



**Written Statement of the
American Civil Liberties Union**

**Submitted to the House of Representatives
Committee on the Judiciary
Subcommittee on Crime, Terrorism and Homeland Security**

**Hearing on “21st Century Law Enforcement: How Smart
Policing Targets Criminal Behavior”**

Friday, November 4, 2011

Chairman Smith and members of the Committee,

The American Civil Liberties Union (ACLU) is a non-partisan advocacy organization with over a half million members, countless additional activists and supporters, and 53 affiliate nationwide dedicated to the principles of equality and justice set forth in the U. S. Constitution and in our laws protecting individual rights. We appreciate the opportunity to submit testimony regarding the pervasive problem of racial profiling. Racial profiling occurs when enforcement authorities target people with humiliating and often frightening interrogations, searches, and detentions based not on evidence of criminal activity but on an individual's perceived race, ethnicity, nationality or religion. Racial profiling violates the U.S. Constitution by betraying the fundamental American promise of equal protection under the law and by infringing on the Fourth Amendment guarantee that all people be free from unreasonable searches and seizures.

Before there was even a name for it, racial profiling has been entrenched within our country's law enforcement practices often at the sacrifice of our civil liberties. Highly decorated U.S. Army Sgt. Rossano Gerald, a black man of Panamanian descent, found that he could not drive more than 30 minutes across Oklahoma without being stopped by state troopers. During one of the stops, the police terrorized Gerald's 12-year-old son with a police dog, separated the father and son, sat them in chokingly hot cars, and turned off their video cameras so that their misconduct could not be uncovered.¹ Sgt. Gerald was an infant when civil rights leader Martin Luther King gave his "I Have a Dream" speech. Despite the progress we have made since then, Sgt. Gerald is just one of thousands of victims of racial profiling and discrimination in America.

For many years, the ACLU has led the fight against racial profiling. In a groundbreaking 1999 report², we highlighted some of the most harrowing cases of racial profiling and offered solutions to address this issue. We have worked with Congress to build support for legislative remedies, such as the End Racial Profiling Act (ERPA)³ – recently introduced by Senator Benjamin L. Cardin (D-MD) – which prohibits racial profiling by federal law enforcement officers and conditions receipt of certain federal criminal justice funding on states adopting similar prohibitions. We have litigated many cases on behalf of victims of racial profiling. For example, in 2006 the ACLU of Michigan settled a case brought on behalf of 22 teenagers who were pulled over, questioned and searched by Eastpointe police officers based on a 1996 memorandum instructing officers to investigate any black youth riding through Eastpointe, a predominantly white city.

Political leaders of both parties have vowed to put an end to racial profiling. In February 2001, President George W. Bush, said of racial profiling: "*It's wrong, and we will end it in America. In so doing, we will not hinder the work of our nation's brave police officers. They protect us every day – often at great risk. But by stopping the abuses of a few, we will add to the public confidence our police officers earn and deserve.*"⁴ Attorney General Eric Holder has made it

¹ DAVID A. HARRIS, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS (American Civil Liberties Union) (1999) available at <http://www.aclu.org/racial-justice/driving-while-black-racial-profiling-our-nations-highways>.

² Harris, *supra* note.

³ End Racial Profiling Act of 2011, S.1670, 112th Cong. (2011).

⁴ Department of Justice, *Fact Sheet: Racial Profiling* (2003), available at: http://www.justice.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf.

clear that ending the practice of racial profiling is a “priority” for the Obama administration. Such expressions of opposition to the concept of racial profiling have failed to generate results in practice and, instead, we face new and more insidious examples of profiling taking root. We must come together now to end this unlawful blight on our society.

The Three Faces of Racial Profiling

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

While Americans tend to think about racial profiling in strictly traditional terms of police stops based on skin color, the common thread tying such actions to the unwarranted detention of an Arab American for national security investigation or the unjustified arrest of a Latino individual for an immigration check is unmistakable. All of it is plain and simple discrimination. Every form of racial profiling is ineffective, and it always erodes the bond effective law enforcement officials try to build with the communities they protect. Such actions violate the Constitution. Racial profiling – in whatever form – has no place in American life.

1. Reclaim Justice: Racial Profiling in Routine Law Enforcement

a. Racial profiling remains a nationwide problem.

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

- A 2008 report by the ACLU of Arizona found that Native Americans were 3.25 times more likely, and African Americans and Hispanics were each 2.5 times more likely, to be searched during traffic stops than whites. It also found that whites were more likely to be carrying contraband than Native Americans, Middle Easterners, Hispanics and Asians on all major Arizona highways.⁶

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

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

- A 2008 report by the ACLU of Louisiana found that people of color were arrested at higher rates than their representation in the population in every town, city and parish examined.⁷
- A 2008 report by Yale Law School researchers (commissioned by the ACLU of Southern California) found that black and Hispanic residents were stopped, frisked, searched and arrested by Los Angeles Police Department officers far more frequently than white residents, and that these disparities were not justified by local crime rates or by any other legitimate policing rationale evident from LAPD's extensive data.⁸
- A 2009 report by the ACLU and the Rights Working Group documented racial and ethnic profiling in 22 states and under a variety of federal programs.⁹

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

In 2002, former Attorney General John Ashcroft said, "*this administration...has been opposed to racial profiling and has done more to indicate its opposition than ever in history. The President said it's wrong and we'll end it in America, and I subscribe to that. Using race...as a proxy for potential criminal behavior is unconstitutional, and it undermines law enforcement by undermining the confidence that people can have in law enforcement.*"¹⁰

Racial profiling in routine law enforcement is fueled by the assumption that minorities commit more of the types of crimes that profiling is used to detect, such as drug crimes. However, reports detailing the results of traffic stops and searches for contraband show that people of color, including African Americans and Latinos, are no more likely, and often less likely, to have illegal drugs and other contraband than whites. Contrary to popular perception, black people use illegal drugs in roughly the same proportion as people of other races and ethnicities.¹¹ Black people are no more likely to speed, drive recklessly, or forget to replace burnt-out headlights than drivers of other ethnicities. Notwithstanding such fact, black people are more likely to be pulled over, and much more likely to be searched.

⁷ ACLU of Louisiana, *Unequal Under the Law: Racial Profiling in Louisiana* 5 (2008), available at www.laaclu.org/PDF_documents/unequal_under_law_web.pdf.

⁸ ACLU of Southern California, *Racial Profiling & The LAPD: A Study of Racially Disparate Outcomes in the Los Angeles Police Department I* (2008), available at <http://www.aclu-sc.org/documents/view/47>.

⁹ ACLU and Rights Working Group, *The Persistence Of Racial And Ethnic Profiling In The United States: A Follow-Up Report To The U.N. Committee On The Elimination Of Racial Discrimination* (2009), available at http://www.aclu.org/pdfs/humanrights/cerd_finalreport.pdf.

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

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

- An analysis by the New York Civil Liberties Union revealed that 3 million innocent New Yorkers were subjected to police stops and street interrogations from 2004 through 2010, and blacks and Latinos were overwhelmingly targeted. 85% of the individuals frisked by the NYPD were black, and only 8% were white. Police officers were more likely to use physical force in cases involving blacks and Latinos than whites. Whites who were frisked were more likely to possess contraband.¹²
- A 2001 Department of Justice report found that, although blacks and Latinos were *more* likely to be stopped and searched by police, they were *less* likely to be in possession of contraband. On average, searches and seizures of white drivers yielded evidence 17 percent of the time, compared to only 8 percent of the time for black drivers and only 10 percent of the time for Latino drivers.¹³
- A 2000 GAO report on the activities of the U.S. Customs Service found that, among U.S. citizens, black women were nine times more likely than white women to be x-rayed after being frisked or patted down. Nevertheless, black women were less than half as likely as white women to be found carrying contraband.¹⁴

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

c. Racial profiling is not a victimless crime.

- Albert Florence, an African-American who works as a financial manager for a high-end car dealership in New Jersey, says he wouldn't wish his encounter with racial profiling on his "worst enemy."

In 2005, Florence was stopped by a New Jersey state trooper on a warrant for an unpaid fine. Florence had already paid the fine and carried documentation to prove it in the glove compartment of his car. On the night of March 3, 2005 however, that didn't help him. Despite showing a police officer the original copy of a document proving that he

¹² Center on Race, Crime and Justice, John Jay College of CUNY, *Stop, Question and Frisk Policing Practices in New York City: A Primer* (2010), available at http://www.jjay.cuny.edu/web_images/PRIMER_electronic_version.pdf.

¹³ Patrick A. Langan, Lawrence A. Greenfeld, Steven K. Smith, Matthew R. Durose, and David J. Levin. *Contacts between Police and the Public: Findings from the 1999 National Survey*, Bureau of Justice Statistics February 2001, NCJ 184957.

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

had completed payment on the outstanding fine, Florence was arrested in front of his wife and 4-year-old son and held for a week in two different New Jersey jails without a hearing.¹⁵ While at the jails, guards subjected Florence to a humiliating strip search, even going so far as to ask him to bend over and cough to prove that he was not carrying contraband inside of his body.¹⁶

Statements from other similarly situated victims of racial profiling are also illuminating:

- In 2010, ABC News produced a piece entitled, “Shopping While Black” to illustrate the problem of racial profiling in stores. The network actually went so far as to plant actors to pretend to shop in high-end New York boutiques, while cameras filmed the actions of sales people and security officers as African-American teens shopped. What they found is that the teenagers were routinely harassed and made objects of suspicion, regardless of their conduct. Below is a quote from a real shopper, also black, who described her experience:

“I went to a store that I had gone to quite a bit in the past. I’m walking around and there’s a salesperson next to me and as I move around the store, I notice that she is always next to me,” said Denise, a victim of racial profiling.¹⁷

- An ACLU report from 2009 highlighted the story of Yawu Miller, a black reporter from the Bay State Banner. Miller decided to test just how quickly he would be pulled over while driving through Brookline, MA, a predominantly white and wealthy neighborhood in Boston. Within minutes, not one, but *three* police cruisers appeared behind him, lights flashing. “Are you lost?” one officer asked. When Miller replied no, another officer quickly followed up, saying, “You’re from Roxbury. Any reason why you’re driving around in circles?”¹⁸
- Just this year, Brooklyn Councilman Jumaane Williams was handcuffed and arrested at a city parade in New York after a dispute over whether he should be admitted to a blocked off area on the street. While this has been chalked up by some as a misunderstanding, it still highlights the level of mistrust and tension in some communities over issues of race when it comes to police detainment. Williams suggests that his arrest was representative of a larger problem of the NYPD targeting “young, black, with locks and earrings.”¹⁹

¹⁵ Ifill, Sherrilyn. *Are Strip Searches Constitutional*. THE ROOT. October 11, 2011, http://www.theroot.com/views/are-strip-searches-unconstitutional?page=0,0&wpisrc=root_lightbox (last visited October 27, 2011).

¹⁶ Sherman, Mark. *Supreme Court Looks at Routine Strip Searches in Jail*. The Huffington Post. November 8th, 2011. Available at: http://www.huffingtonpost.com/2011/10/12/supreme-court-routine-strip-searches_n_1006960.html

¹⁷ Smawley, Michelle and Mary Healy, *What Would You Do? Shopping While Black*, ABC NEWS, May 5, 2010, <http://abcnews.go.com/WhatWouldYouDo/shopping-black-racial-profiling-store/story?id=10416960> (last visited October 27, 2011).

¹⁸ Harris, *supra* note 1.

¹⁹ Fernanda Santos and Michael Wilson, *Police Detain Brooklyn Councilman at West Indian Parade*, N.Y. TIMES, Sep. 6, 2011, at A20.

As these stories suggest, racial profiling is an all too common occurrence, affecting the lives of responsible, productive citizens as they dine, drive, or shop. Not only is this not a victimless crime, but the victims are all around us. As these stories, these interactions hurt and humiliate individuals while doing irreparable damage to relationships between law enforcement and the community.

d. Racial profiling violates human rights standards.

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

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

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

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

2. Reclaim Due Process: Racial Profiling in Immigration and Border Enforcement

Immigration and border enforcement practices continue to promote racial profiling of those who look or sound “foreign.” The ACLU and its Tennessee affiliate recently filed a lawsuit challenging Immigration and Customs Enforcement’s (“ICE’s”) conduct of a raid in Nashville. In the raid, authorities detained and interrogated, among others, a U. S. citizen child simply because of the color of his skin.²² Racial profiling reform must include scrutiny of the

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

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

²² Lindsay Kee, ACLU of Tennessee, “We Don’t Need a Warrant, We’re ICE” (Oct. 21, 2011), available at <http://www.aclu.org/blog/immigrants-rights/we-dont-need-warrant-were-ice>

Department of Homeland Security (“DHS”) ICE programs Secure Communities and 287(g), as well as DHS Customs and Border Protection (“CBP”) enforcement activities at international borders and in the U.S. interior. A ban on racial profiling must also address the growing number of state laws that encourage profiling of people perceived to be “foreign”, including in Alabama where that state’s racial profiling law, HB 56, went into pernicious effect in late September 2011.

a. Secure Communities

The centerpiece of the Obama administration’s immigration enforcement campaign is the ICE Secure Communities program. Under this program, any time an individual is arrested and booked into a local jail for any reason, his or her fingerprints are electronically run through ICE’s database. The fingerprints allow ICE to identify people in state or local custody and to initiate deportation proceedings against them. After a similar ICE jail screening program (the Criminal Alien Program or CAP) was initiated in Irving, Texas, the Warren Institute at the University of California, Berkeley, found strong evidence that police engaged in racial profiling. The report concluded that there was a “marked rise in low-level arrests of Hispanics.”²³

First conceived in 2008, Secure Communities has been aggressively deployed by ICE over the last three years to 1,595 jurisdictions, despite vehement objections by three governors (of Illinois, New York, and Massachusetts) and many county commissioners and local leaders across the country. DHS’s rollout of Secure Communities has been fraught with alleged misrepresentations to Congress and to state and local officials, which have led to a pending DHS Office of Inspector General (OIG) review of the program. The Government Accountability Office (GAO) is also preparing a report on Secure Communities. Massachusetts Governor Deval Patrick explained his opposition to Secure Communities: while “[n]either the greater risk of ethnic profiling nor the overbreadth in impact will concern anyone who sees the immigration debate in abstract terms...[for] someone who has been exposed to racial profiling or has comforted the citizen child of an undocumented mother coping with the fear of family separation, it is hard to be quite so detached.”

Civil rights groups across the country have criticized Secure Communities for encouraging pretextual arrests and racial profiling of immigrants. Under Secure Communities, ICE receives notification of a person’s whereabouts prior to the conviction, or even criminal charging, of that person by the state or locality. Secure Communities, therefore, creates an incentive for state and local police to target immigrants for arrest for minor offenses including driving with a broken tail light, driving with an expired tag, and other minor offenses. Police understand that even if the arrest is baseless or if the person is later cleared of wrongdoing, Secure Communities will bring that person to ICE’s immediate attention for potential deportation even if officials elect not to charge or prosecute.

Civil rights groups’ concerns about Secure Communities have been borne out by ICE statistics. Despite DHS Secretary Napolitano’s October 5, 2011 speech asserting that Secure Communities is “track[ing] down criminals and gang members on our streets,” ICE’s own data is to the

²³ Trevor Gardner II and Aarti Kohli, The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity, “The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program,” September 2009, 1, 5, 8, *available at* http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf

contrary. It shows that the vast majority of those deported under the program are not dangerous violent felons. Nationwide, almost 59 percent of all people deported under Secure Communities had either no criminal convictions or only misdemeanor convictions. In many jurisdictions the rate of deportation of non-criminals or misdemeanants far exceeds the national 59 percent average. By processing non-criminals, misdemeanants, and persons arrested but not convicted of criminal charges, Secure Communities sends a clear message to local police that ICE will turn a blind eye to how arrestees came to be fingerprinted.

DHS has deployed Secure Communities in jurisdictions around the country where local law enforcement agencies have been or are being investigated by the Department of Justice (“DOJ”) Civil Rights Division (“CRT”) for discriminatory policing targeting Latinos or other immigrants. For example, DHS continues to operate Secure Communities in the New Orleans area even though the DOJ CRT earlier this year announced, following a comprehensive investigation, that the New Orleans Police Department (“NOPD”) has engaged in patterns of misconduct that violate the Constitution and federal statutes. The DOJ report documented multiple instances of Latinos being stopped by NOPD officers for unknown reasons and then questioned about immigration status. Members of the New Orleans Latino community told DOJ that Latino drivers are pulled over at a higher rate than other drivers for minor traffic violations because officers assume from physical appearance that they are undocumented and therefore driving without a valid license.²⁴ The DOJ report cites several specific incidents when Latino workers called to request police assistance after being victimized by crime, but were then questioned by NOPD officers about their immigration status and offered no support in pursuing a criminal case.

Yet DHS has continued to operate Secure Communities in the New Orleans, blithely ignoring DOJ findings of biased policing. In this context, it is unsurprising that in Orleans Parish Secure Communities’ deportation consequences have fallen on a group composed of 61% non-criminals and 18% misdemeanants.²⁵ This combined rate of 80% far exceeds the national average and makes New Orleans one of the worst-performing jurisdictions in the country when measured against Secure Communities’ Congressionally-mandated focus on the most dangerous and violent convicted criminals. DHS has done nothing remedial regarding Secure Communities in New Orleans in the wake of DOJ’s report.

Similarly, in early 2011 DHS chose to activate Secure Communities in Suffolk County, New York, even though in 2009 DOJ initiated an investigation of the Suffolk County Police Department (“SCPD”) to address community concerns about SCPD’s policing practices with the Latino community. Many Latino crime victims in Suffolk County described how SCPD demands to know their immigration status rather than address the crimes they report. In September 2011 DOJ sent a formal letter to SCPD, finding that the SCPD policy governing the collection and use of information regarding the immigration status of witnesses, victims, and suspects is subject to abuse by officers. DOJ also recommended that SCPD revise the use of

²⁴ United States Department of Justice, “Investigation of the New Orleans Police Department,” Mar. 16, 2011, 63, available at http://www.justice.gov/crt/about/spl/nopd_report.pdf

²⁵ U.S. Immigration and Customs Enforcement, Secure Communities: IDENT/IAFIS Interoperability Monthly Statistics through April 30, 2011, available at http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf

roadblocks in Latino communities and prohibit identity checks and requests for citizenship documentation.²⁶

New Orleans and Suffolk are just two of the many jurisdictions with records of discriminatory policing where DHS has persisted in operating Secure Communities. Other jurisdictions include Maricopa County, Arizona (sued by DOJ); Alamance County, North Carolina (under DOJ investigation); Puerto Rico (extensive DOJ investigation followed by findings released in September 2011); and Alabama (sued by DOJ for passing HB 56 which, inter alia, mandates verification of immigration status by Alabama law enforcement).

Incentives for racial profiling of perceived immigrants come in many forms:

- A former Sheriff's deputy in McHenry County, Illinois, a Secure Communities jurisdiction, recounted to the *Chicago Tribune* that, "In 2006, the department began posting monthly lists praising deputies with high ticket and arrest totals...prompting younger deputies to compete. Seipler said he was told in 2007 by one deputy that a place to make easy traffic arrests was a predominantly Hispanic apartment complex where, presumably, some residents were illegal immigrants who couldn't get driver's licenses...That didn't seem to square with the minority population of McHenry County, where the state says 7 percent of drivers are Hispanic...In those officers' zeal to snag unlicensed drivers, Seipler said, he feared they were violating the rights of licensed, law-abiding Hispanic citizens."²⁷
- In West Virginia, Secure Communities was activated in February 2009. Two months later, early on a Sunday morning, eleven people in three vehicles left Lobos, a popular Latin dance club in Inwood, a farming region. All departed the club with designated drivers and are of Hispanic heritage. One is the young mother of two U.S. citizen children (ages 5 months and 2 years). The vehicles, traveling separately, were stopped by the West Virginia State Police (WVSP) a mile from Lobos, purportedly for the following infractions: failure to stop at stop sign, crossing the centerline, and "side registration light" out. No drivers were issued traffic citations, but all eleven people were held on ICE detainers issued immediately and remotely by the Pittsburgh Field Office. The children were left for a month without their parents, who could not even contact them for three days. Those arrested were transferred to detention in York, PA, where deportation proceedings continue for six of them.

These arrests took place in a context where WVSP's Martinsburg detachment, which made the stops, has been documented to be twice as likely to stop Hispanic drivers as Caucasians.²⁸ One arresting officer played Mexican music in his police car at the time.

²⁶ See Suffolk County Police Department Technical Assistance Letter (Sept. 13, 2011), available at http://www.justice.gov/crt/about/spl/documents/suffolkPD_TA_9-13-11.pdf

²⁷ Joe Mahr and Robert McCoppin, "Study suggests racial mislabeling skews McHenry County sheriff data Tribune analysis suggests sheriff's deputies underreported Hispanics in traffic stops." *Chicago Tribune* (Mar. 26, 2011).

²⁸ See West Virginia Division of Justice and Community Services, WV Traffic Stop Study: 2009 Final Report, "Search Disparity Indices and Ratios for State Police Detachments," available at http://www.djcs.wv.gov/SAC/Documents/WVSAC_Traffic_statestopratios09.pdf

When the ACLU affiliates of West Virginia and Pennsylvania visited the Lobos arrest site six months later, one of the attorneys discovered that there was no stop sign where a state trooper said the infraction took place. The trooper then changed his statement in the deportation proceedings from saying that a stop sign was ignored to saying that there was a failure to stop at an intersection. Due to the WVSP's aggressive activity outside the Latin dance club, it has shut down.

After more than a year of DHS denials that Secure Communities was at all susceptible to racial profiling, ICE Director John Morton testified to Congress in March 2011 that "I totally recognize the concern on racial profiling. We are instituting a whole series of analytical steps working with the Civil Rights Division [of the Department of Justice], the OCRCL at DHS, inviting them to literally be part of the analysis with us so that we can root out and identify any jurisdictions that are misusing Secure Communities."²⁹ Three months later, ICE announced that "[f]our times a year, beginning in June 2011, CRCL and ICE will examine Secure Communities data to identify law enforcement agencies that might be engaged in improper police practices."³⁰

No such data review has yet taken place, leaving it to nongovernmental analysts to find and disclose the troubling figure that "Latinos comprise 93% of individuals arrested through Secure Communities though they only comprise 77% of the undocumented population in the United States."³¹ Even if DHS data review does occur in every Secure Communities jurisdiction (1,595 and counting), OCRCL has no authority to investigate LEAs' racial profiling. In addition, despite Director Morton's mention of DOJ's Civil Rights Division, there has been no involvement by the Justice Department in Secure Communities oversight, a surprising gap given the FBI's central role in transmitting Secure Communities fingerprints to DHS. Moreover, the new training developed by OCRCL for state and local LEAs is optional; thereby making it highly unlikely those local law enforcement agencies with histories of racial profiling will ever participate. ICE's promised oversight is illusory four months after its announcement, while Secure Communities' scale and structure make it impossible to place confidence in OCRCL's ability to detect, much less prevent, the program's abuses.

b. 287(g)

287(g) refers to ICE's delegation of federal immigration authority to state and local LEAs under section 287(g) of the Immigration and Nationality Act. There are two types of delegation: task forces, with roaming arrest authority, and jail-based agreements allowing state and local officers to act as immigration agents. In its report on *Immigration in the United States: Detention and Due Process*, released in March 2011, the Inter-American Commission on Human Rights emphasized that "[a]s in the case of the CAP and Secure Communities Programs, the 287(g) agreements open up the possibility of racial profiling...ICE has failed to develop an oversight

²⁹ John Morton, Testimony to the House Appropriations Committee's Subcommittee on Homeland Security (Mar. 13, 2011).

³⁰ OCRCL, "Overview of CRCL/ICE Quarterly Statistical Monitoring of Secure Communities," available at <http://www.ice.gov/doclib/secure-communities/pdf/statisticalmonitoring.pdf>

³¹ Aarti Kohli, Peter L. Markowitz, and Lisa Chavez, *Secure Communities by the Numbers: An analysis of demographics and due process*. (The Chief Justice Earl Warren Institute on Law and Social Policy, University of California, Berkeley Law School, Oct. 2011), available at http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf

and accountability system to ensure that these local partners do not enforce immigration law in a discriminatory manner by resorting to racial profiling and that their practices do not use the supposed investigation of crimes as a pretext to prosecute and detain undocumented migrants.”³² Notably, 87% of jurisdictions with 287(g) agreements had a Latino population growth rate higher than the national average between 2000 and 2006.³³

Many domestic reports have also concluded that 287(g) is a failed program. In January 2009 the GAO reported that 287(g) lacked key internal controls and performance objectives.³⁴ The DHS OIG undertook a year-long audit of the program, which culminated in a lengthy and critical March 2010 report with 33 recommendations.³⁵ A September 2010 update by the OIG added 16 new recommendations, stressing that ICE has failed to remedy fundamental problems of prioritization and supervision: 287(g)’s objective of targeting serious criminal offenders is simply unmet. For example, with respect to training, the OIG noted that ICE’s “changes have not impacted those areas of the curriculum that we identified in our prior report as needing improvements.”³⁶ These areas include civil rights laws, complaint procedures, and education about DOJ’s racial profiling guidance. In September 2011, the OIG reported that only half, or 17, of its 33 initial recommendations have been satisfactorily resolved.³⁷

ICE continues to partner with “bad actor” state and local LEAs, creating a culture of impunity in the 287(g) program, as in Secure Communities. An analysis of 287(g) data in Tennessee from 2010 shows that the top five charges immigrants faced as a gateway to deportation continued to be traffic or minor crimes.³⁸ In the first nine months of FY 2010, half of the immigrants encountered by 287(g) officers were persons arrested for misdemeanors, primarily accused traffic offenders, for a total of 20,000 non-priority immigrants.³⁹ Earlier investigations by the ACLU of Georgia in Cobb⁴⁰ and Gwinnett⁴¹ counties, and by the ACLU of North Carolina⁴² reinforce the pretextual and race-based encounters under 287(g).

³² See Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*. (Dec. 30, 2010), 66, 144, available at

<http://cidh.org/pdf%20files/ReportOnImmigrationInTheUnited%20States-DetentionAndDueProcess.pdf>

³³ See Justice Strategies, *Local Democracy on ICE: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement*. (Feb. 2009), 16, available at

<http://www.justicestrategies.org/sites/default/files/publications/JS-Democracy-On-Ice-print.pdf>

³⁴ Government Accountability Office, *Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws*. (Jan. 2009), available at

<http://www.gao.gov/new.items/d09109.pdf>

³⁵ DHS, Office of Inspector General, *The Performance of 287(g) Agreements*. (Mar. 2010), available at

http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-63_Mar10.pdf

³⁶ DHS, Office of Inspector General, *The Performance of 287(g) Agreements: Report Update*. (Sept. 2010), 27, available at http://www.dhs.gov/xoig/assets/mgmt/rpts/OIG_10-124_Sep10.pdf

³⁷ DHS, Office of Inspector General, *The Performance of 287(g) Agreements: FY 11 Update*. (Sept. 2011), 5, available at http://www.oig.dhs.gov/assets/Mgmt/OIG_11-119_Sep11.pdf

³⁸ Brian Haas, “Fewer deportations put 287(g) immigration program at risk.” *The Tennessean* (Nashville), May 26, 2011.

³⁹ OIG, Sept. 2010 report, *supra*, 24.

⁴⁰ American Civil Liberties Union of Georgia Legal Foundation, *Terror and Isolation in Cobb: How Unchecked Police Power under 287(g) Has Torn Families Apart and Threatened Public Safety*. (Oct. 2009), available at <http://www.acluga.org/racial%20profiling%20Cobb.pdf>

⁴¹ American Civil Liberties Union of Georgia Legal Foundation, *The Persistence of Racial Profiling in Gwinnett*:

In recent years several of these problematic 287(g) jurisdictions – particularly the program run by Maricopa County, Arizona’s Sheriff’s Office (MCSO) – have come under intense scrutiny by the Department of Justice and Congress. In 2009 the House Homeland Security Committee and House Judiciary Committee held oversight hearings of the 287(g) program.⁴³ DOJ in 2009 initiated an investigation of MCSO, focusing on whether sheriff’s deputies engaged in patterns or practices of discriminatory policing and unconstitutional searches and seizures. In 2010 DOJ sued MCSO for failure to turn over records. Notwithstanding the horrendous civil rights record of MCSO, ICE has continued to grant it 287(g) jail enforcement authority. As with Secure Communities, this heedless delegation of immigration enforcement authority without regard for MCSO’s history shows a clear disconnect between DOJ and DHS, as DHS continues its active partnership with LEAs being investigated and/or sued by DOJ for civil rights violations.

c. State Racial Profiling Laws

There is no safety net of state laws on which to rely against racial profiling. Most states do not have laws prohibiting racial profiling by law enforcement. 29 states mention racial profiling in statutes, but only 19 require law enforcement to collect data on traffic stops, and there is no standardization of this data. Further, five of the states that prohibit racial profiling only ban the use of race as the *sole* determinate for initiating a stop.⁴⁴

Beginning with Arizona’s passage of state law SB 1070 in April 2010, some states are actively encouraging their law enforcement officials to engage in racial profiling. Indeed, the originally enacted version of SB 1070 explicitly permitted racial profiling as a component of law enforcement stops, before the law’s backers hurriedly amended it. SB 1070 and its imitators in Utah, Indiana, Georgia, Alabama, and South Carolina have created cultures in which state and local police feel empowered to stop people based on their race or ethnicity for purposes of inquiring into immigration status. Even while most of these laws are under court-ordered injunctions against their enforcement, their pernicious effects are manifest. These states have taken advantage of ICE’s tolerance of impunity by giving their police officers the green light to ramp up immigration enforcement.

In Alabama, a federal judge and the Eleventh Circuit Court of Appeals have allowed provisions of state law HB 56 to go into effect that encourage racial profiling through “show me your papers” requirements turning Alabama police officers into immigration agents. Racial profiling was taking place even before this enactment of discrimination. Albertville, Alabama, a centre of

Time for Accountability, Transparency, and an End to 287(g). (Mar. 2010), available at <http://www.acluga.org/gwinnetracialreportfinal.pdf>

⁴² American Civil Liberties Union of North Carolina Legal Foundation and Immigration & Human Rights Policy Clinic, University of North Carolina at Chapel Hill, *The Policies and Politics of Local Immigration Enforcement Laws: 287(g) Program in North Carolina*. (Feb. 2009), available at http://www.acluofnorthcarolina.org/files/287gpolicyreview_0.pdf

⁴³ See ACLU Testimony Submitted for the House Homeland Security Committee hearing titled “Examining 287(g): The Role of State and Local Enforcement in Immigration Law.” (Mar. 4, 2009), available at http://www.aclu.org/files/images/asset_upload_file717_39062.pdf

⁴⁴ Rights Working Group, *FACES OF RACIAL PROFILING: A Report from Communities Across America* (2010), 10, available at <http://rightsworkinggroup.org/sites/default/files/ReportText.pdf>

the state's Latino community, became the site of a police checkpoint described by longtime local grocery store owner Jose Contreras as "a nuisance to our community for the last two years, but since HB 56, I've heard of many more incidents of police detaining and sometimes deporting immigrants, about three to four accounts a week."⁴⁵

The impact of HB 56 has been to create a civil rights crisis in Alabama, leading many Latinos to fear leaving their homes. According to Birmingham resident Isobel Gomez, "[i]f [police] see me they will think I'm suspicious and then they will detain me indefinitely. They will see the colour of my skin."⁴⁶ Race-based apprehensions under HB 56 have marred the law from its first days, when Etowah County's Sheriff touted the apprehension of a Yemeni man as the first state immigration arrest. In fact, after a weekend of detention, the man was determined to be in the United States lawfully and released.⁴⁷ All people of color are vulnerable to "show me your papers" checks that disproportionately fall on them: the first 11 people arrested by the Tuscaloosa police for failing to have drivers' licenses after the new immigration status check requirements went into effect were "two black females, four black males, one white female and four Hispanic males."⁴⁸

The Arizona experience is also rife with racial profiling. In a case recorded by the ACLU of Arizona, Saul Razcon, a Latino man driving on a Tucson-area freeway was stopped by the Arizona Highway Patrol in August 2010, allegedly for a broken window. He was asked for his driver's license and the officer also requested his passenger's license, before questioning whether the three young girls in the back – aged 11, 13 and 17 – had "papers." One of the girls admitted that she didn't. ICE officers arrived and a parent raced to prevent his documented stepdaughter from being taken away. He recalled: "Saul was stopped for next to nothing. The officer told me that he didn't know if they were 'terrorists or criminals.' This greatly offended me and made me think that this man was racist and shouldn't be working as a police officer."⁴⁹ The other two girls, sisters, were deported to Mexico.

Another example is Jim Shee, a plaintiff in the case brought by the ACLU and allied organizations to enjoin SB 1070. He is an elderly resident of Litchfield Park, Arizona, a U.S. citizen of Spanish and Chinese descent has lived in Arizona his entire life. In April 2010, Shee was stopped twice by Arizona police and asked to produce identification documents, with no resulting citations. In the lawsuit, Shee expressed his fear that SB 1070 would lead to his detention because he would be unable to prove that he is a U.S. citizen without carrying his passport around.

d. Border Enforcement

A massive surplus of Customs and Border Protection (CBP) agents has led to widespread racial profiling at the border and far beyond. Apprehensions by the U.S. Border Patrol, a component of

⁴⁵ Andrew Kennis, "Latinos Continue To Be (Illegally) Told, 'Show Me Your Papers!'" *AlterNet* (Sept. 27, 2011).

⁴⁶ Ed Pilkington, "The grim reality of life under Alabama's brutal immigration law." *The Guardian* (Oct. 14., 2011).

⁴⁷ "First alleged violator of Ala. immigration law is legal." *Associated Press* (Oct. 4, 2011).

⁴⁸ Ben Flanagan, "Tuscaloosa police: Not all charged for 'license not on person' since immigration law passed are foreign born." *Al.com* (Oct. 12, 2011).

⁴⁹ Kennis, *supra*.

CBP, have declined more than 72% in recent years as the flow of undocumented immigration into the U.S. decreases.⁵⁰ In fact, in 2010 border apprehensions were at their lowest level since 1972.⁵¹ Yet, each year more and more taxpayer dollars are being poured into increasing the number of Border Patrol agents, which has doubled from 10,000 agents in 2004 to 21,370 today (a total which excludes more than 20,000 CBP officers at ports of entry, not considered part of the Border Patrol).⁵² During this time, CBP's budget has seen a \$5.85 billion, 98 percent budget increase.⁵³

This major overstaffing has left the ever-growing number of agents stationed at the border with nothing to do. Simply put, agents are bored.⁵⁴ For example, in the Yuma, Arizona sector, where apprehensions are down 95%, the number of agents has tripled since 2005.⁵⁵

As a result of the lack of work at the borders and excessive resources, CBP agents have shifted from monitoring cross-border activity to conducting interior enforcement, leading to the use of racial profiling in areas far beyond what most of us consider the border.⁵⁶ Agents claim that they have the authority to question people about their immigration status anywhere within 100 miles of an international boundary.⁵⁷ This is no small jurisdiction—a full *two-thirds* of the United States population lives within 100 miles of land and coastal borders, in areas that CBP claims relevant constitutional protections are inapplicable,⁵⁸ so all persons there can be subjected to questioning and detention that violate the Fourth Amendment in any other circumstance.

In New York, this practice takes the form of roving raids on domestic trains and buses traveling *within* the U.S.⁵⁹ Armed Border Patrol agents now frequently board Amtrak trains and Greyhound buses at stops in western New York, waking up slumbering passengers to demand that they show their papers, and detaining those carrying no proof of legal status.⁶⁰ Those being

⁵⁰ DHS Fact Sheet, "Apprehensions by the U.S. Border Patrol: 2005–2010." (July 2011), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/ois-apprehensions-fs-2005-2010.pdf>; see also Jeffrey Passel and D'Vera Cohn, "U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade." (Pew Hispanic Center, Sept. 1, 2010), available at <http://pewhispanic.org/reports/report.php?ReportID=126>

⁵¹ *Id.*

⁵² Josiah McC. Heyman, "Guns, Drugs, and Money: Tackling the Real Threats to Border Security." (Immigration Policy Center, Sept. 12, 2011), available at <http://www.immigrationpolicy.org/perspectives/guns-drugs-and-money-tackling-real-threats-border-security>

⁵³ Based on administration's budget request for FY 2012, \$11.85 billion. Michele Mittelstadt et al., "Through the Prism of National Security: Major Immigration Policy and Program Changes in the Decade since 9/11." (Migration Policy Institute, Aug. 2011), 3, available at http://www.migrationpolicy.org/pubs/FS23_Post-9-11_policy.pdf

⁵⁴ Patrick Oppmann, "Border agent says there's nothing to do, says money is being wasted." CNN.com (Sept. 6, 2011), available at <http://www.cnn.com/2011/US/09/05/border.patrol.wasteful.spending/index.html>

⁵⁵ Richard Marosi, "Plunge in border crossings leaves agents fighting boredom." *Los Angeles Times* (Apr. 21, 2011), available at <http://articles.latimes.com/2011/apr/21/local/la-me-border-boredom-20110421/2>.

⁵⁶ See, e.g., Nina Shapiro, "Bored at the Border." *Seattle Weekly* (Aug. 3, 2011), available at <http://www.seattleweekly.com/2011-08-03/news/bored-at-the-border/>

⁵⁷ <http://www.nyclu.org/content/letter-border-patrol-sweeps-new-york-times>

⁵⁸ <http://www.aclu.org/national-security-technology-and-liberty/are-you-living-constitution-free-zone>; see also, <http://www.aclu.org/constitution-free-zone-map>

⁵⁹ See, e.g., Nina Bernstein, "Immigrants on Trains Near Northern Border Detained." *New York Times* (Aug. 29, 2010), available at: http://www.nytimes.com/2010/08/30/nyregion/30border.html?_r=1&hpw; Adam Klasfeld, "Border Police Must Release Arrest Statistics From New York Area." *Courthouse News* (June 21, 2011), available at: <http://www.courthousenews.com/2011/06/21/37563.htm>

⁶⁰ Bernstein, *supra*.

questioned and detained are simply traveling from city to city within the United States, and have committed no crime. One such victim of this practice was “a Taiwan-born Ph.D. candidate who had excelled in New York City public schools since age 11. Two days after he gave a paper on Chaucer at a conference in Chicago last year, he was taken from his train seat and strip-searched at a detention center in Batavia, N.Y., facing deportation for an expired visa.”⁶¹

A pending lawsuit alleges that Border Patrol agents use racial profiling in these encounters, conducting interior checks of trains and buses with no warrants and no reasonable suspicion of illegal entry.⁶² Rather, according to the court filing, agents use race to determine which passengers to question.⁶³ It asserts that these raids have had a chilling effect on the ability of people of color, including authorized visitors, students, and immigrants, to travel throughout the state.⁶⁴ Data obtained through litigation reveals that three-quarters of those arrested since 2006 had been in the country more than a year, seriously undermining CBP’s claims that such raids are aimed at border traffic.⁶⁵

The problem exists beyond just New York. Across the northern border, between 2000 and 2010, the number of agents assigned to patrol rose from 300 to 2,263—a 700 percent increase.⁶⁶ In the state of Washington, Border Patrol agents with little to do stop individuals based on their appearance and accent, and are often called in by local police to act as interpreters in traffic stops and minor investigations, thereby allowing them to check the immigration status of those involved.⁶⁷ In the town of Forks, which is 60 miles from the nearest ferry crossing into Canada and 200 miles from the nearest land crossing, Latinos in the community report that they have been stopped and asked for papers by CBP agents at gas stations, grocery stores, farmers’ markets, on bicycles, and even while paying bills at City Hall.⁶⁸ The Border Patrol set up checkpoints on the highway outside of Forks, and has done the same on roads in Maine and Vermont, both in locations two or more hours from the Canadian border.⁶⁹

3. Reclaim Privacy Rights: Racial Profiling in National Security Investigations

Racial profiling extends beyond community enforcement and into the world of nationwide supposed security efforts, which the FBI charts. The overbroad use of authority in response to crises both perceived and real is a threat to civil liberties. This is especially true as the FBI abuses its authority by targeting innocent Americans in ways that profile them based on race, ethnicity, religion, national origin and political activities protected by the First Amendment.

⁶¹ *Id.*

⁶² Complaint at 3-4, *Families for Freedom v. U.S. Customs and Border Protection*, (S.D.N.Y. 2010) (No. 10 CV 2705), available at <http://www.courthousenews.com/2011/06/21/Border%20Police%20FOIA%20complaint.pdf>

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Bernstein, *supra*.

⁶⁶ Nina Shapiro, “Nowhere-Near-the-Border Patrol in Forks.” *Seattle Weekly* (July 27, 2011), available at: <http://www.seattleweekly.com/2011-07-27/news/nowhere-near-the-border-patrol-in-forks/>

⁶⁷ *Id.*

⁶⁸ *Id.*; see also “Border Patrol arrest at farmers market stuns bystanders.” *Peninsula Daily News* (Sept. 4, 2011), available at: <http://www.peninsuladailynews.com/article/20110904/NEWS/309049990>

⁶⁹ *Id.*

In December 2008, in the Bush Administration's final month in office, then-Attorney General Michael Mukasey instituted new guidelines that authorized the FBI to conduct investigations called "assessments" without requiring any factual predicate suggesting the target of the investigation is involved in illegal activity or threats to national security. The assessments only require the agent's subjective determination that he or she is acting with an authorized purpose to prevent crime or interdict threats to national security. The Mukasey guidelines allow the FBI to use a number of intrusive investigative techniques during these assessments, including physical surveillance, retrieving data from commercial databases, recruiting and tasking informants to attend meetings under false pretenses, and engaging in "pretext" interviews in which FBI agents misrepresent their identities in order to elicit information.

A 2009 FBI Counterterrorism Division "Baseline Collection Plan" acquired by the ACLU through the Freedom of Information Act reveals the types of information the FBI gathers during assessments, including identifying information (date of birth, social security number, driver's license and passport numbers), telephone and e-mail addresses, current and previous addresses, current employer and job title, recent travel history, criminal history, whether the person lives with other adults, possesses special licenses or permits, or received specialized training, and whether the person has purchased firearms or explosives.⁷⁰ The New York Times reported that the FBI conducted 82,325 assessments on individuals and groups from March 2009 to March 2011, only 3,315 of which developed information sufficient to justify opening preliminary or full investigations. This data is particularly troubling given the low threshold the Attorney General Guidance requires for opening preliminary investigations, and because the FBI retains all data collected during assessment indefinitely, regardless of whether any criminal violation or threat to national security is identified.

Assessments can even be conducted against an individual simply to determine if he or she would be a suitable FBI informant. Nothing in the new AG Guidelines, however, protects innocent Americans from being thoroughly investigated by the FBI for no good reason. The new Guidelines allow groups to be investigated based on their First Amendment-protected activity so long as it is not the sole basis for such investigation, and they likewise do not clearly prohibit using race, religion, or national origin as important factors in initiating assessments. These assessment practices are an explicit example of how the culture of fear has overtaken a culture of responsible democratic governance.

A 2008 internal FBI guide to implementing the new AG Guidelines, called the Domestic Investigations and Operations Guide (DIOG)⁷¹, contains more startling revelations about how the FBI is using race and ethnicity in conducting assessments and investigations. The DIOG says that investigating and intelligence collection activities must not be based "solely on race." This is in apparent contradiction to the Department of Justice's 2003 Guidance on the Use of Race in Federal Law Enforcement, which is binding on the FBI, and which says race cannot be used "to any degree" absent a specific subject description.

⁷⁰ FBI Electronic Communication from Counterterrorism Division to All Field Offices (9/24/2009) (on file with the ACLU).

⁷¹ U.S. DEP'T OF JUSTICE, OFFICE OF INSPECTOR GEN., A REVIEW OF THE FBI'S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS (2010), available at: <http://www.justice.gov/oig/special/s1009r.pdf>.

The ACLU has sought to uncover information described in the DIOG after filing Freedom of Information Act requests in 34 states. The documents reveal evidence of “geo-mapping”, which allows FBI agents to collect and analyze racial and ethnic demographic information to identify ethnic communities and the location of ethnic businesses and facilities, “if these locations will reasonably aid in the analysis of potential threats and vulnerabilities, and, overall, assist domain awareness of the purpose of performing intelligence analysis.”⁷² From the data collected, the FBI is making crass racial stereotypes about which ethnic groups commit which types of crimes. Then, the FBI is collecting racial and ethnic demographic information and mapping it to identify communities where people fitting that profile might live. These communities are facing indiscriminate “assessments” of behavior based on stereotypes.

For instance, a Detroit FBI memorandum entitled “Detroit Domain Management,” notes there are more than 40 groups designated as terrorist organizations by the U.S. State Department, many of which originate in the Middle East and Southeast Asia.⁷³ It states that “because Michigan has a large Middle-Eastern and Muslim population, it is prime territory for attempted radicalization and recruitment by these terrorist groups,” the Detroit FBI seeks to open a “Domain Assessment for the purpose of collecting information and evaluating the threat posed by international terrorist groups conducting recruitment, radicalization, fundraising, or even violent terrorist acts within the state of Michigan.” Collecting information about the entire Middle-Eastern and Muslim community in Michigan, and treating them all as suspect, is an unjust, unconstitutional violation of civil rights and an affront to religious freedom and American values.

Unfortunately, this type of targeting based on broad-brush racial, ethnic, religious and national origin stereotyping appears in many different types of assessments focusing on a broad array of groups.

A 2009 Atlanta FBI “Intelligence Note from Domain Management” purporting to identify potential threats from “Black Separatist” groups documents population increases among “black/African American populations in Georgia” from 2000 to 2007. While significant portions of this document are redacted, it seems to focus improperly on First Amendment activity, such as non-violent protests after a police shootings and appearances in support of a congressional candidate.

A 2009 San Francisco FBI memorandum stated that “San Francisco domain is home to one of the oldest Chinatowns in North America and one of the largest ethnic Chinese populations outside mainland China,” and justified the opening of a “Domain Management – Criminal” assessment because “[w]ithin this community there has been organized crime for generations.”⁷⁴

⁷² Federal Bureau of Investigation Domestic Investigations and Operations Guide, (Dec. 16, 2008), available at: <http://www.muslimadvocates.org/cgi-bin/mt/mt-search.cgi?IncludeBlogs=1&search=investigative>.

⁷³ Memorandum from Detroit Domain Management Federal Bureau of Investigation (July 6, 2009) (on file with ACLU), available at <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011609.pdf>.

⁷⁴ Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to Mara Salvatrucha Threat, Jan. 21, 2009, <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM009170.pdf>; Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to MS-13 Threat, Dec. 15, 2008, <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011388.pdf>; Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to MS-13 Locations, Sept. 22,

The memorandum also references evidence of the existence of “Russian criminal enterprises” in San Francisco to justify a Domain Management assessment of the “sizable Russian population” in the San Francisco region.

Several documents from FBI offices in Alabama, New Jersey, Georgia and California indicate the FBI is conducting Domain Management assessments to examine threats posed by the criminal gang Mara Salvatrucha (MS-13).⁷⁵ While MS-13 represents a criminal threat that law enforcement needs to understand, the FBI uses the fact that MS-13 was originally started by Salvadorian immigrants to justify broad Domain Management assessments targeting of Hispanic communities. A September, 2008 Intelligence Note produced by the Newark, New Jersey FBI office claims “MS-13 is comprised of members from Central American countries,” yet the “Domain Team” collected population data for other individuals from other Spanish-speaking countries, including Mexico, Cuba, Puerto Rico, the Dominican Republic and Colombia. It also identified the five New Jersey counties with the highest Hispanic populations. Whether this data would be useful in finding locating MS-13 members is doubtful, particularly because the Mobile FBI’s Investigative Note points out that while “MS-13 members are typically Salvadorans, Guatemalans, and Honduran nationals or first-generation descendants...MS-13 has been known to admit Mexicans, Dominicans, *and non-Hispanic individuals*” (emphasis added).⁷⁶ Targeting entire communities for investigation based on erroneous racial stereotypes is bad example of law enforcement intelligence. We urge the FBI to focus on criminal suspects and national security threats, not entire ethnic communities.

This Congress should compel the Obama administration to correct the misguided policies currently in effect. The FBI’s offensive and exploitative use of race and ethnicity in the racial mapping program is evidence that the Guidance fails to protect the constitutional rights of racial and ethnic communities in the United States, and must be amended.

Conclusion

Despite it being both ineffective, unconstitutional and in violation of human rights standards, racial profiling remains a deeply troubling part of life in the United States. This need not be the case. Our nation’s highest officials have already condemned racial profiling as unjust and counterproductive. President Barack Obama, in response to the arrest of Harvard Professor Henry Louis Gates, said, *“there’s a long history in this country of African-Americans and Latinos being stopped by law enforcement disproportionately. That’s just a fact...And even when there are honest misunderstandings, the fact that blacks and Hispanics are picked up more frequently and oftentimes for no cause casts suspicion even when there is good cause. And that’s*

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

⁷⁵ Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to MS-13 Locations, Sept. 22, 2008, <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM008040.pdf>.

⁷⁶ Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to Mara Salvatrucha Threat, Jan. 21, 2009, <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM009170.pdf>.

why I think the more that we're working with local law enforcement to improve policing techniques so that we're eliminating potential bias, the safer everybody is going to be.”⁷⁷

With criticism of the flawed and counterproductive practice of racial profiling coming from prominent conservatives and liberals alike, now is the time for congressional action. First, Congress should pass the End Racial Profiling Act, which would ban the use of racial profiling and provide law enforcement officers with the tools they need to develop more effective practices. Second, Congress should defund and end immigration enforcement initiatives, which foster racial profiling of Latinos and other people of color, including the 287(g) and Secure Communities programs. Finally, Congress should urge the administration to strengthen the Department of Justice Guidance Regarding the Use of Race by Federal Law Enforcement Agencies to address profiling by religion and national origin, close loopholes for the border and national security, and make the guidance enforceable. By following these recommendations, Congress can help law enforcement to direct its resources where they are truly necessary, ensure that our communities are safe, and reaffirm the core principles of the Constitution.

⁷⁷ Press Release, The White house Office of the Press Secretary, News Conference By The President (July 22, 2009), *available at* http://www.whitehouse.gov/the_press_office/News-Conference-by-the-President-July-22-2009/.