

STATEMENT OF
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CENTER FOR CONSTITUTIONAL RIGHTS
END RACIAL PROFILING IN AMERICA HEARING
SENATE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND HUMAN RIGHTS
UNITED STATES SENATE
APRIL 17, 2012

Chairman Durbin, Ranking Member Graham and members of the Subcommittee: I am honored to submit this testimony for the record on behalf of the Center for Constitutional Rights in conjunction with today's hearing on racial profiling. The Center for Constitutional Rights (CCR) is a non-profit legal and educational organization committed to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. These rights and protections must extend to everyone in the country regardless of race, religion, national origin, ethnicity, or immigration status. Through our litigation and advocacy efforts against the New York Police Department (NYPD) and abusive immigration enforcement programs such as Secure Communities, along with our stance against law enforcement's unjust surveillance of and entrapment targeting the Muslim, Arab and South Asian communities, CCR has historically been a strong voice for ending racial profiling across the country.

We thank you for holding this critical and timely hearing on racial profiling and the End Racial Profiling Act. The Center for Constitutional Rights is particularly concerned about the many policies and practices at the national, state and local level which encourage or incentivize discriminatory and abusive law enforcement practices such as racial profiling. These practices

are counterproductive, waste public resources and violate the civil and human rights of persons living in the United States.

Racial profiling occurs whenever law enforcement agents use race, religion, ethnicity, or national origin as the sole factor in deciding whom they should investigate, arrest or detain. Singling people out on the basis of their race, ethnicity, religion, national origin or perceived citizenship or immigration status is a serious concern to the Center for Constitutional Rights and its thousands of supporters. Regardless of whether it takes place under the guise of the war on drugs, immigration enforcement, or counterterrorism efforts, racial profiling harms the community and creates distrust between law enforcement and the communities they serve.

RACIAL AND RELIGIOUS PROFILING BY THE NEW YORK POLICE DEPARTMENT

A. Stop-and-Frisk

The New York Police Department (NYPD) has a history of abusive and racially motivated police practices. In 1999, in the aftermath of the Amadou Diallo murder, CCR brought a class action lawsuit which in 2003 led to disbanding the special unit responsible for the most extreme NYPD use-of-force incidents and regular data and reporting on the NYPD's use of stop-and-frisk. Through the data released to CCR and the public, it became clear that the racial disparity in rates of stops and frisks had only become worse since 2003. The NYPD's stop-and-frisk practice has led to hundreds of thousands of suspicion-less and race-based stops of Black and Latino New Yorkers. A quick review of a few figures makes the point more clear. In 2003, the NYPD recorded 160,851 stops. This number rose to 685,724 in 2011. This reflects a more than 300% increase in the stop rate over eight years. In that time period the NYPD engaged in a total of 4.25 million stops. In 2011 alone, 84% of all stops were of Blacks and Latinos while 7%

of stops were “female.” Although the NYPD justifies its policy as preventing crime and taking guns off the streets of New York, weapons were only found in 1% of stops and less than 6% of stops led to arrests. Additionally, in over 50% of the stops in 2011, officers checked the vague “furtive movement” as one of the reasons for the stop. The human cost of racial profiling through the NYPD’s stop-and-frisk practice has also been well documented and reported on extensively.¹ Unfortunately, the practice is now known as a tool to harass people of color. A generation of Black and brown New Yorkers look at police officers as impediments to their daily routine rather than as protectors of their communities.

In 2008, CCR filed a second class action—*Floyd v. City of New York*—challenging the constitutionality of the stop-and-frisk practice.² In October 2011, a federal judge in the Southern District of New York ruled the case should move forward to trial, writing that the case “presents an issue of great public concern.”³ CCR is also active in a New York City-wide coalition engaging in State and local legislative advocacy to curb biased-based policing,⁴ including the racially motivated stop-and-frisk practice.

The data-reporting requirements of the prior settlement, similar to what the End Racial Profiling Act seeks to achieve, were critical to show the racial disparity and true scope of the problem. Now, the New York City Council as well as advocates, legal organizations and community members can make informed choices regarding one of the NYPD’s cornerstone law

¹ Peart Nicholas, “Why is the N.Y.P.D. After Me?”, Opinion, *New York Times*, December 17, 2011, available at: <http://www.nytimes.com/2011/12/18/opinion/sunday/young-black-and-frisked-by-the-nypd.html?pagewanted=all>.

² For more information related to *Floyd v. City of New York*-08-cv-1034, visit CCR’s case page at www.ccrjustice.org/floyd.

³ *Floyd v. City of New York* 08-cv-1034, Opinion and Order, November 23, 2011.

⁴ “Biased policing” or “biased-based policing” refers to discriminatory enforcement of the law based on categories that include race, color, national origin, gender, religion, age, and sexual orientation. Because it incorporates these categories, it is more broadly applicable than the commonly used term “racial profiling,” which may be understood as referring to discriminatory policing based on race alone.

enforcement tactics. CCR is optimistic that ERPA will aid Congress, State and local officials and advocates across the country to discover systemic problems with police practices and take appropriate measures to resolve any potential race or national origin biased-based policing operations.

B. Surveillance of Arab and Muslim Communities

The systematic NYPD surveillance of Muslim, Arab, and South Asian (MASA) communities in the northeast is another conspicuous and unsettling example of discriminatory police practices. Recent revelations by the Associated Press (AP) prove that the NYPD, with the assistance of the Central Intelligence Agency (CIA) has been engaging in an organized and expansive surveillance program targeting MASA communities because of their religious and ethnic identities and countries of origin.⁵ In fact, the NYPD has mapped, infiltrated, and surveilled every aspect of daily life for members of MASA communities, no matter how innocent or mundane. Even fieldtrips have been infiltrated so that Muslim students' speech and religious activities could be monitored and documented.⁶

There can be no doubt that the surveillance program was tethered solely to identity as a Muslim or what were euphemistically called "Ancestries of Interest."⁷ The NYPD's own documents bear this out. The blanket profiling of the MASA community on the basis of religion, national origin and ethnicity is wrong. It renders otherwise constitutionally protected activities –

⁵ For the full list of Associated Press articles on its probe into the NYPD's surveillance program (beginning August 23, 2011), visit <http://www.ap.org/Index/AP-In-The-News/NYPD>

⁶ Hawley, Chris, "NYPD monitored Muslim students all over Northeast," *Associated Press*, February 18, 2012, available at: <http://www.ap.org/Content/AP-In-The-News/2012/NYPD-monitored-Muslim-students-all-over-Northeast>

⁷ New York City Police Department Intelligence Division, "The Demographics Unit" (Microsoft Powerpoint), *Associated Press*, p. 5, available at: <http://wid.ap.org/documents/nypd-demo.pdf> (describing the NYPD Demographic Unit's surveillance methodology, which identified Egyptian, Yemeni, Pakistani, Indian, and several others as "Ancestries of Interest").

speaking freely, congregating, and practicing religion – presumptively criminal and threatening. The concomitant chilling effect threatens to discourage members of MASA communities from freely exercising the rights enshrined in the US Constitution. This is of deep concern to CCR. We are hopeful that ERPA will help expose and eliminate religious, national origin and ethnic-origin based counterterror policing in New York and beyond.

It bears noting that the profiling and targeting of Muslims and Arabs in counter-terrorism policing practices is but a microcosm of a broader problem of religious, national origin and ethnic-based discrimination evident in US counter-terror policies, both domestically and abroad. Muslims have been the accused in most if not all cases of the hundreds of terrorism prosecutions carried out since 9/11. In cases where special conditions have been imposed on the confinement of people accused or convicted of terrorism, whether through Special Administrative Measures or in Communication Management Units, Muslims have again constituted the majority. Outside of US borders, at the US prison at Guantanamo Bay, for example, Muslim foreign citizens make up the entirety of the population held at Guantanamo, which at its peak held nearly 800 men. While the citizens of over 40 countries have been held at Guantanamo, the largest groups came overwhelmingly from certain countries – or particular “ancestries of interest” – including Yemen, Afghanistan, Pakistan, and Saudi Arabia.

From our vantage point, as an organization that has represented and worked with communities victimized by the full spectrum of US counter-terror policies since 9/11, from domestic surveillance and prosecution to military detention and targeted killing, it is undeniable that the brunt of these policies, whether domestic or international, has been felt almost exclusively by Muslims, Arabs, and people of particular national origins. We therefore urge the

Subcommittee to consider discriminatory US counterterrorism practices in their full context and pass ERPA.

RACIAL PROFILING AND IMMIGRATION ENFORCEMENT

Racially discriminatory police policies, like the NYPD's stop-and-frisk practice, have the potential to have an even harsher impact on non-citizens. This is because the Department of Homeland Security's (DHS) Immigration and Customs Enforcement agency (ICE) has taken drastic measures to place local police at the center of immigration enforcement through its ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ICE ACCESS) programs. CCR is currently litigating *National Day Laborer Organizing Network v. ICE*, a multi-agency Freedom of Information Act (FOIA) action to uncover information and data for one of the ICE ACCESS programs known as Secure Communities.⁸

Secure Communities effectively transforms local police officers into federal immigration agents by requiring local police to run the fingerprints of anyone they arrest through DHS's Automated Biometric Identification System (IDENT) database. If there is a "hit" in the database, ICE is notified and can take action to place a detainer on that individual. We have learned through the released FOIA records, Department of Justice investigations and anecdotes from local advocates and lawyers that when there is "no match" within the IDENT database, sometimes a local law enforcement agency will unlawfully hold a perceived non-citizen in its custody despite an order from a criminal court judge to permit release with or without a bond. Other times the local law enforcement agency will notify ICE, or use other ICE ACCESS programs such as the Criminal Alien Program or 287(g), to seek an admission regarding immigration status from a non-citizen.

⁸ For more information about *NDLON v. ICE*, please visit CCR's case page at <http://ccrjustice.org/secure-communities>.

Programs like Secure Communities, especially when combined with well-documented allegations of racial profiling or other biased-based policing, greatly increase the likelihood non-citizens will end up in removal proceedings following unlawful police interactions. CCR is particularly concerned with the ways in which Secure Communities creates an incentive for participating state and local law enforcement agents to engage in racial profiling and pretextual arrests. This is not a hypothetical concern. In addition to litigation like CCR's stop-and frisk challenge, police and sheriff's departments in seventeen jurisdictions are under investigation by the Department of Justice (DOJ) for alleged unlawful police practices.⁹ These DOJ investigations have shed light on the potential for local police to use arrests pursuant to minor offenses, such as traffic infractions, as a pretext for checking a person's immigration status and as a result facilitating the initiation of removal proceedings. For example, the DOJ investigation into the East Haven Police Department (EHPD) in Connecticut discusses the police using

⁹ See e.g., Horwitz, Sari, "Arizona sheriff rejects court monitor; Justice Department threatens to sue," *Washington Post*, April 3, 2012, available at: http://www.washingtonpost.com/politics/arizona-sheriff-rejects-court-monitor-justice-department-threatens-to-sue/2012/04/03/gIQA8P8ztS_story.html (Maricopa County Sheriff's Office, also citing 17 open DOJ investigations); Lee, Trymaine, "Justice Department Report Details Wide Range of Abuses by New Orleans Police Department," *Huffington Post*, March 18, 2011, available at: http://www.huffingtonpost.com/2011/03/18/justice-department-report-new-orleans-police_n_837866.html (New Orleans Police Department); Kaste, Martin, "Faith in Seattle Police 'Shaken' by DOJ Investigation," *National Public Radio*, April 6, 2012, available at: <http://www.npr.org/2012/04/06/150128344/faith-in-seattle-police-shaken-by-doj-investigation> (Seattle Police Department); See also http://www.justice.gov/crt/about/spl/documents/AlabamaHB56Ltr_12-2-11.pdf (DOJ expresses concern for potential racial or national origin profiling against Latinos in Alabama following implementation of HB 56); LoBasso, Randy, "Nutter Updates 'Stop and Frisk' Policy with Executive Orders Amid City Lawsuit Payout," *Philly Weekly*, June 21, 2011 available at: <http://blogs.philadelphiaweekly.com/phillynow/2011/06/21/nutter-updates-%E2%80%99stop-and-frisk%E2%80%99-policy-with-executive-orders-amid-city-lawsuit-payout/> (Settlement in private lawsuit against Philadelphia's stop-and-frisk practices).

“haphazard and uncoordinated immigration enforcement to target Latinos.”¹⁰ DOJ reviewed numerous incident reports where the East Haven Police Department contacted ICE to ascertain immigration status or seek an immigration hold on Latino arrestees under a local policy to do so pursuant to felony arrests. DOJ found that the arrests in all of these incidents were for traffic infractions, rather than felonies, but EHPD officers requested that ICE issue an immigration detainer, and DOJ concluded “these gaps in policy constitute a means for EHPD officers to harass and intimidate the Latino community.”¹¹ The convergence of local police’s involvement with immigration enforcement and the lack of race and national origin reporting by these same police departments allows racial profiling to go unmonitored and unchecked. CCR is hopeful that ERPA will provide one key step towards accountability and transparency in law enforcement actions.

Conclusion

The practice of racial profiling by federal, state and local law enforcement has resulted in a heightened fear of law enforcement in our community, as in many other communities of color throughout the United States.

CCR is heartened by the Subcommittee’s decision to hold this hearing and we are grateful for the opportunity to present our position on the unjust, ineffective and counterproductive practice of racial profiling. We urge the Committee to move swiftly and take concrete actions to prohibit racial profiling at the federal, state and local level:

¹⁰ Letter, United States Department of Justice Civil Rights Division, “Re: Investigation of the East Haven Police Department,” December 19, 2011, available at:

http://www.rightsworkinggroup.org/sites/default/files/DOJLetter_EastHavenFindings_Dec2011.pdf

¹¹ *Id.* at 9.

- Congress should pass the “End Racial Profiling Act (S.1670)” and institute a federal ban on profiling based on race, religion, ethnicity and national origin at the federal, state and local levels.
- Congress should cut the funding for programs like Secure Communities and 287(g) which provide a mechanism for local law enforcement agencies to engage in racial or national origin profiling.
- The Subcommittee should urge the Department of Justice to amend its 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies to apply to profiling based on religion and national origin, remove national and border security loopholes, cover law enforcement surveillance activities, apply to state and local law enforcement agencies acting in partnership with federal agencies or receiving federal funds, and make the guidance enforceable.

We welcome the opportunity for further dialogue and discussion about these important issues.

Thank you.