Background

Civil liberties are personal freedoms granted to all United States citizens by the U.S. Constitution; these include freedoms of speech, assembly, religion, right to privacy, right to a fair trial, and equal protection under the law. Unfortunately, these rights are not always applied equally and consistently. This is especially the case with minority and immigrant communities, who are often subjected to arbitrary profiling and unlawful surveillance. Profiling occurs when an individual’s race, ethnicity, religion, or national origin is used by law enforcement as a proxy for criminal behavior. Under federal law, profiling violates the Fourth Amendment, which guarantees the right to be safe from unreasonable search and seizure without probable cause, and the Fourteenth Amendment’s “equal protection” clause, which requires all citizens to be treated equally under the law.

However, profiling has been used as a security technique by the U.S. Government for decades. After the September 11th attacks, profiling of Arab Americans and American Muslims emerged in public discourse as a security measure against terrorism. Profiling as a method of maintaining national security has been legitimized through the PATRIOT Act, the FISA Amendments, TSA policies, and the Department of Justice’s 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies. The communities at large and their members individually have both been subjected to heightened scrutiny from law enforcement officials. These practices and policies violate the civil liberties of American citizens guaranteed by the Constitution, and perpetuate the institutionalization of profiling based on race, ethnicity, national origin, and religion. They also misallocate resources to ineffective strategies which may result in a failure to identify genuine threats to our security.

In December 2014, the Department of Justice released long-awaited revisions to its original 2003 Guidance on the use of racial profiling by federal law enforcement officials. The original “Guidance” spelled out considerations that federal law enforcement agencies are both prohibited from using for profiling practices, and circumstances in which they are permitted to use certain considerations. These permissions created loopholes which allowed federal law enforcement agencies to profile individuals and communities based on race and other attributes in the name of national security and border security, codifying the use of profiling. The 2014 revisions were expected to close the loopholes, and while they did expand the considerations law enforcement officers are prohibited from using—-the considerations now include sexual orientation, gender, religion, and national origin—-they failed to fully curtail profiling practices.

The Problem

The 2014 Guidance revisions were a step in the right direction, but the national and border security loopholes, and the inapplicability of the Guidance to state and local law enforcement, remain a concern. The Guidance continues to permit federal law enforcement agencies to gather vast amounts of data on individuals and to map communities based on race, ethnicity or religion. It continues to permit agencies to recruit informants based on race, religion or national origin without any known connection to criminal activity. It does not end the FBI’s permission to spy on Americans and intrude on their houses of worship. Furthermore, the Guidance fails to compel state and local law enforcement to follow federal standards, and the guidelines do not apply to any operation or officers working within 100 miles of any U.S. border. This one stipulation alone permits the arbitrary investigation of nearly two-thirds of the country’s population that lives within 100 miles of the border.

Many of the laws and programs created in the wake of 9/11 concentrate on the Arab American and American Muslim communities, targeting them for widespread surveillance, detention, and, in some cases, deportation. This securitized frame of engagement was amplified during the 2016 election cycle and with the election of Donald Trump as the 45th President of the United States. In an environment
where increased security is a priority to the new Administration, there are more opportunities to exploit the loopholes to continue the problematic and counterproductive programs and policies allowed by the Guidance. It is of the utmost importance these loopholes and exceptions are closed to ensure biased and unfair law enforcement practices, which perpetuate negative and harmful stereotypes, are ended once and for all to prevent the further corrosion of the civil rights and civil liberties of American citizens.

The argument to end profiling programs can also be made on the basis that they are ineffective, unethical, and not worth the loss of trust in American communities. Research shows that as a law enforcement strategy, profiling inhibits officers’ abilities to identify actual problems. Officers who profile based on race and/or other characteristics often fail to notice objectively suspicious behavior, meaning they neglect to address real threats to community safety. When presenting the Guidance in 2003, Attorney General John Ashcroft cited his shared belief with then-President George W. Bush that “racial profiling is wrong.” The 2014 Guidance revisions add to this sentiment: “Attorney General Eric Holder has stated, [biased] practices are ‘simply not good law enforcement.” Despite these acknowledgements, both Attorneys General did not deliver actionable policies which align with their statements. Communities singled out for profiling programs can feel pessimistic and persecuted, and their trust of federal, state, and local law enforcement is significantly eroded.

Helping with the effort to end the ingrained culture of profiling in the United States are Rep. John Conyers (D-MI) and Sen. Cardin (D-MD), who first introduced the End Racial Profiling Act (ERPA) in June 2001, receiving strong bipartisan support. Following the attacks on September 11th, 2001, support for the bill waned, preventing it from passing. Senator Cardin and Representative Conyers have since re-introduced their legislation to address more recent concerns in profiling and discrimination, including increased attention given to religious profiling by President Trump’s Executive Order that institutes a “Muslim Ban” in practice. The updated legislation (S.411), titled the “End Racial and Religious Profiling Act of 2017,” was introduced in February 2017.

Moving Forward

Congress must act on the End Racial and Religious Profiling Act of 2017 (S.411), banning ethnic, religious, national origin, gender identity, sexual orientation, and racial profiling by law enforcement at the federal, state, and local levels, and providing legal recourse for victims of such profiling.

- Pressure the Department of Justice to issue revision of the 2014 “Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity. The 2014 Guidance failed to close the national and border security loopholes, and failed to eliminate provisions that permit discriminatory profiling on the basis of ethnicity, religion, race or national origin. The Guidance also fails to apply to local law enforcement.

- Congress must implement increased oversight, accountability and transparency over the DHS, TSA, and CBP. Officers and agents need to be provided the proper training, support, and oversight needed to ensure that they and the communities they serve are safer.