to do just

that. The ISE-SAR functional standard explicitly adopts a "*behavior-focused approach* to identifying suspicious activity" based on the standard announced in *Terry v. Ohio,* 392 U.S. 1 (1968), and requires that "race, ethnicity, national origin, or religious affiliation should not be considered as factors that create suspicion (except if used as part of a specific suspect description)."[1]

Similarly, the standard that the U.S. Department of Justice incorporated in consent decrees entered into with the New Jersey State Troopers in 1999 and with the Los Angeles Police Department in 2000, after investigating these agencies for unlawful racial profiling and excessive use of force, excludes consideration of race, ethnicity or national origin without a specific suspect description.[2]

6. Please explain how racial profiling interferes with public safety

[Please see responses to Questions #1 and #2 above.]

[1] *See* Information Sharing Environment (ISE) Functional Standard (FS) Suspicious Activity Reporting (SAR) Version 1.5, at 7, 29 (fn. 11), *available at* http://www.niem.gov/pdf/ISE-FS-200_ISE-SAR_Functional_Standard_V1_5_Issued.pdf.

[2] *See, e.g., U.S. v. State of New Jersey*, consent decree entered Dec. 30, 1999, ¶ 26, available at http://www.state.nj.us/lps/jointapp.htm; *U.S. v. City of Los Angeles*, consent decree, ¶103, available at http://www.justice.gov/crt/split/documents/laconsent.php.

Congressman Henry C. "Hank" Johnson, Jr.

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

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June 17, 2010

Questions for Mr. Brian Withrow

1. You would agree that racial profiling is real and does exist? Please explain how law enforcement officers could use data collections procedures to track racial profiling.

2. Would you agree that cases like *Whren* make it harder to challenge traffic stops?

3. Are you familiar with the New Jersey Turnpike Study that found that minorities were five times more likely to be stopped on the Turnpike than non-minorities? What are your thoughts about the methodology of that study?

4. What should Congress do to prevent racial profiling?

Responses to questions from Congressmen Henry C. "Hank" Johnson, Jr. from Dr. Brian L. Withrow.

1. Yes, of course racial profiling is real and it does exist. The problem is, and always has been, proving it. Data collection is important, but only to the extent that it enables individuals police officers, and their supervisors, to evaluate their traffic stop performance. This would require the creation of an internal benchmark whereby individual officers are compared against their similarly situated peers. Otherwise we are left with aggregate data that is less able to substantiate a claim of racial profiling.

2. No, *Whren* did not create new law it only validated a common and useful police procedure. The capacity to question the Constitutionality of a traffic stop was not affected by *Whren*. The salient issue in *Whren*, at least from a racial profiling perspective, is the legality of a consent search subsequent to a legal stop. I would be very reluctant agree with any process that would disallow the use of a consent search. We could however impose requirements on police officers to fully inform citizens of their rights under the law (sort of like we do now with *Miranda* during custodial interrogations) prior to requesting permission. This would have the effect of making the consent search more difficult. Police officers would likely reserve this process for the cases where some level of reasonable suspicion exists, rather than conducting fishing expeditions.

3. Yes, I am familiar with the New Jersey Turnpike Study. The methodology used in this study has been largely discredited in the academic literature and by subsequent court cases.

4. It is very difficult to control police behavior at the federal level. Funding additional data collection and requiring training has not proven to make much difference at the state or local level. Probably the best option would be to require police officers to inform citizens of their rights under the Fourth Amendment prior to seeking their permission to conduct a consent search. Beyond this, some form of injunctive relief might enable individuals to seek redress in the federal court system.

Chairman John Conyers, Jr.

Subcommittee on the Constitution, Civil Rights, and Civil Liberties

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June 17, 2010

Testimony of Professor Deborah Ramirez, with the assistance of research assistant Nelson Rutrick. Submitted on July 28, 2010.

1. **States like Massachusetts and New Jersey have expanded the exclusionary rule to exclude evidence from traffic stops initiated through suspect means. Is this a rule that you feel should be undertaken on the federal level?**

   Yes, the exclusionary rule should be employed in federal courts when statistical evidence demonstrates that a traffic stop was racially motivated. The touchstone of the Fourth Amendment is reasonableness, and it is inherently unreasonable for law enforcement to base searches on race.

   Congress is both morally justified and constitutionally authorized to adopt the exclusionary rule to bar evidence obtained through racial profiling from being used against defendants in court. The Fourth Amendment, which forbids unreasonable search and seizure, has been interpreted by the United States Supreme Court to be a floor, not a ceiling, on the rights granted to the people.[1] The legality of a traffic stop is not based on the subjective intent of a police officer,[2] but Congress has undisputed authority to raise the floor on what constitutes a legal traffic stop and bar racially motivated pretextual stops.

   Applying the exclusionary rule to evidence obtained in racially motivated pretextual traffic stops would protect the integrity of our judiciary from this tainted product of racial profiling as well as deter officers from engaging in this conduct.

2. **New York City faces a class-action lawsuit alleging racial profiling during *Terry* stops conducted from 2004-2009. Among nearly three million *Terry* stops during that period, about 1.5 million were of African-Americans, nearly 900,000 were of Hispanics, and under 300,000 were of whites. Is that statistical disparity alone indicative of the presence of racial profiling?**

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[1] "Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." Miranda v. Arizona, 384 U.S. 466, 467 (1966).

[2] "Subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis." Whren v. United States, 517 U.S. 806, 813 (1996).

Pure statistical analysis alone cannot be indicative of the presence of racial profiling without appropriate benchmarks. *Terry* frisks are usually in response to reports of crime, and any proper analysis of *Terry* stops to examine whether racial profiling took place would need to exempt "be-on-the-lookout" situations which included a description of a suspect's race. Officer-initiated traffic stops based on proactive policing for traffic violations and not based on reported crimes is a different type of enforcement than a street *Terry* frisk and is a much better metric for determining whether racial profiling is present. Rather than forcing each community to reinvent the wheel to find the proper method to analyze racial profiling, a national resource center would provide the guidance, information, tools, and templates needed to strengthen police-community relations without investing the same amount of money that fifty separate state agencies would require.

Without a national resource center devoted to collecting and analyzing data, communities will not be able to put data they collect to its best use. Each individual community will have to create their own goals and benchmarks, utilizing the data collected in a haphazard manner with no defined measurement for success.

Attached to this testimony is a proposal for a national resource center which would meet the needs of communities which are currently at risk due to racial profiling.

3. **Do you think that police procedures and deployment tactics utilized in minority communities create situations where rank-and-file officers engage in profiling behavior even if they disagree with it or do not realize that they are doing it?**

All people engage in unconscious bias and profiling behavior, and gaining an awareness of this bias is the only way to prevent it from affecting police work. A primitive part of our brains, the Limbic System, has the principle function of survival and reproduction and operates beneath our consciousness to assess threats. Limbic thinking includes the powerful tendency to classify people and groups as either "us or them." This means that based on superficial characteristics such as race, another person or group can be automatically classified as dangerous. Our minds are predisposed in perceived dangerous or critical situations to override conscious thought processes and rely on limbic thinking. Research has shown that most people, including minority groups, on a limbic basis referred to as "implicit bias," associate blacks and Hispanics with dangerousness and automatically become hyper-vigilant. Training law enforcement to become aware of their unconscious bias has significantly blunted the impact of this biological mechanism. By training officers to, for example, mentally transpose the races of people they suspect of wrongdoing, officers have been able to determine if the action they are about to take are truly race neutral and appropriate. Although the nature of racial profiling makes it exceedingly difficult to identify and address, becoming aware of this unconscious bias can tremendously reduce its impact.

4. **How would you respond to critics who might argue that requiring every police department to catalog every stop would be too onerous a requirement?**

The burden on police departments in cataloging traffic stops has proven to be extremely minor. Recording all of the necessary data from a stop takes officers less than a minute, and nearly all departments already record this data on their own. Twenty-four states already mandate collection of racial data in all stops, twenty-two have voluntary collection practices already established, and only four have not yet create state-wide procedures.[3] Departments vary on how they actually record this data at the scene of a stop, but the end result regardless of technique has been a minimal burden.

5. **Would you expect such a requirement to discourage officers from pretext stops, and would you expect that to have a deleterious effect on the prevention of crime?**

Having a requirement to catalog stops would remove race from the calculus of police officers who are making traffic stops, without impacting their ability to prevent crime. Stops which are not based on constitutional protected classes such as race are a valid and valuable law enforcement tool which would not be affected by this change. Once officers know these stops are being recorded, they are much more likely to ask themselves if they would take the same action if race were transposed and they were dealing with a white driver or suspect. Recording these interactions will cause police officers to channel their efforts into the application of valid behavioral and situational indicators of criminal activity to determine if a stop is necessary, techniques which have proven to be far more effective in reducing crime than racial profiling.

6. **The TSA no longer uses the list of 14 suspect countries, and they have been instructed to use, instead, a list of factors that are behavioral in nature and which are supposed to be cross-referenced with active intelligence on credible threats. Is this measure sufficient to protect our airlines without resorting to racial profiling? If not, what further steps would you have the TSA take in order to strike the right balance between security and liberty?**

The TSA can protect our airlines without resorting to racial profiling by analyzing the behavior of passengers along with consideration of their travel patterns, method of payment, and amount of luggage carried. Although race can be "beaten" through the use of a "Jihad Jane" counter-profile, in which a terrorist who does not fit the stereotypical profile of Muslim, Arab, or South Asian is the one carrying out an attack, behavioral analysis cannot be similarly gamed. When terrorists attempt to create counter-profiles to a behavioral analysis, they end up making themselves easier to identify and capture. For example, paying for tickets with a credit card creates a paper trail through which people can be tracked and by which financial backers can be more easily identified. Terrorists have the ability to respond to racial profiling with counter-profiles, but they are unable to do the same with behavioral analysis.

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[3] States with mandatory collection of racial data in traffic stops: **AR, CO, CT, FL, KS, KY, LA, MA, MD, MO, MN, MT, NC, NE, NV, OK, OR, RI, SD, TN, TX, UT, VA, WA (24).** Voluntary collection: **AK, AL, AZ, CA, DC, DE, GA, IA, ID, IN, MI, ME, ND, NH, NJ, NM, NY, OH, PA, SC, WI, WV, WY (22).** No collection: **HI, MS, ND, VT (4). Available at** http://www.racialprofilinganalysis.neu.edu/background/jurisdictions.php.

ATTACHMENT

Proposal for a Resource Center Focused on Educating and
Training Law Enforcement, Media, Community Members
and Analysts About the Racial Profiling Data Collection Process

Prepared by Lamberth Consulting

Since racial profiling became broadly publicized in the late 1990's, more than 20 states have some form of legislation specifically intended to addresses racial profiling, and prohibit police officers from engaging in the practice. A review of racial profiling legislation across the country demonstrates that states have addressed the racial profiling issue in 2 primary ways. The first is to require police departments to collect stop data (such as age, race, ethnicity, violation, etc.) for motorist stops. The second is to require agencies to develop policies for preventing racial profiling, and/or to train officers. In addition, literally hundreds of agencies across the country are either currently engaged in or have in the past collected data or provided training to address racial profiling outside of legislative mandate. Most, if not all agencies facing the issue have also chosen to engage their communities either through established community bodies, or through other public venues. Clearly the issue is of national importance to law enforcement agencies, their communities and associated governing bodies.

The goals of enacted state legislation across the country appear to be similar. The first is to make profiling based on the impermissible use of race illegal, and/or to create language that clearly bans police officers from engaging in the practice. The second goal (in states where data is collected) is to provide some level of accountability by police for their stop practices relating to race. The third is to provide direction and education to officers (through policy and/or training) to assist them in performing their duties in a non-biased manner. While enacted legislation in most jurisdictions is fairly clear, the implementation of plans to achieve these goals has proven more challenging. Agencies have collected stop data in most jurisdictions with relative success, but the next step, interpreting or analyzing those data to provide some level of accountability has not gone so smoothly.

Most researchers understand that collected stop data must be compared to a benchmark before meaningful analysis can occur. The benchmark must be properly developed before legislative goals can be achieved. Dozens of different benchmarks have been introduced since 1999 by various groups. Unfortunately, the majority of these benchmarks fail to meet fundamental scientific or common sense standards, and have often created significant problems for agencies that have used them and their communities. Confusion over benchmarking has greatly impeded the industries ability to agree on measurement, and to realize the fundamental goals and rationale for collecting stop data.

Agencies and communities struggling with the data analysis question find themselves faced with attempting to analyze and interpret fundamentally different measurement approaches. Often these attempts are made when the jurisdiction has decided to analyze the data, and must review responses from various research groups providing proposals on various analysis methods. Given the complexity of the issue, this task is daunting even for the more educated reviewers.

In order to assist agencies and communities struggling with addressing this issue, a centralized information and resource about data collection, analysis and training will be of vital importance to jurisdictions across the country.

In order to meet the growing demands for information and resources about racial profiling, we propose that a centralized resource center aimed at servicing the needs of jurisdictions that must address these issues.

The core focus of the center should be four-fold. The first is to provide a centralized repository of tools and information to help educate and inform law enforcement, communities and other stakeholders on the issue. The second is to provide assistance to jurisdictions conducting data collection, data analysis, and training. The third is to conduct research and analysis on existing work done in this area, and in burgeoning areas of this field. The fourth is to coordinate local and regional workshops targeted at introducing data collection and analysis topics to law enforcement agencies and communities across the country.

The centralized repository would be structured to enable access to existing information, tools and knowledge developed over the past several years in this field. Potential topics for this repository would include racial profiling policies, existing data collection systems, tools for data analysis, models for conducting law enforcement/community engagement activities, and addressing media and public concerns about the issue. This could be accomplished through the use of a website structured as a knowledge repository, which would be updated on an on-going basis.

The center would also be structured to provide technical assistance to jurisdictions implementing data collection systems or engaging other methods targeted at addressing the specific needs in their communities as it relates to racial profiling. The center would be positioned to provide assistance in several areas associated with this work. Potential areas for assistance include:

- Developing data collection systems. Center staff would provide assistance in answering questions about processes, tools, required labor, communications to staff and officers when starting to collect racial profiling data.
- Conducting data analysis. Center staff would provide assistance to jurisdictions in data analysis methods. Topics for inclusion would include measuring and benchmarking traffic populations, violator populations, post-stop activity, and analysis techniques for stop data.
- Implementing Community Engagement Models. Staff would be prepared to consult on the various models used for involving community representatives in the process.
- Managing Public Relations. Staff would provide assistance on engaging the media, and assist with communication planning and dissemination regarding collected data and corresponding analysis.
- Training. Staff would provide training on the issue spanning topics which include factual information about bias in law enforcement, as well as data collection and analysis systems.
- Impact Analysis. The staff would assist the requesting jurisdiction in analyzing their efforts to address their issues, evaluating the impact of those efforts. Staff would be positioned to provide guidance to the jurisdiction regarding next action steps.

The Center would also conduct on-going research in the area. Staff would review and critique existing tools, models, policies and methods in this area. Staff would also conduct on-going research in new and burgeoning methods and techniques targeted at addressing racial profiling.

The Center would sponsor local and regional workshops for law enforcement personnel, community representatives, researchers, and media personnel interested in learning more about the issue and what can be done to address it. The workshops would be structured to provide information sessions on the issue, and to educate attendees about the resources that the Center provides.

Answers of the Sikh Coalition to Questions Put Forth by the Honorable Representative Hank Johnson

1) **Please explain how racial profiling has undercut the trust of communities in the faith and integrity of the American judicial system.**

Racial profiling has undercut the trust of communities in the faith and integrity of the judicial system because, simply put, no effective judicial remedy for racial profiling exists. If I as a Sikh believe that I have been subject to unfair law enforcement scrutiny on the basis of my religious or ethnic appearance the federal courts are not a place I can have my rights vindicated. In fact, the Supreme Court has issued rulings that effectively *allow* racial profiling.

For example, in United States v. Brignoni-Ponce, the Supreme Court in 1975 tackled the question of whether "Mexican appearance" was a relevant factor in determining who the U.S. Border Patrol should be able to stop and question about their immigration status. The Supreme Court held that the "likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor."

Similarly, in Whren v. United States, the Supreme Court in 1996 confronted the issue of pre-textual traffic stops. The defendants in Whren argued that since virtually all motorists are violating some provision of traffic law at any time, police have the power to use these violations as a pre-text for what are in truth race-based stops. The defendants in Whren requested that that Supreme Court adopt a standard examining whether "a police officer, acting reasonably, would have made the stop" for the actual traffic violation asserted by the police officer.

In a unanimous decision, the Supreme Court held that any driving violation provides probable cause to make a traffic stop, thus completely eliminating the Fourth Amendment and its protections as a means of ending "unreasonable searches and seizures" on the basis of race. In other words, the defendants would not be able show any evidence that racial profiling was the true reason for their stop. As long as a police office could show that the defendant was violating any traffic law that in of itself is lawful reason for a traffic stop.

However, the Supreme Court in Whren also held that the Equal Protection Amendment provides the only constitutional basis for asserting racial profiling claims. Unfortunately, Equal Protection Amendment claims are nearly impossible to litigate because they require both a showing of "disparate impact" of law enforcement activity on a defined community *and* "discriminatory intent." While statistical analysis of traffic and other law enforcement stops, though costly and time consuming, can demonstrate disparate impact, proving discriminatory "intent" is almost impossible.

Taken together, both the Brignoni-Ponce and Whren cases create a climate which allows police officers to both make race-based assumptions (Brignoni-Ponce) and then be inoculated from scrutiny when they do (Whren). This is a recipe for racial and religious profiling.

Beyond the courts, federal administrative agencies at times also have the ability in theory to provide relief to victims of racial and religious profiling. Unfortunately, as with the courts, administrative remedies are ineffective barriers against racial profiling. Take for instance the 2003 United States Department of Justice Guidance on Racial Profiling ("DOJ Guidance") which forms the basis of most federal agency's anti-profiling policies.

First it should be noted that the Guidance itself is merely Guidance, it does not have the force of law. That being said, even as a mere Guidance, it is ineffective. It contains a gaping "national security" loophole which effectively states that the protections against profiling contained in the Guidance may be cast aside for vague and undefined reasons of national security. In addition, religion is not protected by the DOJ Guidance. This means that Sikhs and Muslims, who have suffered profiling after 9/11, have no protection at all under the Guidance.

It is this loophole ridden Guidance that forms the basis of most of the federal government's own anti-profiling policies. In this way, profiling undermines community trust in both the judicial and administrative systems that are supposed to protect against profiling but fail to do so.

2) **Please explain how the mistrust of the law enforcement officers has hurt communities of color.**

Law enforcement departments that use racial profiling cut themselves off from the communities they serve, making their jobs more difficult and dangerous.

One of the key identified elements of successful law enforcement has been community policing. Community policing has one central principle: that the police and the community must work together to create and sustain real and lasting gains in public safety. Neither the police nor the public can make the community safe by themselves.

Law enforcement and those they serve must have a real partnership, based on trust, dedicated to the common goal of stifling crime and making the community a good place to live and work. But when racial profiling becomes common practice in the law enforcement agencies, this partnership is put in jeopardy. It supplants trust with fear and suspicion. Fear and suspicion cut off the flow of communication.

Information from the community is one of the essential ingredients of any successful effort to get ahead of terrorist/criminals. Using profiling against these communities --- which clogs the flow of information between community and law enforcement ---- is therefore counterproductive. In addition, communities of color feel that they can no longer go to law enforcement to protect them from crime when law enforcement is victimizing them through profiling.

In these ways, mistrust of law enforcement hurts communities of color.

3) What should Congress do to prevent racial profiling?

What is necessary to combat profiling is an effective law - namely the End Racial Profiling Act --- that allows for two simple yet powerful means of addressing profiling directly: 1) a system of data collection that provides the public with insight into who is being stopped, how often, and whether the stops yielded an arrest; and 2) an individual right of action in a court of law to bring claims of profiling to a court.

While in an ideal world, police would not profile in the first instance, when they do, we need an effective law to combat and provide lawful limits on the practice. Without these limitations, imbedded in the law, the police have no guidance on what is and what is not acceptable. Only a law that bans racial profiling and provides effective judicial remedies to combat it will create a culture shift in which law enforcement feels compelled to end profiling.

4) Please explain why data collection is an effective tool in combating racial profiling.

Data collection is an effective tool in combating racial profiling because such data will inform the public and law enforcement on whether any one group is disproportionately being stopped or shouldering the burden of law enforcement activity. The public can then weigh the costs and benefits in an enlightened way on whether the actions of our government actually keep our country safe or whether they are misdirected at minority communities.

Also by implementing a data collection system, we send a clear message to the entire police community, as well as to the larger community, that the actions of law enforcement will be fairly scrutinized by the public. This should act as an important deterrent against profiling.

5) Please explain how racial profiling is harmful as terrorist and criminals can respond by modifying their behavior, and recruitment policies.

Indeed experience tells us that there is no reliable profile of a terrorist who would do our country harm. For example, five of the widely known terrorist acts or arrests of accused terrorists this year did not involve people who fit the "typical" terrorist profile.

One of these attacks involved a man named Patrick Bedell, who this past March started shooting at police officers at the Pentagon Metro Station stop in Washington as a result of his extremist anti-government views. Similarly, Joseph Stack in February flew an airplane into an IRS building in Austin, Texas, again because of his extremist anti-government views.

Similarly, Collen LaRose aka "Jihad Jane" a white woman, and Jaime Paulin-Ramirez, another white woman, were both accused by the federal government of planning terrorist killings in March. Finally, again in March, the federal government arrested members of the "Hutaree" militia, a purportedly "Christian" militia group for planning acts of terrorism against the United States.

Perhaps it is this ability of terrorists to skirt any profile we create that led New York City Police Commissioner Ray Kelly to declare profiling to be "just nuts."[1] In an interview, Commissioner Kelly went on to declare:

> "We [the NYPD] have a policy against racial profiling… it is the wrong thing to do, and it's also ineffective. If you look at the London bombings, you have three British citizens of Pakistani descent. You have Germaine Lindsay, who is Jamaican. You have the next crew, on July 21st, who are East African. So whom do you profile?"

Commissioner Kelly is not alone. In response to the failed Christmas Day attack this past December, General Michael Hayden, former Director of the Central Intelligence Agency and former Director of the National Security Agency, stated:

> "[H]e [the accused Christmas Day bomber] would not have automatically fit a profile if you were standing next to him in the visa line at Dulles, for example. So it's the behavior that we're attempting to profile. And it's the behavior, these little bits and pieces of information that were in the databases, that we didn't quite stitch together at this point in time. But it wasn't a question of ethnicity or, or religion… it's what people ***do*** [emphasis added] that we should be paying attention to."[2]

Agreeing with General Hayden, former Department of Homeland Security Secretary Michael Chertoff stated that:

> "I think relying on, on preconceptions of stereotypes is, is actually kind of misleading and arguably dangerous… what I would say is you want to look at things like where has a person traveled to, where have they spent time, what has their behavior been. But recognize, one of the things al-Qaeda's done is deliberately tried to recruit people who don't fit the stereotype, who are Western in background or appearance. Look at a--like a guy like an Adam Gadahn, who grew up in California, who's one of the senior level al-Qaeda operatives but does not fit the normal prejudice about what a--an extremist looks like."

For these reasons racial profiling is harmful because terrorists and criminals can respond by modifying their behavior, and recruitment policies

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1 See, "Troublemakers: What pit bulls can teach us about profiling," New York Magazine, February 6, 2006. Accessible at: http://www.newyorker.com/archive/2006/02/06/060206fa_fact?currentPage=all

2 See: Meet the Press Transcript, January 3, 2010. Accessible at: http://www.realclearpolitics.com/articles/2010/01/03/john_brennan_michael_chertoff_michael_hayden_on_meet_the_press_99758.html

6) Please explain how racial profiling interferes with public safety.

Racial and religious profiling interferes with public safety because it destroys bridges of trust between communities and law enforcement that are necessary to effectively combat crime.

Racial and religious profiling also harm public safety by disproportionately focusing law enforcement activity on specific communities instead of criminal behaviors. This leads police to misdirect their work towards communities instead of criminals.

For example, in May the New York Times reported that Blacks and Latinos were nine times more likely as whites to be stopped by the New York City Police Department, but, once stopped, were no more likely to be arrested.[3] In other words while Blacks and Latinos were stopped and frisked 490,000 times compared to 53,000 times for whites in New York City last year, the number of stops that led to arrest --- or what is known as the "hit rate" --- was slightly above 6% for whites and slightly less than 6% for Blacks. That is a great deal of law enforcement focus on a particular community with little law enforcement reward.

And what's more amazing about New York City is that we have seen similar targeting of minority communities before without any law enforcement reward. Ten years ago, the New York State Attorney General found that while Blacks and Latinos made up almost 3/4s of the persons stopped by police, the rates at which the stops led to an arrest was *less* for both Blacks and Latinos than whites.

Numbers don't lie and these numbers make clear that racial profiling is a failed law enforcement strategy.

3 See, "New York Minorities More Likely to be Frisked," New York Times, May 12, 2010. Accessible at: http://www.nytimes.com/2010/05/13/nyregion/13frisk.html.

STATEMENT OF

MARGARET HUANG, EXECUTIVE DIRECTOR
RIGHTS WORKING GROUP

HEARING ON: RACIAL PROFILING AND THE USE OF SUSPECT CLASSIFICATIONS IN LAW ENFORCEMENT POLICY

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

UNITED STATES HOUSE OF REPRESENTATIVES

THURSDAY JUNE 17, 2010

Chairman Conyers, Chairman Nadler, Ranking Member King, Ranking Member Sensenbrenner, and members of the Committee: I am Margaret Huang, Executive Director of the Rights Working Group. Thank you for the opportunity to submit testimony for the record regarding today's hearing on racial profiling and the use of suspect classifications in law enforcement policies.

Formed in the aftermath of September 11th, the Rights Working Group (RWG) is a national coalition of more than 250275 organizations representing civil liberties, national security, immigrant rights and human rights advocates. RWG seeks to restore due process and human rights protections that have eroded since 9/11, ensuring that the rights of all people in the U.S. are respected regardless of citizenship or immigration status, race, national origin, religion or ethnicity.

Racial and religious profiling is a pervasive problem that affects many communities across the country. While traditionally thought of as targeting African Americans, profiling affects a broad range of people in the U.S., including Native Americans, African Americans, Asian Americans, Latinos, Arabs, Muslims and South Asians. Not only is racial and religious profiling humiliating and degrading for the people subjected to it, it is unconstitutional and violates fundamental human rights, it is an ineffective law enforcement practice, and it damages community safety.

Racial Profiling in Cars and on the Sidewalk

Racial minorities and indigenous peoples continue to be disproportionately targeted by law enforcement based upon subjective identity-based characteristics rather than on identifiable behavior that makes them reasonably suspicious of criminal activity. Across the United States, traffic stops are often used as a pretext for determining whether these individuals are engaged in criminal activity. These racially motivated searches are not productive—they result in extremely low seizure rates of contraband.

A national survey conducted in 2002 by the DOJ found that blacks and Hispanics were two to three times more likely to be stopped and searched than whites but were less likely to be found in possession of contraband.[i]

- In Arizona, analysis of data related to highway stops made between July 1, 2006 and June 30, 2007 found that Native Americans were more than 3 times as likely to be searched as whites by officers of the Arizona Department of Public Safety. African Americans and Hispanics were 2.5 times more likely to be searched than whites. Whites, however, were found to be more likely to be carrying contraband than Native Americans or Hispanics; seizure rates of drugs, weapons or other illegal materials for whites and African Americans were similar.[ii]

- In Maryland, data from 2008 shows that 70% of individuals searched by Maryland State Police (MSP) on Interstate 95 were people of color (defined in a related report as African American, Hispanic and other non-white individuals). This is a finding very similar to that revealed by data from 2002, the year prior to a consent decree where MSP agreed to improve procedures for motorists to file complaints of racial profiling and where MSP agreed to investigate all such complaints. When the American Civil Liberties Union and the National Association for the Advancement of Colored People filed a public information request for investigative records related to complaints of racial profiling after 2003, MSP refused to turn over these documents and then appealed the ruling of a judge who stated that the documents should be disclosed.

- In New York, the Center for Constitutional Rights (CCR) alleged that the New York Police Department (NYPD) engaged in a policy and practice of illegal racial profiling. In CCR's lawsuit *Floyd v. City of New York*,[iii] a court ruling during the discovery period of this case ordered the NYPD to release all of its 'stop-and-frisk' data from 1998 through the beginning of 2008 to CCR. This data revealed that in 2009, a record 575,304 people were stopped, 87 percent of whom were Black and Hispanic individuals—although they comprise approximately 25 percent and 28 percent of New York City's total population respectively. Of the cumulative number of stops made since 2005, only 2.6 percent resulted in the discovery of a weapon or contraband. Though rates of contraband yield were minute across racial groups, stops made of Whites proved to be slightly more likely to yield contraband.[iv]

Racial Profiling in Immigration Enforcement

DHS has increasingly used state and local criminal justice systems to enforce civil immigration laws. Today, DHS' law enforcement arm, Immigration and Customs Enforcement (ICE), implements a number of programs tied to the criminal justice system which are failing to locate ICE' intended criminal targets. The Criminal Alien Program (CAP), Secure Communities (SC), and 287(g) agreements are programs with express formal missions to locate and remove immigrants that pose serious threats to public safety, and yet available evidence strongly suggests that the agency is not meeting these priorities. The results are dramatic for two reasons: firstly that distinct law enforcement tools are becoming merged together in a conflicted mission that neither effectively fights crime nor effectively enforces federal immigration programs, and secondly that public safety is jeopardized when serious criminal immigrants are ignored for minor status offenders. In a bid to bring people into the criminal justice system in order to check

their immigration status, state and local police are increasingly using racial profiling and pre-textual arrests. Programs that target "violent criminal offenders" cannot adequately identify their targets unless a person has in fact been convicted of committing a crime. Checking a person's immigration status before they are convicted creates an incentive for racial profiling and greatly increases the likelihood that these programs will identify only those with minor offenses who may never be convicted of committing any crime.

Ample evidence has been gathered documenting the problems of racial profiling in the 287(g) program, but more and more evidence is emerging of racial profiling in other ICE programs, including Secure Communities and the Criminal Alien Program ("CAP").

287(g) Program

The 287(g) program is a voluntary partnership initiative that authorizes the DHS Secretary to enter into agreements with state and local law enforcement agencies to perform limited immigration enforcement duties. DHS explains that state and local law enforcement play a critical role in protecting the homeland because "they will often encounter foreign-born criminals and immigration violators who pose a threat to national security or public safety."[v] However, many state and local jurisdictions emphasize traffic violations and other minor infractions in enforcement through the 287(g) program.

- ICE-deputized officers in Gaston, North Carolina, reported that ninety-five percent of state charges from 287(g) arrests were for misdemeanors.[vi] Another nearby county reported that eighty-percent of their 287(g) arrests were misdemeanors with forty-five percent being non-DWI traffic violations.[vii] Neither of these entities with which ICE is contracting are prioritizing taking violators who "pose a threat to national or public safety" off the streets.

- In 2008, the Cobb County jail processed 3,180 inmates for ICE detention. Of those, 2,180 were arrested for traffic offenses—almost 69% of the people held on ICE detainers by Cobb officials. This alarming trend has continued into this year: in February and January of 2009, of the 434 people held in Cobb County on ICE detainers, 255 were arrested on non-DUI traffic offenses. Also troubling is the fact that the reasons provided for arrest were violations that the police could discover only after pulling over a driver, such as driving without a license or insurance.[viii]

Although ICE issued a new MOA for the 287(g) program in 2009 with prioritized categories of offenders, the program still grants the ability to check the immigration status of people who are brought in for minor charges and before they are convicted of any crime. The new MOA is not significantly different from the old agreement, and, in several some cases, worse.[ix] There is currently no guidance or other oversight mechanisms in place to ensure that ICE priorities would be complied with at the state and local level, or to monitor arrests to identify whether or not racial profiling is occurring.

In April of 2010, the Department of Homeland Security's Office of Inspector General (DHS OIG) issued their report on an audit of the 287(g) program. It's a scathing assessment of the program confirming what advocacy groups had been reporting for some time – that the program

lacks proper training, oversight and protections against racial profiling. Out of the 33 recommendations made by the DHS OIG, only 3 were complied with and closed.[x] Tellingly, the one recommendation that ICE rejected was a recommendation that would require officers to collect data that would help identify determine whether racial profiling was occurring.[xi]

Criminal Alien Program

The Criminal Alien Program (CAP) is a screening process within federal, state, and local correctional facilities intended to identify and place detainers on "criminal aliens to process them for removal before they are released to the general public."[xii]. CAP is intended to place "a high priority on combating illegal immigration, including targeting illegal aliens with criminal records who pose a threat to public safety."[xiv]

A recent study by the Warren Institute at the Berkeley Law Center for Research and Administration found that the Irving, Texas, CAP program resulted in 2% felony charges, while 98% of ICE detainers were issued for misdemeanor offenses.[xv] Further, the report found an upward trend in Latino arrests and ICE referrals and a downward trend in issued detainers, indicating that after implementation of CAP, the majority of Latino arrests were for misdemeanor offenses of lawful residents.[xvi] Drawing attention to the inconsistencies in the program's mission, one of the Institute's recommendations is to prohibit CAP screenings for individuals arrested for non-felony offenses.[xvii] These numbers also speak to the way in which even programs which appear to be limited in scope can lead to illegal profiling by law enforcement.

Secure Communities

Secure Communities (SC) is a program that enables correctional officers to enter fingerprints of alleged criminals who are suspected immigration violators into a DHS biometric database. In theory, SC utilizes a "threat-based approach" designed to "prioritize criminal aliens for enforcement action based on their threat to public safety."[xviii] DHS states:

"ICE is focusing efforts first and foremost on the most dangerous criminal aliens currently charged with, or previously convicted of, the most serious criminal offenses. ICE will give priority to those offenses including, crimes involving national security, homicide, kidnapping, assault, robbery, sex offenses, and narcotics violations carrying sentences of more than one year."[xix]

DHS states that SC "supports public safety by strengthening efforts to identify and remove the most dangerous criminal aliens from the United States."[xxi] Early numbers from the Secure Communities Initiative seem to indicate that they are flagging a high number of suspected criminals that are charged with lesser offenses. Between inception of the program in October 2008 and the time of a joint announcement by the Secretary of the Department of Homeland Security and the Assistant Secretary for ICE in November 2009, Secure Communities had identified only 11,000 individuals charged with or convicted of Level 1 crimes while more than 100,000 individuals were charged with or convicted of lesser Level 2 and Level 3 crimes.[xxii] The "criminal aliens" included in ICE's numbers even included U.S. citizens, since naturalized U.S.

citizens have records in immigration databases.

Inherent Authority

In addition to these formal agreements, in 2002 the Office of Legal Counsel at the Department of Justice issued a legal decision reversing previous memos, finding that state and local law enforcement agencies have "inherent authority" to enforce federal immigration law. This decision has been interpreted by some to give state and local law enforcement agencies the ability to arrest people they suspect to be undocumented and turn them over to ICE. When acting on "inherent authority," there is no oversight, no training and no way of addressing the actions of law enforcement and how they affect the constitutional rights of those they encounter.

SB 1070

The steady transfer of authority from ICE to state and local law enforcement, encouraging them to enforce federal civil immigration law, has paved the way for the passage of Arizona's SB 1070. Programs that involve state and local law enforcement agencies have a well documented record of resulting in racial profiling, where large numbers of pre-textual arrests are made in order to check an individual's immigration status. The Arizona law has enshrined this practice in law, making racial profiling the rule rather than the exception. By requiring officers to check the status of any person they have a "reasonable suspicion" may be undocumented, and allowing citizens to sue law enforcement if they believe they are not fulfilling their duty, the atmosphere will be ripe for massive racial profiling.

Racial Profiling in "National Security" or "Counterterrorism" Measures

Following the tragic events of September 11, 2001, the U.S. government implemented counterterrorism programs and policies that profiled mostly Muslim, Arab and South Asian men based on their perceived race, ethnicity, religion or national origin. The government also began aggressively using civil immigration laws, criminal laws and criminal procedures in a sweeping and discriminatory manner to target members of these communities.

- Muslims, Arabs and South Asians have been profiled at border stops and airports where individuals are singled out for intrusive questions, invasive searches and lengthy detentions without reasonable suspicion of criminal activity. Customs and Border Patrol (CBP) agents question individuals about their faith, associations and political opinions. Travelers have had their personal documents, books and electronic devices seized and many of these travelers believe that the information contained therein has been copied by CBP agents. This unjust treatment is due partly to poor CBP guidance released in 2008 that allows officers to "review and analyze information transported by any individual attempting to enter, reenter, depart, pass through, or reside in the United States" absent individualized suspicion.

- In August 2007, the Transportation Security Administration (TSA) released new guidelines to serve as standard operating procedures for airport security screening. Sikh turbans and Muslim head coverings were singled out for screening with higher scrutiny,

despite a lack of evidence that these religious head coverings were being employed to hide dangerous items. Widespread profiling of Sikhs occurred as a result, and the Sikh Coalition, an advocacy group, found that turban-wearing men faced additional scrutiny absent reasonable suspicion at rates so disproportionate as to suggest that nearly all turban-wearing Sikh men were being subjected to additional screening.[xxiii] In late 2007, a set of options for screening Sikhs that allow, for example, greater privacy, was negotiated by the TSA and Sikh organizations in coordination with the release of TSA's October 2007 "bulky clothing" policy. The policy was implemented with questionable success, with great variance and inconsistency between airports. TSA's broad "bulky clothing" policy through which "passengers could be subjected to additional screening to further evaluate any item that could hide explosives or their components" has resulted in de facto racial profiling, capturing a great majority of Sikhs who wear non-form fitting headwear, flowing clothing, or other secular and religious clothing.

- The National Security Entry-Exit Registration System (NSEERS) employed immigration law as a counterterrorism tool. This program required non-immigrant males aged 16-45 from 25 countries (all but one were predominantly Muslim countries, the anomaly was North Korea) to register themselves at ports of entry and local immigration offices for fingerprinting, photographs, and lengthy interrogations. Many individuals were deported through secret proceedings that took place without due process of law. More than 80,000 men underwent registration and thousands were subjected to lengthy interrogations and detention. Though certain registration requirements have been suspended, individuals who did not comply with NSEERS registration requirements, due to factors including inadequate government notice of the requirements and individuals' fear of potential interrogations, detention and deportation, are still subject to severe penalties which have included the prevention of naturalization or the deportation of individuals. An investigation by the National Commission on Terrorist Attacks upon the United States determined that programs like NSEERS did not demonstrate clear counterterrorism benefits.[xxiv]

- "Operation Frontline," a DHS program initiated after September 11th and designed to "detect, deter and disrupt terrorist operations" utilized the NSEERS database to identify targets. Data from DHS revealed that 79% of individuals investigated were from Muslim-majority countries.[xxv] Data also demonstrated that foreign nationals from Muslim-majority countries were 1,280 times more likely to be targeted than similarly situated individuals from other countries.[xxvi] Similarly to NSEERS, Operation Frontline was not effective in producing a single terrorism-related conviction from the interviews conducted under the program.

FBI Investigations

As part of the "war on terror," the Federal Bureau of Investigations (FBI) has continued to undertake problematic inquiries and investigations of members of Muslim communities, Muslim religious organizations (including mosques), and even Muslim charities.[xxvii] Targeted individuals have been investigated at their places of employment, their homes, and their schools and

universities, and have had their families, friends, classmates, and co-workers questioned and harassed.[xxviii] These investigations have had a chilling effect on the civic participation of Arab, Muslim and South Asian individuals and communities, since many are afraid to attend their local mosques or get involved with Islamic organizations and events.[xxix]

Rarely do these investigations result in terrorism related charges. Most cases have resulted in no charges being filed at all or with the filing of lesser charges such as immigration-related offenses, tax evasion or document fraud. The creation of a "suspect community" seems to have been codified in the new FBI guidelines, allowing agents to consider race and religion when starting investigations. For example, in February 2009, it was reported that the FBI had infiltrated several mosques in California, using cameras and other surveillance equipment to record hours of conversations in those mosques, as well as in restaurants and homes.[xxx] Local residents report that the surveillance has caused them to avoid the mosques and pray at home, avoid making charitable contributions – a fundamental tenet of the Muslim faith – and refrain from having conversations about political issues such as U.S. foreign policy.[xxxi]

Use of Informants and Agent Provocateurs

Since 9/11, the FBI has increasingly used informants to infiltrate mosques and other places where Muslims gather.[xxxii] A number of these informants have been paid large sums of money to elicit information about potential criminal or terrorist activity, which has led to charges of entrapment.[xxxiii] Some feel that the financial incentives cause these agents to exaggerate claims or instigate plots in order to show success.[xxxiv] Nassem Khan, an informant who infiltrated a mosque in Lodi, California, recorded conversations with a young man named Hamid Hayat. These conversations raised questions of entrapment after Khan repeatedly tried to goad Hayat into attending a terror training camp.[xxxv]

FBI Guidelines and Profiling in the Arab, Middle Eastern, Muslim and South Asian Communities

In October 2008, former Attorney General Michael Mukasey and the Department of Justice under the Bush Administration released *The Attorney General's Guidelines for Domestic FBI Operations*.[xxxvi] The new Guidelines went into effect on December 1, 2008. The new Guidelines have several significant problems.

The FBI guidelines for Domestic Investigative Operational Guidelines (DIOGs) are extremely problematic and give the FBI wide latitude to target the Arab, Middle Eastern, Muslim and South Asian community. These guidelines explicitly allow the use of race and religion in investigations, relax the rules so that individual FBI agents can start an assessment with little to no factual predicate, and agents can even gather information on ethnic or cultural factors. These provisions create a scenario where Arabs, Middle Eastern, Muslim and South Asian communities can be targeted for broad surveillance and data gathering. This has the effect of being the "stop and frisk" of the war on terror – it allows the government to investigate numerous individuals with no factual predicate and base investigations largely on race, religion, national origin or ethnicity in the hopes of finding someone violating the law. Such activity not only undermines the Department's own racial profiling guidance, it also isolates those families and communities

who are subjected to such scrutiny and sends a message to these communities that they are not welcome in the United States, that they are perhaps "less American" than people of other religions.

Most notably:

- The guidelines undermine even the narrow protections provided for in the Department of Justice's 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (DOJ Guidance), which states

  > "In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement officers *may not use race or ethnicity to any degree*, except that officers may rely on race and ethnicity in a specific suspect description. This prohibition applies even where the use of race or ethnicity might otherwise be lawful."[xxxvii]

  The FBI Guidelines guts this protection, stating that agents cannot conduct investigative activity "solely on the basis of race," or solely on the basis of first amendment activity.[xxxviii] This is a far narrower standard, in direct violation of the standard set for in the DOJ guidance and paves the way for racial and religious profiling in FBI investigations.

- The guidelines open the door to abuse of power and racial profiling by allowing the FBI to open "assessments" without any factual predicate.[xxxix] By calling their investigations "assessments," FBI agents can investigate any person they choose - there is no requirement of a factual connection between the agent's authorizing purpose and the actual conduct of the individuals who are being investigated.[xl] FBI agents can initiate "assessments" without any supervisory approval and without reporting to FBI headquarters or to the Department of Justice.[xli] The FBI can even initiate an "assessment" if the agent determines that the person might make a good FBI informant.

- The guidance allows for domain mapping, permitting agents to "identify locations of concentrated ethnic communities."[xlii] It also allows FBI agents to focus on "behavioral characteristics reasonably believed to be associated with a particular criminal or terrorist element of an ethnic community."[xliii] Within this same section, an example is given that a cultural act of charitable giving "would be relevant if intelligence revealed that, unknown to many donors, the charitable causes were fronts for terrorist organizations or that terrorists supporters within the community intended to exploit the unwitting donors."[xliv]

Combined, these provisions, along with others in the FBI Guidelines, create a situation that allows for widespread profiling in these communities—targeting their neighborhoods and even tenets for their faith ("zakat" or charitable giving) for surveillance with little to no supervision. It is invasive and has a chilling effect on communities' willingness to engage in constitutionally protected political activity and religious practice. Despite the statements of Attorney General Holder, who said that ending racial profiling was a "priority" for the Obama administration and

that profiling was "simply not good law enforcement,"[xlv] the Obama administration has not repealed these guidelines.

Racial and Religious Profiling is Ineffective, Alienates Communities and Makes Everyone Less Safe

Data from across the country demonstrates that racial profiling is an ineffective crime detection tactic. Racial profiling is also unconstitutional and in violation of human rights obligations. It contributes to mistrust and fear of police by members of minority communities who become less likely to report crimes or serve as witnesses.

- A 2006 study commissioned by the DOJ found that Arab Americans were significantly fearful and suspicious of federal law enforcement due to government policies. It also found that both community members and law enforcement officers determined that diminished trust was the most important barrier to cooperation.[xlvi] Community groups have also reported that members of these targeted communities became so afraid of having any contact with officials after post-9/11 "national security" or "counterterrorism" policies were introduced that they did not report domestic violence or other crimes, did not ask for assistance in emergency situations, and, in some cases, did not seek medical treatment[xlvii].

- A recent and as yet unpublished study from Salt Lake City, Utah analyzing the effect of laws that deputize state and local police officers to engage in immigration enforcement found that *all residents*, not just those who may be undocumented, would be less likely to report crimes if their local police was engaging in civil immigration enforcement. Specifically, the study found that when white and Latino respondents considered a future with such an immigration law, their willingness to report drug crimes was drastically reduced—by approximately 20% for both white and Latino respondents. White respondents were also 11% less likely to report violent crimes and the unwillingness of Latino respondents to report violent crimes was higher than 25%.[xlviii]

Conclusion

Racial and religious profiling has long been seen as an inefficient tool for law enforcement and has been recognized as such by law enforcement agencies at every level.

Former Homeland Security Secretary Michael Chertoff highlighted the ineffectiveness of profiling based on national origin in the days after the 2009 Christmas Day bomb attempt on board a flight bound for Detroit. "Well," he said, "the problem is that the profile many people think they have of what a terrorist is doesn't fit the reality. Actually, this individual probably does not fit the profile that most people assume is the terrorist who comes from either South Asia or an Arab country. Richard Reid didn't fit that profile. Some of the bombers or would-be bombers in the plots that were foiled in Great Britain don't fit the profile. And in fact, one of the things the enemy does it to deliberately recruit people who are Western in background or in appearance, so that they can slip by people who might be stereotyping. So, I think the danger is, we get lulled into a false sense of security, if we profile based on appearance. What I do think is

important is to look at behavior. And that's something that we are doing and should continue to do more of."[xlix]

On the issue of state and local law enforcement being involved in the federal government's immigration enforcement responsibilities, numerous representatives of law enforcement agencies and associations have flagged this as a troubling trend. The Arizona Associations of the Chiefs of Police released a statement in opposition to their state's Senate Bill (SB) 1070. Their statement definitively says that, "[t]he provisions of the bill remain problematic and will negatively affect the ability of law enforcement agencies across the state to fulfill their many responsibilities in a timely manner."[l] Chief Harris, President of the Arizona Associations of Chiefs of Police emphatically stated, "You have one side saying that we're going to do racial profiling. You have another side saying we're not doing enough ... It makes it very difficult for us to police our communities." Echoes of this statement were heard across the country from law enforcement including the Los Angeles Police Chief Charlie Beck who stated that under such laws, "we will be unable to do our jobs . . . laws like this will actually increase crime, not decrease crime."[li]

We agree with these law enforcement experts and the finding in the DOJ Guidance which states that "[r]acial profiling in law enforcement is not merely wrong, but also ineffective. Race-based assumptions in law enforcement perpetuate negative racial stereotypes that are harmful to our rich and diverse democracy, and materially impair our efforts to maintain a fair and just society."

Racial and religious profiling is humiliating and degrading to those who are targeted, violates constitutional and international law, and is simply an ineffective law enforcement technique. All local, state and federal law enforcement agencies should ban the use of "suspect classifications" in their day to day duties and focus on the criminal enforcement work that prevents and solves crimes while keeping our communities safe.

Recommendations:

- Congress should introduce and pass the "End Racial Profiling Act" instating a federal ban on profiling based on race, religion, ethnicity and national origin at the federal, state and local levels;
- Congress should repeal section 287(g) of the Immigration and Nationality Act;
- Congress should restrict if not eliminate funding for Secure Communities and other programs that utilize state and local law enforcement agencies to conduct civil immigration enforcement;
- Congress should work with the Administration to ensure that the Department of Justice's 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies is strengthened to cover profiling based on religion and national origin and to close the loopholes that allow for profiling at the border and in the name of national security;
- Congress should urge the Department of Justice to revise the 2002 Inherent Authority memo and reestablish the long-standing precedence of federal-only enforcement of immigration laws;
- Congress should work with the Administration to terminate the NSEERS program and repeal related regulations. Individuals who did not comply with NSEERS due to lack of knowledge or fear should not lose eligibility for, or be denied, a specific relief or benefit.

Similarly, the federal government should provide relief to individuals who were deported for lack of compliance with NSEERS but otherwise had an avenue for relief.

- Congress should work with the Administration to address the 2008 Attorney General's Guidelines for Domestic FBI Operations and the FBI's Domestic Investigative Operational Guidelines that implement the 2008 Attorney General's Guidelines to ensure they comport with constitutional and international human rights protections.

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[i] U.S. Department of Justice, Bureau of Justice Statistics, Contacts between Police and the Public: Findings from the 2002 National Survey, *available at*http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp02.pdf.
[ii] ACLU of Arizona, Driving While Black or Brown: An Analysis of Racial Profiling in Arizona (April 2008) *available at* http://www.acluaz.org/DrivingWhileBlackorBrown.pdf.
[iii] CCR is currently involved in class-action litigation against the New York City Police Department (NYPD) challenging the stop-and-frisk practice, *Floyd, et al. v. City of New York, et al* More information is *available at*http://ccrjustice.org/ourcases/current-cases/floyd-et-al.
[iv] The Center for Constitutional Rights, Racial Disparity in NYPD Stops-and-Frisks: The Center for Constitutional Rights Preliminary Report on UF-250 Data from 2008 through June 2008 (January 15, 2009) *available at* http://ccrjustice.org/files/Report_CCR_NYPD_Stop_and_Frisk_0.pdf.
[v] Department of Homeland Security, Immigration and Customs Enforcement, "State and Local Coordination," May 19, 2009, available at: http://www.ice.gov/pi/news/factsheets/section287_g.html.

[vi] *Id.*

[vii] *Id.* at 17.

[viii] The American Civil Liberties Union Foundation of Georgia, "Terror and Isolation in Cobb: How Unchecked Police Power under 287(g) Has Torn Families Apart and Threatened Public Safety," October 2009, available at: http://www.aclu.org/files/intlhumanrights/immigrantsrights/asset_upload_file306_41281.pdf.

[ix] The American Civil Liberties Union of Tennessee, "ACLU-TN Comparison of the Old and New 287(g) Agreements," July 2009, available at: http://www.aclu-tn.org/pdfs/287(g)MOA comparison.pdf.

[x] *See Generally* Department Of Homeland Security, Office of Inspector General "The Performance of 287(g) Agreements," March 2010 available at: http://www.dhs.gov/xoig/assets/mgmtrpts/OIG 10-63 Mar10.pdf.

[xi] *Id.* At 53.

[xii] Department of Homeland Security website, "Criminal Alien Program," November 19, 2008, available at: http://www.ice.gov/pi/news/factsheets/criminal_alien_program.htm.

[xiv] *Id.*

[xv] The Chief Justice Earl Warren Institute on Race, Ethnicity, and Diversity, University of California Berkeley, Berkeley Law School, "The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program," 2 September 2009, available at: http://www.law.berkeley.edu/files/policybrief irving FINAL.pdf.

[xvi] *Id.* at 7.

[xvii] *Id.* at 2.

[xviii] Department of Homeland Security, Immigration Customs and Enforcement, "Secure Communities Fact Sheet", September 1, 2009, available at: http://www.ice.gov/doclib/pi/news/factsheets/secure_communities.pdf.

[xix] *Id.*
[xxi] *Id.*

[xxii] Immigration and Customs Enforcement Website, Secretary Napolitano and ICE Assistant Secretary John Morton Announce that the Secure Communities Initiative Identified More than 111,000 Aliens Charged with Or Convicted of Crimes in its First Year (Nov.12, 2009), *available at* http://www.ice.gov/pi/nr/0911/091112washington.htm.
[xxiii] The Sikh Coalition, The TSA Report Card: A Quarterly Review of Security Screenings of Sikh Travelers in U.S. Airports, (August 2009).
[xxiv] Thomas R. Eldridge et al., 9/11 and Terrorist Travel: A Staff Report of the National Commission on Terrorist Attacks upon the United States (2004).
[xxv] Eric Lichtblau, Inquiry Targeted 2,000 Foreign Muslims in 2004, N.Y. Times, Oct. 31, 2008, at A17, *available at* http://www.nytimes.com/2008/10/31/us/31inquire.html.
[xxvi] Yousef Munayyer, End Counterproductive Racial Profiling, S.F. Chron., Nov. 23, 2008, at G-4, *available at*http://sfgate.com/cgi-bin/article.cgi?f=c/a/2008/11/23/INS3149NFE.DTL.
[xxvii] See Jennifer Turner, ACLU, Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the

"War on Terrorism Financing" (2009) (hereinafter "Blocking Faith, Freezing Charity"); see also ACLU, Race & Ethnicity, at 108-09.

[xxviii] Blocking Faith, Freezing Charity, *supra* note i, at 14.

[xxix] *Id.*

[xxx] See Shelby Grad, FBI Plans to Continue Mosque Monitoring Despite Concerns in Orange County, L.A. Times, June 9, 2009, available at http://latimesblogs.latimes.com/lanow/2009/06/fbi-plans-to-continue-mosque-monitoring-despite-concerns-inorange-county.html; Scott Glover, FBI Monitored Members of O.C. Mosques at Gyms, Alleged Informant Says, L.A. Times, Apr. 28, 2009, available at http://articles.latimes.com/2009/apr/28/local/me-surveillance28.

[xxxi] Teresa Watanabe & Paloma Esquivel, L.A. Area Muslims Say FBI Surveillance has a Chilling Effect on their Free Speech and Religious Practices, L.A. Times, Mar. 1, 2009, available athttp://articles.latimes.com/2009/mar/01/local/me-muslim1.

[xxxii] See Tony Allen-Mills, FBI 'lured dimwits' Into Terror Plot: The Arrest of Petty Crooks Over a Plan to Target Jews has Put the Use of Sting Operations Under Fire, London Times, May 24, 2009, available at http://www.timesonline.co.uk/tol/news/world/us_and_americas/article6350389.ece.

[xxxiii] See Michael Wilson, In Bronx Bomb Case, Missteps Caught on Tape, N.Y. Times, May 21, 2009, at A1, available at http://www.nytimes.com/2009/05/22/nyregion/22plot.html?pagewanted=1; William K. Rashbaum, Man Gets 30 Years in Subway Bomb Plot, N.Y. Times, Jan. 9, 2007, at B1, available at http://www.nytimes.com/2007/01/09/nyregion/09plothtml?scp=5&sq=Shahawar%20Matin%20Siraj%27&st=cse.

[xxxiv] See, e.g., William K. Rashbaum, Guilty Verdict in Plot to Bomb Subway Station, N.Y. Times, May 25, 2006, at B1, available at http://www.nytimes.com/2006/05/25/nyregion/25herald.html?pagewanted=1&sq=Shahawar"%20Matin%20 Siraj&st=cse%27&scp=3.

[xxxv] Frontline: The Enemy Within: Informants in Counterterrorism Investigations (PBS television broadcast Oct. 10, 2006), available at http://www.pbs.org/wgbh/pages/frontline/enemywithin/reality/informant.html.

[xxxvi] Office of the Att'y Gen., U.S. Dep't of Justice, The Attorney General's Guidelines for Domestic FBI Operations (2008), available at http://www.justice.gov/ag/readingroom/guidelines.pdf .

[xxxvii]GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (emphasis added) June 2003, US Department of Justice, Civil Rights Division, http://www.justice.gov/crt/split/documents/guidance_on_race.php.

[xxxviii] Office of the Att'y Gen., U.S. Dep't of Justice, The Attorney General's Guidelines for Domestic FBI Operations 17 (2008), available at http://www.justice.gov/ag/readingroom/guidelines.pdf.

[xxxix] Office of the Att'y Gen., U.S. Dep't of Justice, The Attorney General's Guidelines for Domestic FBI Operations 17 (2008), available at http://www.justice.gov/ag/readingroom/guidelines.pdf.

[xl] Id. at 17 ("Assessments . . . require an authorized purpose but not any particular factual predication.").

[xli] Id. at 18, 19

[xlii] Id at 32.

[xliii] Id) at 33.

[xliv] Id at 34.

[xlv] Hearing to Review Funding and Oversight of the Dep't of Justice: Hearing Before the Senate Appropriations Subcomm. On Commerce, Justice and Science, and Related Agencies, 111th Cong. (2009) (statement of Eric Holder, Attorney General).

[xlvi] Vera Institute of Justice, Law Enforcement and Arab-American Community Relations after September 11, 2001: Engagement in a Time of Uncertainty 13, 21 (2006).

[xlvii] Immigration Policy Center, Targets of Suspicion: The Impact of Post-9/11 Policies on Muslims, Arabs and South Asians in the United States, May 2004, *available at*http://ispu.org/reports/articledetailpb-63.html.

[xlviii] Phillip Atiba Goff, Liana Maris Epstein, Chief Chris Burbank, Division Chief Tracie L. Keese, The Consortium for Police Leadership in Equity, Deputizing Discrimination? Causes & Effects of Cross-Deputization in Salt Lake City, Utah, *soon to be available at* http://www.policingequity.org.

[xlix] CNN, Anchor Campbell Brown, Investigating the Christmas Day Terror Attack; Obama Administration Downplaying War on Terror?, December 30, 2009, Transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0912/30/ec.01.html.

[l] AACOP STATEMENT ON SENATE BILL 1070, *available at* http://www.leei.us/main/media/AACOP_STATEMENT_ON_SENATE_BILL_1070.pdf.

[li] **Associated Press, Police chiefs voice concerns to AG about Ariz. law**

By PETE YOST (AP) , May 27, 2010, *available at* http://www.google.com/hostednews/ap/article/ALeqM5jKVfYxH4wbJdoijU3S9P1SqlCQ8QD9FUPM485

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CONGRESSIONAL TESTIMONY

Written Testimony for the
Committee on the Judiciary
Subcommittee on the Constitution,
Civil Rights, and Civil Liberties
U.S. House of Representatives

Hearing on
"Racial Profiling and the Use of Suspect
Classifications in Law Enforcement
Policy"
June 17, 2010

Submitted by
Deepa Iyer, Executive Director
South Asian Americans Leading Together

ABOUT SAALT

South Asian Americans Leading Together (SAALT), is a national, nonpartisan, non-profit organization that elevates the voices and perspectives of South Asian individuals and organizations to build a more just and inclusive society in the United States.[1] SAALT's strategies include conducting policy analysis and advocacy; building partnerships with South Asian organizations and allies; mobilizing communities to take action; and developing leadership for social change. SAALT works with a base of individual members and advocates and is the coordinating entity of the National Coalition of South Asian Organizations (NCSO), a network of 39 organizations in 13 geographic regions that provide direct services to, organize, and advocate on behalf of the South Asians in the United States. The experiences and local knowledge of member organizations within the NCSO in large part inform the policy recommendations included in this testimony.

SAALT denounces the use of profiling based on race, religion, ethnicity, national origin, nationality, and immigration status. Especially since 9/11, South Asians, Sikhs, Muslims, and Arab Americans have been subjected to policies that are based in profiling by federal, state, and local law enforcement activities. SAALT works closely with partner organizations to identify the impact of profiling tactics and advocate against their utilization.[2] SAALT strongly urges the passage of federal legislation, such as the *End Racial Profiling Act*, that eliminates profiling in all its forms, including those resulting from post-9/11 policies and practices.

ABOUT THE SOUTH ASIAN COMMUNITY

The South Asian community in the United States is extremely diverse in terms of our ancestry, ethnicity, national origin, immigration status, economic status, religion, culture, sexual orientation, and political affiliation. South Asians trace their ancestries to Bangladesh, Bhutan, India, Nepal, Pakistan, Sri Lanka, and the Maldives. The community also includes members of the South Asian diaspora – past generations of South Asians who originally settled in many areas around the world, including the Caribbean (Guyana, Jamaica, Suriname, and Trinidad & Tobago), Africa (Nigeria, South Africa, and Uganda), Canada, Europe, the Middle East, and other parts of Asia and the Pacific Islands (Fiji, Indonesia, Malaysia, and Singapore). South Asians practice a diverse array of faiths and the community includes Muslims and Sikhs, who have been particularly affected by profiling policies and practices, as well as Buddhists, Christians, Hindus, Jains, and Zoroastrians. South Asians are also diverse in terms of immigration status. The majority of South Asians who live in the United States are foreign-born, with over 75% of the population born outside the United States, and possess a range of immigration statuses, including student and worker-visa holders and their dependents; lawful permanent residents; naturalized and native-born citizens; and undocumented immigrants.[3]

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[1] For further information about SAALT, visit www.saalt.org. (Last accessed May 17, 2010)

[2] For further information about SAALT's efforts to eliminate profiling and resources on the impact of profiling on the South Asian community, visit www.saalt.org/pages/Racial-and-Religious-Profiling.html. (Last accessed May 17, 2010)

[3] U.S. Census 2000, Summary Files 1 through 4. *See also*, South Asian Americans Leading Together, "Demographic Characteristics of South Asians in the United States: Emphasis on Poverty, Gender, Language Ability, and Immigration Status" (2007). Available at

The community is also experiencing significant increases in population growth. Over 2.8 million South Asians reside in the United States.[4] Between 1990 and 2000, for example, the Indian, Pakistani and Bangladeshi populations were the fastest growing segments within the entire Asian American community.[5] The rapid growth of the South Asian community is reflected throughout the country – while metropolitan areas such as New York/New Jersey, the San Francisco Bay Area, Chicago, Los Angeles, and the Washington, DC metro area have the largest populations of South Asians, areas with emerging populations include Atlanta, Houston, and Seattle.[6]

EXECUTIVE SUMMARY

SAALT supports the introduction and passage of the *End Racial Profiling Act* (*ERPA*), proposed by Congressman John Conyers (D-MI) and Senator Russell Feingold (D-WI). We are pleased to see the introduction of civil rights legislation that intends to eliminate the scourge of profiling of communities of color. While historically, the impact of profiling has been experienced most directly by African-American and Latino communities, over the past nine years since the terrorist attacks of September 11, 2001, South Asian and Arab communities in the United States have been targeted by law enforcement tactics and national security policies. As a result, individuals of Arab or South Asian descent, and those practicing the Muslim and Sikh faiths, have also experienced the devastating impact of profiling.

Specifically, *ERPA* would do the following:

- Prohibit the use of profiling based on race, religion, ethnicity, or national origin by federal, state, and local law enforcement
- Institute anti-profiling trainings for law enforcement agents
- Ensure data collection and monitoring of law enforcement activities as it relates to race, religion, ethnicity, and national origin
- Develop meaningful procedures for receiving, investigating, and responding to complaints
- Establish a private right of action for victims of profiling
- Authorize the Attorney General to provide grants to law enforcement agencies to encourage the development and implementation of best policing practices and withhold grants from law enforcement agencies that fail to comply with the Act
- Mandate the Attorney General to submit periodic reports to Congress on ongoing discriminatory practices by federal, state, and local law enforcement

As a result of these provisions, *ERPA* will lead to the elimination of profiling based on a range of characteristics, including race, religion, ethnicity, and national origin by law enforcement at all levels of government. In addition, victims of profiling would be able to file lawsuits on their behalf against law enforcement agencies that violate their rights. Finally, law enforcement officials would receive training on how to refrain from using profiling tactics and implement best

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www.saalt.org/attachments/1/Demographic%20Characteristics%20of%20SA%20in%20US.pdf. (Last accessed May 17, 2010)

[4] U.S. Census Bureau, American Community Survey (2006).

[5] *See note 3.*

[6] *Id.*

practices that enable community policing. With *ERPA* in place, the utilization of law enforcement tactics relying on profiling will be lessened, and communities of color will have more reasons to trust law enforcement.

SAALT also encourages the adoption of several additional provisions in order to strengthen *ERPA*. In many ways, the current language within ERPA reflects our country's historic understanding of profiling – one that is based primarily on race and is limited to traffic stops or drug trafficking. Yet, in today's society, profiling is used and experienced in additional and different ways, as we have observed in the post-9/11 environment. Today, profiling tactics are used by authorities enforcing immigration and national security policies, and the communities enduring the impact of profiling now also include Asian Americans, Arab Americans, South Asians, Sikhs, and Muslims in the United States.

To reflect the pernicious and evolving forms of profiling that exist today, SAALT recommends the inclusion of provisions that explicitly address profiling that has occurred in the post-9/11 context, including the following:

- In order to apply to situations of profiling occurring in the airport context, ensure the definition of law enforcement's "routine and spontaneous activities" covered by *ERPA* includes searches of persons, possessions, or property of individuals "in any form of public or private transit"
- In order to apply to situations of profiling resulting from FBI surveillance activity, ensure the definition of law enforcement's "routine and spontaneous activities" covered by *ERPA* "data collection and analysis, assessments, and predicated investigations"
- In order to capture information on the rates of profiling in the various contexts that it occurs, beyond "stop and frisk" situations, ensure that data analysis provisions apply to "disparities in other data collected pursuant to routine or spontaneous investigations"
- In order to clearly apply to profiling that has occurred since 9/11, ensure specific findings outlining the impact of such policies and practices

By including these provisions, *ERPA* would become a more comprehensive piece of legislation, which can provide direction to law enforcement authorities and protection to as many individuals in the United States as possible.

PROFILING AND ITS CONSEQUENCES

> *"The data do not support the profiling assumption that using racial or ethnic appearance to target law enforcement efforts will make for more efficient, more accurate policing, or for the arrest of more criminals. In fact, the opposite is true. Using race does not cause hit rates to go up; instead, the hit rate actually drops."*
>
> – **Professor David Harris, University of Pittsburgh School of Law**[7]

Profiling is a law enforcement tactic that connects individuals to crimes based on characteristics unrelated to criminal conduct, such as race, religion, ethnicity, national origin, and perceived immigration status. Federal, state, and local law enforcement officials often use these factors as predictors of criminal activity. Historical and contemporary examples include the use of racial profiling when stopping African-American motorists, interrogating Latino travelers, and questioning and searching South Asian, Muslim, Sikh, and Arab individuals. Despite the fact many claim to extol the necessity of profiling, the reality demonstrates that the consequences of profiling underscore the need for it to be eliminated. Specifically, the failures of profiling include how it ineffectively diverts limited resources away from law enforcement; undermines trust between targeted communities and law enforcement; and perpetuates misconceptions about affected communities in the eyes of the general public.

Diverts Limited Law Enforcement Resources

Evidence and experts have shown that profiling is a counterproductive method of identifying criminals and national security threats. In many cases, law enforcement agents miss the real criminals by focusing on a race-based profile rather than looking for specific behavioral indicators of illegal activity.[8] In fact, prior to 9/11, the then-U.S. Customs Service eliminated the use of race, ethnicity, and gender in determining which passengers were subject to searches and began focusing solely on behavioral factors indicating suspicion.[9] A subsequent study by Lamberth Consulting revealed that this change in policy resulted in an almost 300% increase in searches that actually yielded illegal contraband and activity.[10]

Yet many law enforcement agencies at all levels of government instead continue to rely upon factors, such as race, religion, ethnicity, and national origin, rather than neutral indicators of suspicious activity. By employing such tactics, law enforcement agents are diverting their limited time and resources away from individuals who actually pose a threat. In the post-9/11 context, while South Asians, Muslims, Sikhs, and Arabs have disproportionately endured the impact of national security policies, many of the individuals charged with terrorist activity have not been from Muslim-majority countries. Jose Padilla, Richard Reid, and Colleen LaRose (also known as

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[7] David Harris, "Confronting Ethnic Profiling in the United States," *Justice Initiatives*, Open Society Justice Initiative (June 2005).

[8] *See, e.g.*, American Civil Liberties Union of Arizona, *Driving While Black or Brown: An Analysis of Racial Profiling in Arizona* (April 2008). Available at www.acluaz.org/DrivingWhileBlackorBrown.pdf. (Last accessed May 17, 2010)

[9] *See generally*, Lamberth Consulting, "Racial Profiling Doesn't Work." Available at www.lamberthconsulting.com/about-racial-profiling/racial-profiling-doesnt-work.asp. (Last accessed May 17, 2010)

[10] *Id.*

"Jihad Jane"), are all examples of individuals who do not fit the "Muslim terrorist" profile that law enforcement agencies have been using over the past nine years.

Undermines Trust Between Targeted Communities and Government

The effects of profiling policies are far-ranging on communities that are being targeted by such tactics. Individuals from these communities feel disempowered and marginalized, and in many cases, do not trust government officials or law enforcement. Community members begin to feel wary about reporting criminal activity or seeking protection to due perceptions that law enforcement is biased and not committed to the affected community's safety. Law enforcement agents find that their connections and contacts to communities being profiled are weakened.[11] And, the rates of people of color and immigrants who are stopped, questioned, incarcerated, detained, and deported due to the use of profiling tactics begin to increase.[12]

In the post-9/11 context, policies implemented in the name of national security have resulted in South Asian, Muslim, Sikh, and Arab community members becoming hesitant to contact police when they feel unsafe. For example, numerous South Asian women's organizations that assist community members facing domestic violence reported that post-9/11 policies have not only resulted in an increase in abuse but also made battered women afraid to contact police.[13] In addition, profiling policies have raised suspicion within affected communities about sharing personal information with the federal government and heightened fears around participation in efforts intended to benefit the community, such as the U.S. Census.[14]

Perpetuates Public Misconceptions and Stereotypes of Targeted Communities

Profiling on the basis of factors such as race, ethnicity, religious affiliation, national origin and immigration status, fuels perceptions among the public at large that targeted community members are worthy of heightened suspicion. In fact, a report by SAALT compiling and analyzing incidents of xenophobic rhetoric in political discourse showed at least 31 remarks made by elected officials and political candidates linking South Asians, Muslims, Sikhs, and

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[11] *See, e.g.* Madison Police Department Detective Alix Olson, "American law enforcement must demand the removal of Sheriff Arpaio from duty" (January 14, 2010). Available at www.huffingtonpost.com/alix-olson/american-law-enforcement_b_423527.html. (Last accessed May 17, 2010)

[12] *See generally*, Rights Working Group and American Civil Liberties Union, *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 www.aclu.org/files/pdfs/humanrights/cerd_finalreport.pdf. (Last accessed May 17, 2010)

[13] Immigration Policy Center, "Targets of Suspicion: The Impact of Post-9/11 Policies on Muslims, Arabs, and South Asians in the United States," (hereinafter "IPC Report") *Immigration Policy In Focus,* Vol.3, Issue 2 (May 2004). Available at www.immigrationpolicy.org/sites/default/files/docs/Targets%20of%20Suspicion.pdf. (Last accessed May 17, 2010) *See also* "Letter from South Asian Women's Organizations to White House Council on Women and Girls and White House Advisor on Violence Against Women" (November 2, 2009). Available at http://saalt.org/attachments/1/Letter%20from%20South%20Asian%20Organizations%20on%20Violence%20against%20Women%20Issues.pdf. (Last accessed May 17, 2010).

[14] Tara Bahrampour, "Some Muslims, fearing backlash, worry about intent of Census," *The Washington Post* (March 20, 2010) Available at www.washingtonpost.com/wp-dyn/content/article/2010/03/09/AR2010030901688.html (Last accessed May 17, 2010)

Arabs to terrorism between 2002 and 2008.[15] In addition, at least four such remarks were statements in support of profiling based on misperceptions that these community members inherently pose a national security threat to this country.[16]

Such policies and statements consequently foster an environment that makes it more likely that individuals from affected backgrounds will be subjected to harassment, bullying, and discrimination in other settings as well, such as in the classroom, at work, and other public venues.[17] For example, many reports emerged immediately after 9/11 (and still occasionally recur to this day) of South Asians, Muslims, and Sikhs being removed from flights, even after passing through security and boarding planes, due to unfounded concerns raised by crew members and fellow passengers.[18]

POST-9/11 PROFILING AND THE SOUTH ASIAN EXPERIENCE

> *"Since September 11, our nation has engaged in a policy of institutionalized racial and ethnic profiling ... If Dr. Martin Luther King Jr. were alive today ... he would tell us we must not allow the horrific acts of terror our nation has endured to slowly and subversively destroy the foundation of our democracy."*
>
> – **Congressman John Conyers**, in a civil rights celebration of Dr. Martin Luther King's birthday (2002)

While profiling of African-American and Latino communities continues unabated, as alluded to above, a new dimension arose when South Asian, Muslim, Sikh, and Arab community members also became targets for suspicion by law enforcement following 9/11. National security and immigration policies in the post-9/11 environment have led to racial, religious and national origin profiling by local, state and federal law enforcement agencies in three specific arenas:

- Travel at airports (including security screenings, border inspections, and terrorist watchlists);
- Immigration-related consequences of national security policies (including special registration; lengthy background checks delaying naturalization applications); and

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[15] South Asian Americans Leading Together, "Documented Incidents of Xenophobia and Intolerance in Political Discourse: Part I" (October 2008). Available at www.saalt.org/attachments/1/Xenophobia%20Community%20General%20_October%2020082_.pdf. (Last accessed May 17, 2010)

[16] *Id.*

[17] *See generally*, National Coalition of South Asian Organizations, *A National Action Agenda: Policy Recommendations to Empower South Asian Communities – Civil Rights and Civil Liberties Section* (July 2008). Available at www.saalt.org/attachments/1/Civil%20Rights%20and%20Civil%20Liberties.pdf. (Last accessed May 17, 2010.

[18] *See e.g.* Sharon Cohen, "Arab Americans Complain of Profiling" (Case of Ashraf Khan flying to Pakistan), *Associated Press* (September 25, 2001). Linda Gibson, "Uneasy pilots refuse Arab-named travelers" (Cases of Akbar Ali and Muhammad Naeem from Pakistan), *St. Petersburg Times* (September 22, 2001). Available at www.sptimes.com/News/092201/Hillsborough/Uneasy_pilots_refuse_.shtml (Last accessed May 17, 2010). Bob Herbert, "High Altitude Rambos" (Case of Dr. Bob Rajcoomar, of Indian descent), *The New York Times* (September 19, 2002).

- Government surveillance of communities (including at places of worship, community organizations, and charities)

As described below, these policies have had a disproportionate impact on South Asian, Muslim, and Sikh, as well as Arab and Middle Eastern, communities in the United States, and have disrupted the lives of individuals from these backgrounds.

Profiling While Traveling

> *"My family and I have been stopped and questioned at the border. As a police officer, I was shocked to see the federal government searching and questioning innocent travelers simply trying to return home. Targeting travelers based on their religion is not an effective way to protect our country—it is a costly distraction from those who mean us harm."*
>
> - **New York Police Department Detective Jamiel Altaheri** (April 2009)[19]

Although the U.S. government officially denies that it has employed profiling in the post-9/11 environment, there is evidence that various federal law enforcement agencies are subjecting travelers to profiling on the basis of race, ethnicity, religion, and nationality at airport security border inspections, and in the context of terrorist watchlists. While efforts to ascertain the actual scope of these policies and practices are stunted by the reluctance or unwillingness of government agencies to audit and provide complete data on its activities, organizations advocating on behalf of affected communities have been able to compile anecdotal and self-reported figures.

Secondary Screening Practices at Airports (conducted by U.S. Transportation Security Administration)

In the wake of 9/11, the U.S. Department of Transportation was praised for implementing screening policies that respected the civil rights of passengers from various religious backgrounds. Yet, airport screening procedures were subsequently altered in a manner that resulted in the targeting of many South Asian, particularly Sikh and Muslim, travelers. In August 2007, the Transportation Security Administration (TSA) within the Department of Homeland Security (DHS) instituted guidelines affecting those who wore religious headcoverings, including turbans worn by Sikh men and headscarves worn Muslim women. According to these guidelines, these individuals were subject to the "possibility of additional security screening, which may include a pat-down search of the headcovering" and "may be referred for additional screening if the security officer cannot reasonably determine that the head area is free of a detectable threat item."[20] In addition, TSA officers routinely informed passengers that the

[19] Quote from Muslim Advocates, *Unreasonable Intrusions: Investigating the Politics, Faith & Finances of Americans Returning Home* (April 2009). Available at www.muslimadvocates.org/documents/Unreasonable_Intrusions_2009.pdf. (Last accessed May 17, 2010)
[20] Transportation Security Administration, "News & Happenings: Security Screening of Head Coverings" (August 28, 2007). Available at www.tsa.gov/press/happenings/head_coverings.shtm. Last accessed May 17, 2010

guidelines automatically mandated searches of certain headcoverings, including the turban, regardless of whether the metal detector was set off.[21]

In response to advocacy efforts from various civil and immigrant rights organizations, particularly those representing Muslim and Sikh communities, the guidelines were revised to the current "bulky clothing" screening procedure that leaves it to an individual TSA officer's discretion to conduct a secondary screening if they believe the headcovering was bulky.[22] It also requires a TSA officer to provide the choice a private screening or use of a puffer machine, a self-pat-down and test for chemical traces through a finger swab, or a pat-down of the headcovering from a TSA officer.[23]

Despite improvements to airport screening policies, in practice, many South Asian travelers routinely encounter secondary security screening by TSA officers and some are continually told that turbans and headscarves require an automatic search. In fact, a report by The Sikh Coalition found that among Sikh travelers surveyed, there was a 100% secondary screening rate for those wearing turbans at certain airports.[24]

Below are a few incidents that underscore the abuse of discretion on the part of TSA officers and their impact on South Asian travelers:

> *Nadia Hassan, a Maryland woman traveling from Washington Dulles to Los Angeles in January 2010, was instructed by TSA officials to take off her headcovering. When she declined, she was put through a public full-body patdown and all her belongings were tested for bomb-making chemicals. When she asked TSA officials about her treatment, she was told that a policy went into effect mandating searches of all headscarves.*[25]
> *A Sikh passenger who had been told to proceed without secondary screening at Richmond Airport was called back for secondary screening when a supervisor yelled to the original screener, "Hey, he has to get patted down."*[26]

The severely disproportionate impact that TSA officers' actions have on South Asian, Sikh, and Muslim travelers is often based on the lack of adequate training on existing protocols and can be

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[21] Letter from Senators Richard Durbin, Russell Feingold, Barack Obama, and Jeff Bingaman to TSA Administrator/DHS Assistant Secretary Kip Hawley (September 25, 2007). Available at www.sikhcoalition.org/advisories/documents/TSALetteronSikhScreening.pdf. (Last accessed May 17, 2010)
[22] Transportation Security Administration, "News and Happenings: TSA Adjust Security Procedures for Bulky Clothing" (October 15, 2007). Available at www.tsa.gov/press/happenings/sop_adjustments.shtm. *See also* Transportation Security Administration, "News and Happenings: TSA's Head-to-Toe Screening Policies" (October 15, 2007). Available at www.tsa.gov/press/happenings/sop_facts.shtm.(Last accessed May 17, 2010)
[23] *Id.*
[24] The Sikh Coalition, *The TSA Report Card: A Quarterly Review of Security Screenings of Sikh Travelers in U.S. Airports, Q2 2009* (August 2009). Available at https://salsa.wiredforchange.com/o/1607/images/2009%20Q2%20Report%20Card.pdf. (Last accessed May 17, 2010).
[25] Council on American-Islamic Relations, "TSA tells Muslim traveler hijab now triggers security checks" (January 6, 2010). Available at www.cair.com/ArticleDetails.aspx?mid1=777&&ArticleID=26219&&name=n&&currPage=5. (Last accessed May 17, 2010)
[26] *See note 24.*

fueled by blanket assumptions about community members posing a threat to national security. **Federal policies must be instituted that prohibit profiling in airport security screening procedures; mandate data collection and audits on the part of TSA to determine whether profiling is occurring; and require routine and uniform training of officers on civil rights protections guaranteed to travelers.**

Intrusive Border Questioning and Searches (conducted by U.S. Customs and Border Protection)

Travelers seeking to enter or re-enter the country from abroad are required to undergo security screening and immigration inspection administered by U.S. Customs and Border Protection (CBP) within DHS. Under current policies, CBP uses a two-track system for screening persons entering the country – one for U.S. citizens and another for non-citizens. On either of these tracks, agents may select a traveler for secondary enhanced screening that can include intrusive body and baggage searches, extensive questioning, and detention.

South Asian travelers entering or returning to the United States have been targeted for detailed interrogation about political views, family members, friends and acquaintances, financial transactions, and religious beliefs. In fact, two civil rights organizations, Asian Law Caucus and Muslim Advocates, have documented complaints about invasive inspections by CBP officers at U.S. ports of entry.[27] The complaints were overwhelmingly lodged by travelers of South Asian, Muslim, and Middle Eastern descent, and many were U.S. citizens and lawful permanent residents.[28]

In addition to intrusive questioning, such travelers have been compelled to turn over personal belongings, including laptop computers, cell phones, letters, digital cameras, confidential company documents, and business cards.[29] Individuals were often quizzed about the knowledge of their documents, photos, and contacts. Items were often searched and copied by CBP officers with virtually no evidence that the individual posed a legitimate threat while simultaneously violating basic privacy rights of those affected.[30]

Below are a few incidents that demonstrate the impact that these practices have had on South Asian travelers seeking to come into the United States:

> *Anila Ali, a naturalized U.S. citizen, originally from Pakistan, teaches middle school near Los Angeles and is an active member of various community-based and charitable organizations. In December 2007, she flew back to Los Angeles after attending her mother's funeral in Pakistan. Upon arrival at the airport, a CBP officer shouted at her to step aside, saying "You're here from Pakistan? Go over there!" After being pulled aside,*

[27] Muslim Advocates, *Unreasonable Intrusions: Investigating the Politics, Faith & Finances of Americans Returning Home* (hereinafter "Muslim Advocates Report") (April 2009). Available at www.muslimadvocates.org/documents/Unreasonable_Intrusions_2009.pdf. (Last accessed May 17, 2010). *See also*, Asian Law Caucus, *Returning Home: How U.S. Government Practices Undermine Civil Rights At Our Nation's Doorstep* (hereinafter "Asian Law Caucus Report") (April 2009). Available at www.asianlawcaucus.org/wp-content/uploads/2009/04/Returning%20Home.pdf. (Last accessed May 17, 2010)
[28] *Id.*
[29] *Id.*
[30] *Id.*

a CBP asked her about her travels and handled every item in her purse, even opening tampons. When she asked the agent's supervising officer why she had been singled out, she was told that is was because of where she was born and her name. This was the fifth time in recent years that she had been pulled aside for questioning.[31]

"Rajiv", a U.S. citizen and resident of the District of Columbia, is an artist of Indian descent and, despite his Hindu heritage, is often mistaken for being Muslim on account of his prominent beard. In September 2008, he returned to the U.S. from visiting family in India, and was detained for 30 minutes at John F. Kennedy airport in New York City. CBP agents searched his luggage, where they found his laptop and a 500GB external hard drive. They took both sets of equipment to another location and returned half an hour later. They also asked questions about his travel companions, whom he visited, how often he traveled overseas, and where his family lived. Agents took a particular interest in his visa to visit Pakistan, asking multiple times about the nature of his interest in traveling there.[32]

Questioning individuals about their religious or political views and scrutinizing their personal belongings, particularly when based on factors unrelated to criminal activity and individualized suspicion, has a chilling effect on freedom of expression and association. **Given this impact and the denial of basic rights, Congress must enact policies that prohibit law enforcement agencies, including CBP, from relying on race, ethnicity, national origin, or religion, specifically in the context of border inspections and investigatory decisions.**

Terrorist Screening Database (maintained by the Terrorist Screening Center)

The Terrorist Screening Center (TSC) within the Federal Bureau of Investigation (FBI) maintains the U.S. government's centralized and consolidated Terrorist Screening Database (TSDB) (also known as the "terrorist watchlist"). Included within the TSDB are two subset lists: the "No-Fly List", where listed individuals are prohibited from boarding airlines; and the "Selectee List", where listed individuals are subjected to additional secondary screening.[33] The TSDB is described by the FBI as "a single database of identifying information about those known or reasonably suspected of being involved in terrorist activity."[34]

The TSDB has come under severe public criticism for being overbroad, inaccurate, and mismanaged. As of March 2009, there were one million names on the list, but given that the database is overly expansive and not updated, it has often yielded a number of "false positives" while simultaneously not capturing individuals who actually pose a threat to national security.[35] In fact, in 2008, 33,000 entries were removed by the FBI pursuant to an effort to purge the database of outdated information and individuals whose names were cleared after investigation.[36]

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[31] *See note 27*, Asian Law Caucus Report.
[32] *See note 27*, Muslim Advocates Report.
[33] Federal Bureau of Investigation, "Terrorist Screening Center: Frequently Asked Questions." Available at www.fbi.gov/terrorinfo/counterrorism/faqs.htm. (Last accessed May 17, 2010)
[34] *Id.*
[35] Peter Eisler, "Terrorist watchlist hits 1 million," *USA Today* (March 10, 2009). Available at http://www.usatoday.com/news/washington/2009-03-10-watchlist_N.htm. (Last accessed May 17, 2010).
[36] *Id.*

In addition, between 2007 and 2009, approximately 51,000 individuals had filed "redress" requests claiming they were wrongly included in the database.[37] In Congressional testimony, even DHS stated that the use of similar data in the airport context would "expand the number of misidentifications to unjustifiable proportions without a measurable increase in security." In the context of border searches and inspections, it has been noted that CBP "screens individuals against more name records from the consolidated terrorist database than any other federal agency," thus increasing the likelihood of individuals being questioned and searched simply based upon their name, ethnicity, and country of origin.[38]

The criteria used to populate these lists are not public, making it impossible for community members to ascertain whether they are indeed included in the database. Yet the fact that various government agencies, including TSA and CBP rely upon the TSDB coupled with the disproportionate impact the these agencies' security measures have had on South Asian, Muslim, Sikh, and Arab community members, raises the strong possibility that race, religion, ethnicity, and national origin are factors used in developing and maintaining these lists. **Congress must ensure that there is adequate oversight to ensure accuracy within the TSDB and, in particular, that profiling on the basis of race, religion, national origin, and ethnicity are not the sole factors determining an individuals' inclusion on its lists.**

Profiling in the Immigration Context

> *"Times of crisis are the true test of a democracy. Our nation still bears the scars of an earlier crisis when our government went too far by detaining Japanese, German, and Italian Americans based on their race, ethnicity, or national origin. We should not repeat those same mistakes."*
>
> - Letter from **Senator Russell Feingold, Senator Edward Kennedy, and Congressman Conyers** (December 2002)

As a predominantly foreign-born community, South Asians routinely interact with the immigration system and, in the post-9/11 era, policies implemented purportedly in the interest of national security have resulted in harsh immigration-related consequences. Such policies have often been used as a proxy for immigration enforcement crackdowns on South Asian, Muslim and Arab communities. In fact, in the weeks immediately after 9/11, South Asians, Muslims, and Arabs, were apprehended and detained by the FBI and held without charge; eventually, most were deported for minor immigration violations rather than any terrorism-related offenses.[39] Programs and practices, such as the National Security Entry-Exit Registration System (NSEERS) and lengthy security background check delays in processing individuals' naturalization applications, have similarly yielded no proven counterterrorism information while simultaneously resulting in the selective deportation and denial of immigration benefits of community members based on race, religion, and national origin.

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[37] *Id.*

[38] *See note 27*, Asian Law Caucus Report.

[39] U.S. Department of Justice, Office of the Inspector General, *The September 11 Detainees: A Review of Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* (June 2003). Available at www.justice.gov/oig/special/0306/index.htm. (Last accessed May 17, 2010)

NSEERS/Special Registration (enforced by U.S. Department of Homeland Security)

Initiated by the U.S. Department of Justice in 2002, the special registration program under NSEERS required nonimmigrant males over the age of 16 and who were nationals of 25 specified countries to be fingerprinted, photographed, and questioned by immigration authorities at ports of entry and local immigration offices.[40] With the exception of North Korea, the list was exclusively comprised of Arab- or Muslim-majority countries in the Middle East and South Asia, including Bangladesh and Pakistan. Failure to comply with NSEERS led to fines, detention and deportation. By September 2003, more than 80,000 men had complied with the program; over 13,000 were subjected to investigations, primarily related to irregularities in their immigration status.[41] The government has yet to identify the extent to which the NSEERS program protected national security.

The impact on South Asian communities in the United States was severe and palpable. Many within the Bangladeshi and Pakistani communities who participated in the program in order to remain in compliance with the law, were placed into deportation or removal proceedings for minor immigration violations. Others who were not aware of the program, because of a lack of proper public notification and often confusing information about its requirements on the part of the government, were charged with "willful failure to register", damaging their ability to obtain immigration benefits for which they were otherwise eligible.[42] In addition, previously vibrant Bangladeshi and Pakistani neighborhoods in various parts of the country, particularly in New York, became vacant as community members fled the country.[43]

While portions of the program were suspended in 2003, certain aspects still remain, including registration at ports-of-entry and departure as well as penalties for those who did not comply.[44] In addition, similar programs arose, including Operation Frontline (formerly known as the *October Plan*), which led to the investigation and arrests of immigrants from Muslim-majority countries between May 2004 and February 2005.[45] Relying upon various government immigration databases, including those resulting from NSEERS program, this enforcement effort led to the targeting of individuals simply based on their religious affiliation and national origin in

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[40] *See generally*, U.S. Department of Homeland Security "Special Registration Archives." Available at www.ice.gov/pi/specialregistration/archive.htm. (Last accessed May 17, 2010)

[41] *See generally*, Kareem Shora, American-Arab Anti-Discrimination Committee and Shoba Sivaprasad Wadhia, Center for Immigrants' Rights, Penn State's Dickinson School of Law, *NSEERS:The Consequences of America's Efforts to Secure Its Borders* (March 31, 2009). Available at www.adc.org/PDF/nseerspaper.pdf. (Last accessed May 17, 2010)

[42] *Id.*

[43] *See generally*, South Asian Americans Leading Together, "The Continuing Impact of the Special Registration Program" (hereinafter "SAALT Continuing Impact Factsheet") (December 2005). Available at www.saalt.org/attachments/1/Spec%20Reg%20Factsheet.pdf. (Last accessed May 17, 2010). *See also note 13*, IPC Report.

[44] U.S. Department of Homeland Security, "Fact Sheet: Changes to National Security Entry/Exit Registration System (NSEERS)" (December 1, 2003). Available at www.dhs.gov/xnews/releases/press_release_0305.shtm. (Last accessed May 17, 2010)

[45] American-Arab Anti-Discrimination Committee and Yale Law School, "ICE targets immigrants from Muslim majority countries prior to 2004 Presidential elections" (October 2008). Available at www.adc.org/PDF/frontline.pdf. (Last accessed May 17, 2010)

the name of national security.[46] Again, the government has failed to show the link between the protection of U.S. interests and the targeting of individuals based on their nationality.

Below are a few incidents that demonstrate the impact that the NSEERS program continues to have on South Asians in the United States:

> *Originally from Pakistan, Mr. A. was a legally blind elderly gentleman who resided in Brooklyn. He came to the United States to seek medical treatment for his blindness and was living here for over ten years. He subsequently overstayed his visa and became undocumented. Then, in the winter of 2003, he learned of NSEERS at a town hall meeting with government officials. At the meeting, he was encouraged to register and learned that this could legalize his status. Subsequently, Mr. A. appeared for NSEERS and, to his surprise, was detained by immigration officials due to his lack of status. During his detention, he was held in a highly air-conditioned room in winter, told to remove his warm clothing, and had his passport confiscated. Lacking any identification or immigration status, Mr. A. was unable to obtain necessary medical treatment for his eyes. Following his detention, he was placed in removal proceedings.*[47]

> *Abu Hasan Mahmud Parvez is a native and citizen of Bangladesh who entered the United States on a diplomatic visa and was later granted a student visa. He then married a Bangladeshi woman, who was in the process of applying for a green card, and together they had a United States citizen son. However, Parvez was placed in removal proceedings, due to a visa overstay, even after complying with NSEERS.*[48]

Given its explicit targeting of individuals of nationals from South Asia and the Middle East coupled with its complete ineffectiveness at promoting the country's safety, **it is vital that Congress eliminate NSEERS and similar programs that result in the selective enforcement of immigration laws implemented in the name of national security.**

Security Background Check Delays in Naturalization Applications (conducted by U.S. Citizenship and Immigration Service and Federal Bureau of Investigation)

Another example of the impact of profiling on the South Asian community arises in the adjudication of applications for immigration-related benefits. Under current immigration laws and regulations, all applications submitted to the U.S. Citizenship and Immigration Service (USCIS) must undergo various security background checks – including clearance through the Interagency Border Inspection System (IBIS), FBI fingerprint databases, and the FBI National Name Check Program – before they are approved. By law, decisions on naturalization applications should be completed within 120 days after a naturalization interview. Yet, as a result of the FBI name check process in particular, many South Asian community members have had their applications severely delayed, sometimes for years. While USCIS and the FBI took promising measures in 2008 to improve the processing times for such applications, many South Asians continue to await naturalization for which they are eligible.

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[46] *Id.*
[47] *See note 43*, SAALT Continuing Impact Factsheet.
[48] *See note 41.*

The corollary effects of security-related background check delays have been far-reaching, as affected individuals have been denied certain rights and benefits solely afforded to U.S. citizens. For example, many South Asians have been unable to take advantage of expedited processing of sponsorship applications for spouses and children abroad of U.S. citizens. Community members also face barriers in pursuing careers in government that are reserved for U.S. citizens. In addition, many who have been unable to naturalize face heightened scrutiny by CBP, as described above, because of their nationality.

The following incident demonstrates the impact that security-related background check delays have had on South Asian naturalization applicants:

> *In November 2001, a Pakistani national applied for naturalization, and in November 2002, he received a letter informing him that he passed the requisite interview and exams but the application could not yet be approved because of background checks. After waiting four years for notice of the naturalization oath ceremony, he went to his Congressional representative and inquired about the delay. His representative was also informed that the application remained pending because of ongoing background checks. Not having any family in the U.S., he wanted to sponsor his parents in Pakistan to come to the United States because they were elderly and ill. Despite having absolutely no criminal record, when returning twice from Pakistan while awaiting naturalization, he was stopped and held for interrogation at the airport upon arrival.*[49]

Such cases highlight the **need for Congress to ensure that immigration applications are not denied or delayed because of an individual's nationality, national origin or religion**.

Profiling and Surveillance

> *"[U]sing 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."*
>
> - **Former Attorney General John Ashcroft** (February 2002)

As part of counterterrorism efforts, law enforcement has focused its activities, including surveillance, investigations, and undercover operations, on the Muslim population in the United States, affecting many South Asian community members. Various policies and practices have been employed by law enforcement agencies, including the infiltration of ethnic and religious communities through the use of informants and agents provocateurs as well as FBI policies expanding the ability to commence national security investigations with virtually no preliminary evidence required.

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[49] New York University School of Law, Center for Human Rights and Global Justice, *Americans on Hold: Profiling, Citizenship, and the "War on Terror."* Available at www.chrgj.org/docs/AOH/AmericansonHoldReport.pdf. (Last accessed May 17, 2010).

Individuals have been investigated at their places of employment, their homes, and their schools and universities, and have had their families, friends, classmates, and co-workers questioned and harassed. In addition to the targeting of individual community members, selective intelligence-gathering has also affected the community's religious organizations, such as mosques and Muslim charities. Keeping these communities under watch has resulted in a chilling effect on the civic participation of Muslim individuals, including those in the South Asian community. Many have reported that surveillance, for example, has caused them to not attend mosque, avoid making charitable contributions, and refrain from having conversations about political issues, such as U.S. foreign policy.[50]

While investigations and surveillance foster sentiments within affected communities of feeling under siege, rarely do they result in any concrete terrorism-related charges. In fact, most cases have either resulted in no charges being filed at all or with the filing of lesser charges, such as immigration-related offenses, tax evasion, or document fraud.

Use of Informants and Agent Provocateurs (employed by Federal Bureau of Investigation)

Since 9/11, law enforcement agencies have increasingly employed tactics that turn community members into the "eyes and ears" of the government to ascertain suspicious activity. While it is vital for all community members to remain vigilant in order to prevent threats, policies and practices implemented by the government have had the effect of turning community members against one another. For example, the FBI often infiltrates mosques and other places where Muslims gather through informants who track the activities of those who attend and even help to promote terrorist plots that entrap unsuspecting Muslim community members.[51] In some instances, anecdotal evidence suggested that community members have been pressured to become informants through monetary incentives, revocation of immigration status, and even the threat of arrest.

The following case demonstrates the impact that the use of informants and agents provocateurs has had on the lives of innocent members of the South Asian community:

> *In a 2002 case in Lodi, California, federal agents paid a Pakistani immigrant nearly $230,000 to infiltrate a predominantly Pakistani mosque. The informant aggressively pushed for a community member, Hamid Hayat, to attend a terrorist training camp in Pakistan.*[52]

The use of informants has promoted fear and mistrust within the South Asian community, particularly among those who attend mosques. In addition, it simultaneously undermines law

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[50] *See generally*, American Civil Liberties Union, *Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the "War on Terrorism Financing"* (June 2009). Available at http://www.aclu.org/pdfs/humanrights/blockingfaith.pdf. (Last accessed May 17, 2010)

[51] *See e.g.* Michael Wilson, "In Bronx Bomb Case, Missteps Caught on Tape," *The New York Times* (May 21, 2009). Available at www.nytimes.com/2009/05/22/nyregion/22plot.html?pagewanted=1. (Last accessed May 17, 2010). *See* also William K. Rashbaum, "Man Gets 30 Years in Subway Bomb Plot," *The New York Times*, (January 9, 2007). Available at www.nytimes.com/2007/01/09/nyregion/09plot.html. (Last accessed May 17, 2010)

[52] Frontline, "Interview with James Wedick (October 10, 2006). Available at http://www.pbs.org/wgbh/pages/frontline/enemywithin/interviews/wedick.html. (Last accessed May 17, 2010)

enforcement efforts to forge stronger ties with the community in order to identify actual threats to national security. **Congress must ensure that measures that ban profiling on the basis of race, religion, ethnicity, and national origin apply to federal law enforcement agencies, such as the FBI, engaged in surveillance activities that rely upon the use of informants and agents provocateurs.**

Domestic Investigative Operational Guidelines (employed by Federal Bureau of Investigation)

In October 2008, the Department of Justice, under the direction of former Attorney General Michael Mukasey, issued revised FBI guidelines that relaxed restrictions on federal law enforcement to conduct threat assessments using factors based on religion and ethnicity. Initially unavailable to the public, advocacy by privacy rights and civil rights organizations, including Muslim Advocates, led to the release of a redacted version; yet, provisions related to mosque infiltration and mapping of religious and ethnic communities remains undisclosed.[53]

The current Domestic Investigative Operational Guidelines (DIOGs), which went into effect in December 2008, provide the FBI significant latitude to target its efforts on Middle Eastern and Muslim communities, including the South Asian community, in several different ways. First, the guidelines explicitly allow the use of race and religion in investigations. They undermine even the narrow protections articulated in the Department of Justice's 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies (DOJ Guidance), which states:

> "In making routine or spontaneous law enforcement decisions, such as ordinary traffic stops, Federal law enforcement *officers may not use race or ethnicity to any degree*, except that officers may rely on race and ethnicity in a specific suspect description. This prohibition applies even where the use of race or ethnicity might otherwise be lawful."[54] (emphasis added)

The DIOGs provide much more restricted limitations on profiling by stating that agents cannot conduct investigative activity "solely on the basis of race," or solely on the basis of First Amendment activity[55], in direct violation of the standard set forth in the DOJ guidance.

Second, the DIOGs lower the threshold necessary to commence threat assessments without requiring adequate factual basis or supervisory approval for national security cases.[56] By removing the requirement for a factual predicate, they open the door to abuse of power and profiling. In addition, by calling these investigations "assessments," FBI agents can investigate any person they choose without mandating an evidentiary connection between the agent's

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[53] Muslim Advocates *Freedom of Information Act* Complaint to the U.S. Department of Justice regarding the DIOGs (September 16, 2009). Available at http://www.muslimadvocates.org/documents/Muslim%20Advocates%20Complaint%20To%20File.pdf. (Last accessed May 17, 2010)

[54] U.S. Department of Justice, Civil Rights Division, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (June 2003). Available at www.usdoj.gov/crt/split/documents/guidance_on_race.php. (Last accessed May 17, 2010)

[55] U.S. Department of Justice, Office of the Attorney General, *The Attorney General's Guidelines for Domestic FBI Operations* (December 2008). Available at www.justice.gov/ag/readingroom/guidelines.pdf.

[56] *Id.*

authorizing purpose and the actual conduct of individuals being investigated. Furthermore, by permitting FBI agents to initiate such assessments absent supervisory approval or reporting to FBI headquarters or the Department of Justice, there is virtually no oversight over decisions being made.

Third, the DIOGs authorize the FBI to collect data and monitor activities in areas where particular racial and ethnic communities are concentrated.[57] They also allow FBI agents to focus on "behavioral characteristics reasonably believed to be associated with a particular criminal or terrorist element of an ethnic community."[58] The DIOGs specifically provide the example of charitable giving as such a cultural act that "would be relevant if intelligence revealed that, unknown to many donors, the charitable causes were fronts for terrorist organizations or that terrorists supporters within the community intended to exploit the unwitting donors."[59]

Such provisions create scenarios where the government is allowed to cast an overly broad net on South Asian, as well as Arab, Muslim, and Middle Eastern, communities for purposes of surveillance and data gathering. The effect is isolation of targeted individuals while continuing to perpetuate the notion that certain communities are worthy of suspicion. In addition, the government's ability to undertake such intrusive surveillance techniques without any factual basis creates a chilling effect on how South Asian community members conduct their daily lives, including business transactions, interactions with fellow community members, and charitable donations to places of worship. **Congress must ensure that measures that ban profiling on the basis of race, religion, ethnicity, and national origin apply to FBI and other law enforcement surveillance activities, including data collection and analysis, investigations, and threat assessment activities.**

RECOMMENDATIONS

As demonstrated above, the consequences of profiling since 9/11 on the basis of race, religion, ethnicity, nationality, and national origin on the South Asian community have been expansive and profound. In addition, such practices and policies have been either ineffective or counterproductive towards achieving national security. Yet, there are currently limited prohibitions that prevent law enforcement from engaging in such activities. Under existing policies, law enforcement agencies are bound by the minimal and vague guidelines set forth in the DOJ Guidance. Yet the DOJ guidance is inadequate in several respects. Specifically, it fails to prohibit profiling on the basis of religion or national origin; includes an overly broad exemption for national security matters; does not apply to state and local law enforcement agencies; and lacks an enforcement mechanism to ensure law enforcement agency compliance.

Given the dearth of robust and effective administrative policies to curb profiling and assess its impact, SAALT believes it is incumbent upon Congress to enact legislation banning its practice. Legislation such as *ERPA*, which has been introduced in previous Congressional sessions, serves as an ideal vehicle to achieve the goal of eliminating profiling.

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[57] *Id.*
[58] *Id.*
[59] *Id.*

Specifically, *ERPA* would do the following:

- Prohibit the use of profiling based on race, religion, ethnicity, or national origin by federal, state, and local law enforcement
- Institute anti-profiling trainings for law enforcement agents
- Ensure data collection and monitoring of law enforcement activities as it relates to race, religion, ethnicity, and national origin
- Develop meaningful procedures for receiving, investigating, and responding to complaints
- Establish a private right of action for victims of profiling
- Authorize the Attorney General to provide grants to law enforcement agencies to encourage the development and implementation of best policing practices and withhold grants from law enforcement agencies that fail to comply with the Act
- Mandate the Attorney General to submit periodic reports to Congress on ongoing discriminatory practices by federal, state, and local law enforcement

In addition to the laudable measures included *ERPA*, we also strongly urge the inclusion of provisions that explicitly address profiling that has occurred in the post-9/11 context, including the following:

- In order to apply situations of profiling occurring in the airport context, ensure the definition of law enforcement's "routine and spontaneous activities" covered by the Act includes searches of persons, possessions, or property of individuals "in any form of public or private transit"
- In order to apply to situations of profiling resulting from FBI surveillance activity, ensure the definition of law enforcement's "routine and spontaneous activities" covered by the Act includes "data collection and analysis, assessments, and predicated investigations"
- In order to capture information on the rates of profiling in the various contexts that it occurs, beyond "stop and frisk" situations, ensure that data analysis applies to "disparities in other data collected pursuant to routine or spontaneous investigations"
- In order to clearly apply to profiling that has occurred since 9/11, ensure specific findings outlining the impact of such policies and practices

CONCLUSION

In conclusion, SAALT supports the introduction of the *End Racial Profiling Act*, and urges Congressional members to strengthen the legislation during the review process by including the provisions recommended above. We commend Congressman Conyers and Senator Feingold for their longstanding commitment to addressing the impact of racial and religious profiling. SAALT stands together with our allies in support of this important legislation, which will reaffirm our country's fundamental ideals of civil rights, equality, and due process.

For further information about the impact of profiling on the South Asian community, contact Priya Murthy, SAALT's Policy Director, at priya@saalt.org or (301) 270-1855.

STATEMENT OF
WADE HENDERSON, PRESIDENT & CEO,
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS

HEARING ON
"RACIAL PROFILING AND THE USE OF SUSPECT CLASSIFICATIONS IN LAW ENFORCEMENT POLICY"

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES
UNITED STATES HOUSE OF REPRESENTATIVES

JUNE 23, 2010

Chairman Conyers, Chairman Nadler, Ranking Member Smith, Ranking Member Sensenbrenner, and members of the Committee: I am Wade Henderson, president & CEO of The Leadership Conference on Civil and Human Rights. Thank you for the opportunity to submit testimony for the record regarding the problem of racial profiling and the use of suspect classifications in law enforcement policy.

The Leadership Conference on Civil and Human Rights is a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the civil and human rights of all persons in the United States. Founded in 1950 by A. Philip Randolph, Arnold Aronson, and Roy Wilkins, The Leadership Conference works in support of policies that further the goal of equality under law through legislative advocacy and public education. While we were founded to be the legislative arm of the civil rights movement, our mission has since expanded so that today we are meeting the new challenges of the 21st century, which include guaranteeing a high education for children, ensuring economic opportunity and justice for all workers, and reforming our criminal justice system.

I applaud the Committee for holding this hearing on a matter of vital importance to our coalition. Despite the strides our nation has made toward achieving racial equality, racial profiling is an area in which racial inequality persists.

Racial profiling is the reliance by law enforcement on race, ethnicity, national origin, or religion in deciding whom to investigate, arrest, or detain, where these characteristics are not part of a specific subject description. The practice of using race as a criterion in law enforcement flies in the face of progress we have made toward racial equality and must be stopped. Racial profiling is a moral and social problem that threatens our shared value of humane treatment of all people under the law.

Racial profiling violates U.S. laws. According to the U.S. Constitution and federal laws and guidelines, every person has the fundamental right to equal protection under the law, regardless of race, ethnicity, religion, or national origin. Racial profiling is so insidious and pervasive that it can affect people in their homes or at work, or while driving, flying, or walking. It is antithetical to the founding principle in the Declaration of Independence that "all men are created equal" and to the Constitutional right to equal protection under the law, regardless of race, ethnicity, religion, or national origin.

Following the tragic events of September 11, 2001, many South Asians, Muslims, Arabs, and Sikhs, as well as other immigrants were treated with generalized suspicion based on their national origin, ethnicity

and religion and without trustworthy information linking them to criminal conduct. Policies primarily designed to impact certain groups, however, are ineffective and often result in the destruction of civil liberties for everyone. Singling out African Americans, Latinos, Muslims, Arabs, and South Asians for special law enforcement scrutiny without a reasonable belief that they are involved in a crime will result in little evidence of actual criminal activity and wastes important police resources. Racial profiling makes us all less safe, by distracting law enforcement from the pursuit of individuals who pose serious threats to security.

In 2003, The Leadership Conference on Civil Rights Education Fund released a policy report entitled "Wrong Then, Wrong Now, Racial Profiling Before & After September 11, 2001." The report examined the flawed and widespread practice of racial profiling, which was given a new dimension in the aftermath of the events of September 11. The rigorous empirical evidence developed showed that minority drivers were stopped and searched more than similarly situated Whites. The data also showed that minority pedestrians were stopped and frisked at a disproportionate rate, and that, in general, federal, state, and local law enforcement officials frequently use race as a basis for determining who to investigate for such activity as drug trafficking, gang involvement, and immigration violations. Sadly, the data today is consistent with what it was almost a decade ago and in many ways the need for action by our federal government is even more necessary at this time.

Racial profiling leads to individual indignity and suffering, undermines the integrity of our criminal justice system, and instills fear and distrust among members of targeted communities. When law enforcement authorities engage in profiling, they pay less attention to actual criminal behavior while instilling fear and distrust in members of targeted communities. Racial minorities continue to be targeted at disproportionate rates by law enforcement and the targeting is not effective. Recent data on stops and frisks in New York City showed the racially driven use of stops and frisks against minorities yields little achievements in fighting crime. According to the data, in 2009, even though Blacks and Latinos comprise 25 and 28 percent of New York City's population respectively, they comprised 87 percent of the individuals that were stopped. Stops made of White individuals during that time period yielded slightly more contraband.[1] The data also demonstrates that Blacks and Latinos are more likely to be frisked after a New York Police Department- initiated stop than Whites. Between 2005 and June 2008, only 8 percent of Whites stopped were also frisked, while 85 percent of Blacks and Latinos who were stopped were also frisked.[2]

Recent federal government initiatives designed to combat illegal immigration further encourage racial profiling. Immigration and Customs Enforcement within the U.S. Department of Homeland Security (DHS) has shifted significant responsibility for enforcement of civil immigration laws to state and local law enforcement authorities. The use of the Delegation of Immigration Authority, otherwise known as the Section 287(g) program, by state and local law enforcement authorities has led to rampant abuses by those agencies. The facts show that many local law enforcement agencies repeatedly use 287(g) agreements to stop, frisk, detain, arrest, question, harass, terrorize, and otherwise target individual Latinos and entire Latino communities in a broad way to enforce federal immigration laws, for no reason other

[1] The Center for Constitutional Rights, Racial Disparity in NYPD Stops-and-Frisks: The Center for Constitutional Rights Report on UF-250 Data from 2008 through June 2008 (January 15, 2009) *available at* http://ccrjustice.org/files/Report_CCR_NYPD_Stop_and_Frisk_0.pdf.
[2] *Ibid.*

than that they appear to be Latino and thus are profiled as potential illegal immigrants. But because it is impossible to ascertain a person's legal status by his or her name, appearance, or way of speaking, 287(g) programs that focus on enforcing civil immigration laws incentivize police to racially profile vast numbers of Latinos, most of whom are U.S. citizens or legal residents, as potential illegal immigrants. As this Committee is well aware, the Office of Inspector of DHS released a report in April 2010 confirming many of the criticisms levied against the program by advocates and immigration groups since implementation of section 287(g) began in 2002.[3] The OIG report provides damning evidence that the program is fundamentally flawed.[4]

Other efforts by state and local governments to redress the harm caused by racial profiling have been insufficient to address the national problem of racial profiling. Arizona's recently signed Senate Bill 1070 would require law enforcement officers to question the immigration status of someone who is stopped, detained, or arrested if there is "reasonable suspicion" that they are in the country illegally. This law, which goes into effect July 29, 2010, invites police to rely on appearance characteristics such as race, ethnicity, and language, and thereby essentially codifies racial profiling. The racial profiling invited by the Arizona legislation go wells beyond federal law and arguably violates both the Constitution's guarantee of equal protection under the law and federal civil rights protections.

The End Racial Profiling Act (ERPA) would apply the prohibition on racial profiling to state and local law enforcement, close the loopholes in its application, include a mechanism for enforcement of the new policy, require data collection to monitor the government's progress toward eliminating profiling, establish a private right of action for victims of profiling, and provide best practice development grants to state and local law enforcement agencies that will enable agencies to use federal funds to bring their departments into compliance with the requirements of the bill. ERPA will lead to the elimination of profiling based on characteristics, including race, religion, ethnicity, and national origin by law enforcement at all levels of government.

It is time for this Congress to lead the way to an America where "all men are created equal" and "equal protection under the law" apply to all persons living in the United States. By allowing racial and religious bias to decide who is detained by law enforcement, we betray that fundamental promise of equal protection under the law. We urge Congress to introduce and pass ERPA and finally take the first step toward ending racial profiling in America.

Thank you for your leadership on this critical issue.

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[3] *The Performance of 287(g) Agreements,* OIG-10-63 (Dep't of Homeland Security Office of Inspector General, Mar. 2010) http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf (last visited June 15, 2010).
[4] *Id.*

Statement of the National Immigration Law Center
Hearing on "Racial Profiling and the Use of Suspect
Classifications in Law Enforcement Policy"
Before the House Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Submitted by
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June 24, 2010

Introduction

Racial profiling and the use of suspect classifications by law enforcement are historic problems, but recent state laws that in effect mandate racial profiling by law enforcement officers create new and ominous consequences. This dangerous situation is exemplified by the enactment of Arizona Senate Bill 1070 ("SB 1070"), signed into law on April 23, 2010 by Gov. Janice Brewer.[1]

The law creates a state crime for the failure to carry immigration documents and requires law enforcement officials to verify the immigration status of anyone they have "reasonable suspicion" to believe is undocumented.[2] Immigration status, however, is not something that can be visibly observed. Therefore, because the characteristics an officer would rely on in order to form the requisite suspicion are primarily racial, SB 1070 indisputably requires officers to racially profile.

As co-lead counsel in a class action suit challenging Arizona SB 1070, the National Immigration Law Center ("NILC")[3] brings particular expertise to the issue of racial profiling by law enforcement. Claims include that SB 1070 is preempted by federal immigration law, and unconstitutionally violates the right to freedom of speech, the right to travel, the right to be free from unlawful searches and seizures, and the right to equal protection of the law through its promotion of discrimination based on race and national origin.[4] On June 4, 2010, counsel for plaintiffs lodged a Motion for Preliminary Injunction seeking to enjoin implementation of SB 1070.[5] As exhibits to the Preliminary Injunction Brief, NILC filed the declarations of three current and former police chiefs: Chief of the Yakima, Washington, Police Department, Samuel Granato; Chief of the San Francisco, California, Police Department, George Gascón; and former Director of the United States Marshals Service and former Chief of the City of Tampa, Florida, Police Department, Eduardo Gonzalez.

The voices of police chiefs are especially instructive in analyzing the potential effects of SB 1070 because police chiefs have direct knowledge of what causes racial profiling by law enforcement as well as the pernicious effects of such profiling on the larger community. That SB 1070 encourages racial profiling is central to the declarations of these police chiefs. The chiefs' views about how enforcement of a law like SB 1070 will result in racial profiling are shared by other members of the law enforcement community.[6] In statements, press briefings, legal declarations, and editorials, law enforcement leadership nationwide has condemned SB 1070[7] because (1) it mandates racial profiling, and (2) law enforcement's engagement in racial profiling will make communities less safe.

I. Racial Profiling Will Occur as a Result of SB 1070

Chief of the Yakima, Washington, Police Department, Samuel Granato does not believe "that SB 1070 can be enforced in a racially neutral manner."[8] Other police chiefs agree that SB 1070 is discriminatory because it targets people based on race or national origin.[9] According to the former director of the United States Marshals Service and former chief of the City of Tampa

Police Department, Eduardo Gonzalez, SB 1070 will "lead to unlawful racial and ethnic profiling."[10] Because as much as 30 percent of Arizona residents are Latino,[11] officers under SB 1070 will inevitably profile citizens and persons with visas. As Chief of the Pima County, Arizona, Police Department, Clarence Dupnik stated:

> [N]o one can tell them what an illegal immigrant looks like and when it is ok to begin questioning a person along those lines. This law puts [officers] in a no-win situation: They will be forced to offend and anger someone who is perhaps a citizen or here legally when they ask to see his papers—or be accused of nonfeasance because they do not. [12]

Moreover, SB 1070, creates a private right of action for any person to sue a city, town, or county that fails to enforce the provisions of federal immigration law to less than the full extent permitted under federal law. Thus, because of the constant threat of litigation, SB 1070 will put pressure on officers to engage in racial profiling in order to enforce the provisions of the law.

Besides causing officers to racially profile after making a stop, SB 1070 incentivizes pretextual stops and the use of local ordinances as gateways to status checks on people of color. SB 1070 provides a perverse incentive for officers to engage in racial profiling prior to a stop because officers are aware that they can check immigration status once the stop has been made. As a series of government and nongovernment reports on the 287(g) program have shown, deputizing local officers to act as immigration officers -- even when a stop is necessary to the immigration status check -- results in pretextual arrests and other stops for minor offenses, all based on racial profiling.[13] SB 1070 will result in the use of local ordinances and pretextual stops to legitimize racial profiling by Arizona police. According to Chief of the San Francisco Police Department, George Gascón:

> If SB 1070 goes into effect, there will be a greater incidence of pretextual stops of individuals of color in Arizona as officers will use pretextual reasons to stop or question individuals they believe to be here illegally. If an officer is motivated by race or ethnicity he/she can easily find a valid pretext for encountering an individual, whether by following a car until a minor traffic violation occurs or by approaching a pedestrian for "consensual" questioning.[14]

Even in their defense of SB 1070, proponents of the law rely on racial stereotypes to describe the characteristics that might lead an officer to have reasonable suspicion that a person is undocumented. Among these characteristics are "grooming,"[15] "cars on blocks in the yard", or "too many occupants of a rental accommodation."[16] Police Chief Gascón disagrees that racial profiling will not occur:

> As a practical matter, even the amended language, which prohibits consideration of race, color or national origin, will not prevent the improper use of race or ethnicity. Short of directly observing an

> individual actually crossing the border in a surreptitious manner, there are not reliable indicators that would give rise to a reasonable suspicion to believe that a person is unlawfully in the United States.[17]

Proponents of SB 1070 argue that racial profiling will not occur because officers will be given civil rights training. However, Police Chief Gonzalez says that based on his "34 years of law enforcement experience, [he] believe[s] it will be extremely difficult to construct a training program for enforcement of SB 1070 that will successfully prevent officers from resorting to using racial and ethnic appearance to form the requisite suspicion…"[18] Police Chief Granato agrees that "it is not possible to construct a training that would sufficiently prepare officers to enforce SB 1070 in a uniform manner."[19] Whether the officer notices the appearance of foreignness before or after the stop, the officer has at least an initial incentive, if not a legal mandate, to racially profile during the course of a stop.

II. Law Enforcement's Focus on Racial Profiling Will Make Communities Less Safe by Destroying Community Trust and Diverting Police Resources from Fighting Crime

First, SB 1070 will make communities less safe by causing a large sector of the community to distrust law enforcement. By mandating racial profiling, SB 1070 discourages people of color, regardless of immigration status, from reporting crime. According to Police Chief Gonzalez "distrust of law enforcement will be created whether or not community members have legal status … because immigrant families and communities are typically made up of both those with lawful status and those without."[20] According to Police Chief Gascón, "out of fear of deportation of a family member or neighbor, even many victims of crimes who are in legal immigration status will decide not to contact the police."[21] Police Chief Granato agrees: "My job as a law enforcement officer is compromised when the individuals I am charged to serve and protect are afraid to have contact with me. This is exactly what will happen as a result of SB 1070's mandate to investigate immigration status…"[22] According to Tucson Police Chief Roberto Villaseñor, "when you enact legislation that makes any subset of that community feel like they are being targeted specifically […] that damages our capability to obtain information to solve the crimes that we need to work with."[23] Racial profiling is not a victimless crime. As Police Chief Granato stated, "[SB 1070] further victimizes some of the most vulnerable victims of crime…"[24] When racial profiling occurs, every contact with the police is fraught with peril.

If people of color know that an immigration status check will result from contact with the police, they are less likely to call the police when they witness or are the victims of crimes. When racial profiling is used by law enforcement, each member of the community becomes a target based solely upon the way he looks or sounds and will therefore be less likely to come forward on his own behalf or on behalf of others. The racial profiling mandated under SB 1070 will create a "fracture" between law enforcement and a segment of the community.[25] According the San Francisco Police Chief George Gascón:

> [SB 1070] will create a vacuum in law enforcement, and criminals will be emboldened because they will have less reason to be concerned about being reported by victims or witnesses in immigrant communities, and less reason to fear any consequences for their criminal conduct… I cannot overstate the critical importance of victim and witness cooperation in solving crimes and anything that diminishes that cooperation should be rejected.[26]

Community policing is heavily reliant on trust within communities. Fearing the police even as a means to safety, immigrants will stop reporting crimes because of the possibility of being detained themselves.[27] Police chiefs from around the country believe that the racial profiling mandated under SB 1070 will "break down the trust that police have built in communities and will divert law enforcement resources away from fighting crime."[28] Police chiefs believe the result of SB 1070's mandate of racial profiling will be an increase in crime – not a decrease in crime.[29]

Second, law enforcement's focus on racial profiling and the resulting immigration enforcement duties will make communities less safe by diverting resources from priorities like fighting crime committed by dangerous criminals. The Arizona Association of Chiefs of Police opposes SB 1070 because "[t]he provisions of the bill… will negatively affect the ability of law enforcement agencies across the state to fulfill their many responsibilities in a timely manner."[30] According to Police Chief Gonzalez:

> The law puts police officers in an untenable situation because it requires that they enforce immigration laws to the fullest extent permitted by federal law or risk being sued. SB 1070 divests local officers of the discretion to determine how best to ensure the safety of the community and retain the trust of the immigrant population by mandating that they enforce immigration laws…[31]

By diverting "critical and already strained police resources away from the task of pursuing serious and violent crimes into the complicated and vague task of enforcing immigration laws," SB 1070's mandate of racial profiling will negatively impact public safety.[32] Police Chief Gascón agrees that SB 1070 creates a resource allocation problem for already underfunded police departments because "police officers cannot take on immigration enforcement without taking substantial time away from priorities that are more central to a local law enforcement agency, such as investigating and preventing violent crimes and property crimes…"[33] The private right of action provision makes this scenario more than hypothetical. This provision requires state and local law enforcement agencies to prioritize immigration over many competing law enforcement activities and thus strips agencies of their discretion to exercise considered judgment about how best to ensure public safety.

Conclusion

The issue of racial profiling by law enforcement is not confined to SB 1070. Numerous states are considering passing similar laws.[34] Because it relies on racial profiling, SB 1070's

implementation will result in a less safe Arizona and a less safe country for us all. We recommend that the Subcommittee on the Constitution, Civil Rights, and Civil Liberties consider what police chiefs know to be true: racial profiling is not an effective tool in law enforcement – it violates civil rights, and it makes communities less safe.

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[1] Arizona Senate Bill 1070, 49th Leg., 2nd Reg. Sess., Ch. 113 (Az. 2010); *see also* Arizona House Bill 2162, 49th Leg., 2nd Reg. Sess., Ch. 211 (Az. 2010) (amending SB 1070).

[2] According to SB 1070 this requirement is triggered by any "lawful stop, detention or arrest…in the enforcement of any other law or ordinance of a county, city or town". *Id.* § 2; A.R.S. § 11-1051(B). However, this limitation does little to obviate the risk that officers will engage in racial profiling because, as discussed in more detail below, it is easy for an officer to find a pretextual reason for a lawful stop.

[3] NILC is a 501(c)(3) organization dedicated to defending and advancing the rights of low-income immigrants and their family members. For over 30 years, NILC has built a reputation as a leading expert on laws affecting immigrants.

[4] Complaint for Declaratory and Injunctive Relief, *Friendly House et al. v. Whiting et al.*, No. CV 10-1061 (D. Ariz. May 17, 2010), *available at* http://www.nilc.org/immlawpolicy/LocalLaw/complaint_final-2010-05-17.pdf.

[5] Plaintiffs' Motion for a Preliminary Injunction at 2, *Friendly House et al. v. Whiting et al.*, No. CV-10-01061-MHA (D. Ariz. June 4, 2010), *available at* https://salsa.democracyinaction.org/o/371/images/6-4-10-Pl-Motion13rief.pdf. This motion was ordered filed on June 21, 2010.

[6] *See Arizona Association of Chiefs of Police Statement on Senate Bill 1070, available at* http://www.leei.us/main/media/AACOP_STATEMENT_ON_SENATE_BILL_1070.pdf; *See also* Phillip Atiba Goff, Liana Maris Epstein, Chief Chris Burbank, Division Chief Tracie L. Keese, The Consortium for Police Leadership in Equity, Deputizing Discrimination? Causes & Effects of Cross-Deputization in Salt Lake City, Utah, *soon to be available at* http://www.policingequity.org.

[7] *See Police chiefs voice concerns about Ariz. immigration law*, (Arizonacentral.com May 26, 2010), *available at* http://www.azcentral.com/news/articles/2010/05/26/20100526arizona-immigration-law-police-chiefs-concern.html#ixzz0r3N9N8CC; *see also* Plaintiffs' Motion for a Preliminary Injunction at 2, *Friendly House et al. v. Whiting et al., supra* note 1.

[8] Declarations submitted to the court on June 14, 2010 in *Friendly House, et al. v. Whiting, et al.*, No. CV-10-01061-PHX-JWS (D.Ariz.) [hereinafter *Declarations*].

[9] Lisa Halverstadt, *3 police leaders oppose Arizona immigration law* (The Arizona Republic, May 17, 2010) *available at* http://www.azcentral.com/news/articles/2010/05/17/20100517arizona-immigration-law-police-leaders-oppose.html.

[10] *Declarations, supra* note 4; *See also* Jonathan J. Cooper, *Ariz. Immigration Law Divides Police Across US*, ASSOCIATED PRESS (May 17, 2010) (Phoenix, Arizona Police Chief Jack Harris stating that SB 1070 will make it "very difficult not to profile").

[11] *Pima County Sheriff Calls Arizona Law "Stupid," Will Not Enforce It*, (huffingtonpost.com, April 28, 2010), *available at* http://www.huffingtonpost.com/2010/04/28/pima-county-sheriff-calls_n_555895.html.

[12] Clarence W. Dupnik, Arizona's Immigration Mistake: Those who look suspiciously like illegal immigrants will find their liberty in severe jeopardy (Wall Street Journal, May 5, 2010) *available at* http://online.wsj.com/article/SB10001424052748704342604575222420517514084.html.

[13] *Terror and Isolation in Cobb: How Unchecked Police Power under 287(g) Has Torn Families Apart and Threatened Public Safety* (American Civil Liberties Union of Georgia, Oct. 2009), http://www.acluga.org/287gReport.pdf (last visited April 26, 2010); *Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws* (Government Accountability Office, GAO-09-109, Jan. 2009), www.gao.gov/new.items/d09109.pdf (last visited April 26, 2010); Aarti Shahani and Judith Greene, *Local Democracy on Ice: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement* (Justice Strategies, Feb. 2009); *The Policies and Politics of Local Immigration Enforcement Laws* (American Civil Liberties Union of North Carolina Foundation and Immigration & Human Rights Policy Clinic, University of North Carolina, Feb. 2009) http://www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf (last visited April 26, 2010); *The Persistence of Racial Profiling in Gwinnett: Time for Transparency, Accountability, and an End to 287(g)* (American Civil Liberties Union of Georgia, March 2010), www.acluga.org/GwinnettRacialReportFinal.pdf (last visited April 26, 2010); Mai Thi Nguyen and Hannah Gill, *The 287(g) Program: The Costs and Consequences of Local Immigration Enforcement in North Carolina Communities* (The University of North Carolina at Chapel Hill, Feb. 2010) http://isa.unc.edu/migration/287g_report_final.pdf (last visited April 26, 2010).

[14] *Declarations, supra* note 8.

[15] Eric Zimmermann, *GOP congressman: Spot illegal immigrants by their 'grooming'* (The Hill June 15, 2010), *available at* http://thehill.com/blogs/blog-briefing-room/news/103259-gop-congressman-spot-illegal-immigrants-by-their-grooming.

[16] *Email from Kris Kobach to Russell Pearce* (April 28, 2010), *available at* http://wonkroom.thinkprogress.org/wp-content/uploads/2010/04/kobachemail.jpg.

[17]George Gascón, *Top Cop: Arizona Immigration Law Puts Police in "Precarious Position"*, (The Crime Report, May 24, 2010) *available at* http://thecrimereport.org/2010/05/24/top-cop-arizona-immigration-law-puts-police-in-%E2%80%9Cprecarious-position%E2%80%9D/.
[18] *Declarations*, *supra* note 8.
[19] *Id.*
[20] *Id.*
[21] *Id.*; *see also Declaration of Police Chief Granato, stating that,* "when, as a result of their involvement in immigration enforcement, local police officers come to be viewed as arms of the federal immigration enforcement system, immigrant communities will grow to distrust the police and will likely avoid contact with law enforcement out of fear that it could lead to their deportation or the deportation of a family member, friend, or neighbor…"
[22] *Id.*
[23] *See* Plaintiffs' Motion for a Preliminary Injunction at 2, *Friendly House et al. v. Whiting et al.*, *supra* note 1, referencing Boyd Decl., Ex. 32, Huma Khan, *Police Chiefs Slam Arizona Immigration Law*, ABC NEWS (May 26, 2010).
[24] *Id.*
[25] Maria Pena, *Police Chiefs Criticize Arizona Immigration Law* (Latin American Herald Tribune), *available at* http://www.laht.com/article.asp?ArticleId=357524&CategoryId=12395.
[26] See *Top Cop: Arizona Immigration Law Puts Police in "Precarious Position"*, supra note 17.
[27] Crime-stopper faces deportation (MSNBC.com, May 26, 2010) available at http://www.msnbc.msn.com/id/37263917/ns/us_news-immigration_a_nation_divided/from/ET.
[28]Police chiefs voice concerns to AG about Ariz. law (Associated Press, May 26, 2010) available at http://www.google.com/hostednews/ap/article/ALeqM5jKVtYxH4wbJdoijU3S9P1SqlCQ8QD9FUPM485.
[29] *See* Police chiefs voice concerns to AG about Ariz. law, (The Associated Press, May 26, 2010), *available at* http://www.google.com/hostednews/ap/article/ALeqM5jKVtYxH4wbJdoijU3S9P1SqlCQ8QD9FUPM485.
[30] *AACOP Statement on Senate Bill 1070, available at* http://www.leci.us/main/media/AACOP_STATEMENT_ON_SENATE_BILL_1070.pdf.
[31] *Declarations*, *supra* note 8.
[32] *Id.*
[33] *Id.*
[34] Resolutions/Copycats, (Reform Immigration for America, updated weekly) *available at* http://org2.democracyinaction.org/o/5681/t/5800/petition.jsp?petition_KEY=463 (last visited June 23, 2010).