

July 23, 2010

Attorney General's Working Group on Racial Profiling Guidance
c/o Samuel Bagenstos, Principal Deputy Assistant General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Sam and members of the Attorney General's Working Group:

Thank you for meeting with us in May to discuss your ongoing review of the Department's 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies ("Guidance"). We appreciate the Department's efforts to consult with community and civil liberties groups during this review, as well as your consideration of our substantive concerns about the omissions and exceptions in the Guidance. We are encouraged by the Department's commitment to this issue, including its recent decision to challenge the State of Arizona's discriminatory policing law, S.B. 1070.

We write now to address some of the questions raised during the meeting and to provide further information as to why a timely revision of the Guidance is so urgently needed.

To summarize our key recommendations, the Guidance should be modified to:

- Include religion and national origin as protected classes;
- Remove the national security and border integrity exception;
- Explicitly state that the ban on profiling applies to intelligence activities carried out by law enforcement agencies subject to the Guidance;
- Ensure that it is enforceable and that law enforcement agencies are held accountable for any violations; and
- Apply to state or local law enforcement agencies working in cooperation with federal agencies or receiving federal financial assistance, including grants, training, use of equipment, donations of surplus property, and other assistance.

Behavior-Focused, Constitutional Standard

Our request to include religion and national origin and to remove the national security and border integrity exceptions is not without precedent in federal law enforcement. As discussed during our meeting, federal agencies are currently using different standards relating to the use of race, ethnicity, religion and national origin in investigative activities. One seemingly fair standard is the one recently implemented by the Director of National Intelligence (DNI) for use in its Information Sharing Environment (ISE)-Suspicious Activity Reporting (SAR) system. 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 Department 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 We are eager to continue a conversation with you about modifying the Guidance to reflect the ISE-SAR and Department consent decrees standards.

Discriminatory Federal Law Enforcement Policies & Practices

On June 17, 2010, the House Judiciary Committee held a hearing entitled “Racial Profiling and the Use of Suspect Classifications in Law Enforcement Policy.” This was the first congressional hearing on racial profiling in nearly a decade. During this hearing, members heard testimony from community advocates, law enforcement officials, and academics about the impact of racial profiling on individuals and communities across the country. Specifically, panelists testified about racial, religious and ethnic profiling by federal, state and local law enforcement, including the FBI, Customs and Border Protection, and the Transportation Security Administration.³

Highlighted below are some of the issues that were raised during the hearing, and a sample of the real life instances where the omissions and exceptions in the Guidance are resulting in discriminatory targeting by law enforcement agencies across the country. These examples underscore the urgent need to revise and strengthen the Guidance.

Discriminatory FBI Policies & Practices

Shortly after 9/11, the FBI reiterated its commitment to not target individuals on the basis of race, religion, national origin, and ethnicity, without individualized suspicion of criminal activity. The commitment was based not only on the well-documented harms caused by racial profiling, but also on a consensus that racial profiling is ineffective as a law enforcement tactic. But in more recent years, FBI policies have changed, most notably with the adoption in December 2008 of the Attorney General’s Guidelines for Domestic FBI Operations and the FBI’s Domestic Investigations and Operations Guide (DIOGs). Under these policies, today the FBI can target individuals and groups for questioning and surveillance with no individualized suspicion of wrongdoing, but rather because of a perception that—by virtue of their membership within a particular racial, religious,

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>.

³ The written statements of the witnesses can be found on the House Judiciary Committee website, at: http://judiciary.house.gov/hearings/hear_100617_1.html.

national, or ethnic group—they are either engaged in, or will be able to reveal evidence of, criminal activity.

The DIOGs also authorize the collection of racial and ethnic demographic data and cultural and behavioral information about racial and ethnic communities. This type of data collection and geo-mapping is based on generalized suspicion of particular racial and ethnic communities, not individualized suspicion of criminal activity or threats to national security. The FBI's power to map collected data heightens the concern that this information is used by law enforcement agencies to target unlawfully innocent Americans for further investigative activities. This is not only a fear but the reality experienced by many Muslim Americans today, as described in the live and written testimony of Muslim Advocates at the congressional hearing (copy attached hereto).

The DIOGs also allow the FBI to send undercover agents and informants into organizations, including houses of worship and other institutions where First Amendment rights are implicated, with no factual predicate that criminality is afoot. That means that law-abiding individuals and organization across the country are subjected to surveillance based on no more than their membership in a protected class (or what should be a protected class). Again, as described in the written testimony of Muslim Advocates, Muslim, Arab and South Asian communities are subject to unwarranted scrutiny by undercover agents and unfair infiltration by informants in mosques and community organizations, creating a chill on lawful religious, associational, and expressive activities.

Discriminatory Customs & Border Protection (CBP) Policies & Practices

Customs and Border Protection (CBP) is targeting with impunity individuals entering the United States at land and air ports of entry on the basis of ethnicity, national origin, race, and religion, based on the border integrity exception in the Guidance. CBP maintains the ability to set up check-points and patrol within 100 miles of any land or sea border, which has led to checkpoints in northern and southern border states where agents engage in enforcement actions that target individuals based on their perceived membership within a protected class. In some states, the 100-mile rule may swallow much of the state, allowing CBP to extend their enforcement activities throughout the state and conduct searches and seizures at much lower standards than constitutionally allowed under non-border circumstances.

Similarly, individuals returning to the country from abroad are being targeted for additional, extensive, and intrusive questioning by CBP at airports, based on no more than their religion, ethnicity, race or national origin. Law-abiding individuals, particularly Muslim Americans and those perceived to be Muslim, are consistently 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 are engaged in unlawful activity.⁴

⁴ See Muslim Advocates, *Unreasonable Intrusions: Investigating the Politics*,

CBP dismisses complaints by advocates and individuals improperly targeted for searches, seizures, and questioning at the border, maintaining that it is operating within the parameters of the Guidance's border exception. The Guidance's failure to prohibit profiling on the basis of national origin and religion also allows CBP to circumvent allegations that they are engaging in unlawful profiling, as these are not recognized by the Guidance.

Discriminatory Immigration & Customs Enforcement (ICE) Policies & Practices

Unlawful profiling is also occurring across the country under programs like 287(g), the Secure Communities and the Criminal Alien Program.⁵ Exceptions in the Guidance allow agents to make the case that they are not profiling based on race or ethnicity but rather on national origin, because they are looking to locate undocumented persons. This is particularly acute in 287(g) jurisdictions where state and local law enforcement agents are deputized to act as federal immigration agents and are explicitly (through their MOUs) bound by the Guidance, and, although it is frequently observed in the breach, Title VI's prohibition of national origin discrimination, as protected classes. Immigration and Customs Enforcement's resistance to the Department of Homeland Security Inspector General's recent recommendation to "[e]stablish collection and reporting standards that provide objective data to increase monitoring of methods participating jurisdictions use in carrying out 287(g) functions, and their effect on civil liberties" impedes progress in reducing racial profiling.⁶

Discriminatory Transportation Security Administration Policies & Practices

Transportation Security Administration (TSA) officers have asserted extremely wide discretion to pull aside whomever they choose with little to no oversight and accountability. The result has been profiling of travelers at our nation's airports based on race, religion, ethnicity, and national origin. As described in written testimony by the Sikh Coalition (attached hereto), Muslim, Arab, South Asian, and Sikh travelers, particularly those who wear articles of clothing associated with their religion including turbans and headscarves, are bearing a disproportionate amount of this scrutiny. The Guidance's

Faith & Finances of Americans Returning Home (2009), available at http://www.muslimadvocates.org/documents/Unreasonable_Intrusions_2009.pdf; see also Asian Law Caucus, *Returning Home: How U.S. Government Practices Undermine Civil Rights At Our Nation's Doorstep* (2009), available at <http://www.asianlawcaucus.org/wp-content/uploads/2009/04/Returning%20Home.pdf>.

⁵ See, e.g., Vic Vela, "Santa Fe Jail Shields Its Prisoners from ICE." *Albuquerque Journal* (May 26, 2010) (Santa Fe County jail director Annabelle Romero "claims the feds use such factors as Mexican-sounding names to decide which inmates they want to interview. 'The individuals they do select to interview are mostly Hispanic and have hyphenated names,' Romero said. 'The way it was conducted I thought was unfair.'")

⁶ See DHS Office of Inspector General, "The Performance of 287(g) Agreements." (Apr. 2010), available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf, 27.

national security loophole allows TSA to continue to target Muslim, Arab, South Asian and Sikh travelers at our nation's airports, despite its own internal policies that prohibit targeting individuals on the basis of their membership within a protected class.

Thank you again for your openness and willingness to engage in a thoughtful conversation about the Guidance and the recommendations discussed above. We look forward to continued discussions with the Working Group as you complete your review and will be in contact about scheduling our next meeting.

Sincerely,

American-Arab Anti-Discrimination Committee
American Civil Liberties Union
Bill of Rights Defense Committee
Center for National Security Studies
The Leadership Conference on Civil and Human Rights
Muslim Advocates
Open Society Institute
Rights Working Group
Sikh Coalition
South Asian Americans Leading Together

Attachments