



June 30, 2010

The Honorable Jerrold Nadler
Chair, Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable James Sensenbrenner
Ranking Member, Subcommittee on the Constitution, Civil Rights, and Civil
Liberties
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

**RE: Hearing on “Racial Profiling and the Use of Suspect Classifications
in Law Enforcement Policy”**

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we applaud the Subcommittee for its recent hearing “Racial Profiling and the Use of Suspect Classification in Law Enforcement Policy.” This important hearing helped to bring much needed attention to a problem that remains widespread across the United States – racial, ethnic and religious profiling by law enforcement agencies.

Every year, untold numbers of people of color experience the humiliation of being stopped while driving, flying or even walking simply because of their race, ethnicity or religion. They are not stopped because they have committed a crime, but because they are presumed guilty of criminal misconduct by law enforcement authorities based on race, religion and ethnicity. The problem is particularly pervasive for those who are, or appear to be, African American, Native American, Asian, Latino, South Asian, Arab, or Muslim. This practice violates our nation's basic constitutional commitment to equality under the law as well as our human rights obligations, particularly under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which the United States ratified in 1994 and which is binding on all levels of federal, state and local governments.

Last year, in response to a last-minute submission by the previous administration to the United Nations (UN) Committee on the Elimination of

Racial Discrimination (CERD) in January 2009 regarding U.S. compliance with ICERD, the ACLU and the Rights Working Group (RWG) prepared a joint report – The Persistence of Racial and Ethnic Profiling in the United States. The ACLU/RWG report compiled data from around the country and found that racial profiling remains a pervasive problem and that law enforcement agencies continue to investigate, stop, frisk or search racial minorities based upon subjective identity-based characteristics, rather than identifiable evidence of illegal activity.

In contrast, the previous administration's submission to CERD was plagued with omissions, deficiencies and mischaracterizations. For example, in both its initial report to CERD in April 2007 and its follow-up submission, the previous administration relied on the Justice Department's 2003 "Guidance Regarding the Use of Race by Federal Law Enforcement Agents" to support claims that the government was taking steps to eliminate racial profiling. However, the Guidance does not cover profiling based on religion or national origin, does not apply to the actions of state and local law enforcement acting in partnership with the federal government, does not include any mechanisms of accountability for violating the recommendations, and contains a blanket exception to the recommendations in the context of protecting "national security" or "border integrity."

As a result of discriminatory policies and reliance on the vague Justice Department guidance, Arabs, Muslims and South Asians have been disproportionately victimized through various government initiatives including FBI surveillance and questioning, special registration programs like National Entry and Exit Registration System (NSEERS), border stops and airline profiling, and the creation of "no-fly lists". For example, in August 2007, the ACLU and the New York Civil Liberties Union (NYCLU) filed a federal civil rights lawsuit charging that a Transportation Security Administration (TSA) official and JetBlue Airways illegally discriminated against an American resident, Raed Jarrar, based solely on the Arabic message on his t-shirt and his ethnicity. JetBlue and a TSA official, identified as "Inspector Harris," would not let Raed Jarrar board his 2006 flight at John F. Kennedy Airport until he agreed to cover his t-shirt, which read "We Will Not Be Silent" in English and Arabic script. Harris told Jarrar that it is impermissible to wear an Arabic shirt to an airport and equated it to a "person wearing a t-shirt at a bank stating, 'I am a robber.'"

Similarly, Latino communities have been harassed and abused under the so-called 287(g) program, which delegates immigration enforcement authority to state and local police. These law enforcement agencies typically lack the training and experience to take on such complicated duties. Accordingly, the agreement delegating duties normally handles by federal agencies ends up draining state and local police resources while fostering racial profiling and resulting in the improper deportation of U.S. citizens and lawful permanent residents.

The problem of racial profiling in immigration enforcement has been well-documented in numerous reports. This April, the Department of Homeland Security (DHS) Office of the Inspector General ("OIG") released a scathing report documenting wide-ranging problems with the 287(g) program. The report made clear that the 287(g) program lacks sufficient safeguards against racial profiling and other civil rights abuses. The 287(g) program has also been subject

to numerous lawsuits and government investigation. In 2009, the Department of Justice Civil Rights Division initiated an investigation of Maricopa County Sheriff's Office in Arizona for alleged civil rights abuses, focusing on patterns of discriminatory police practices and unconstitutional searches and seizure. The ACLU has also filed a class-action lawsuit against the Maricopa County Sheriff's Office in Arizona for racially profiling Latino drivers for the purpose of selectively enforcing immigration laws.

Additionally, in 2007, the ACLU of New Mexico and Mexican American Legal Defense and Educational Fund sued the Otero County Sheriff's Office for raiding Latino homes without search warrants, interrogating Latino families without evidence of criminal activity, and targeting Latino households on the basis of race and ethnicity. The Sheriff's Department denied any wrongdoing but agreed to revise operational policies in order to provide more effective law enforcement to its constituents and to focus its attention on persons suspected of committing crimes. And in 2008, the ACLU of Northern California sued Immigration and Customs Enforcement (ICE) and Sonoma County for racial profiling and unlawfully detaining Latinos. Specifically, the suit charges Sonoma County deputies with stopping and searching people who appear to be Latino, interrogating them about immigration status based on perceived race, and detaining them in jail without lawful authority.

Even as the ACLU and other organizations across the country committed to defending civil liberties have litigated against racial profiling in the immigration context, some state legislatures have moved to legally entrench the practice. For example, racial profiling should be expected to worsen significantly if Arizona's new law S.B. 1070, which would give state and local police broad power to detain anyone suspected of being in the country illegally, goes into effect. The ACLU, together with a group of other civil rights organizations, has challenged the Arizona law and requested a preliminary injunction to block the law from taking effect this summer.

Additionally, African Americans and other members of minority communities continue to be disproportionately stopped, searched and arrested by law enforcement. For example, the NYCLU has been leading challenges to the New York Police Department's stop-and-frisk practices. The Department's own reports on its stop-and-frisk activity confirm what many people in communities of color across the city have long known: The police are stopping hundreds of thousands of law abiding New Yorkers every year, and the vast majority are black and Latino. An analysis by the NYCLU revealed that more than 2 million innocent New Yorkers were subjected to police stops and street interrogations from 2004 through 2010, and that black and Latino communities continue to be the overwhelming target of these tactics. Nearly nine out of 10 stopped-and-frisk New Yorkers have been completely innocent, according to the NYPD's own reports

On September 28, and partly as a result of problems highlighted by the ACLU and the Rights Working Group in our report, the UN CERD committee expressed its concerns in a letter to the Obama administration over a lack of progress toward ending racial discrimination in the United States. The letter, which included several of our recommendations, urged the government to do more to end racial profiling and specifically to "make all efforts to pass the End Racial Profiling Act (ERPA) and to review its 2003 Guidance Regarding the Use of Race by Federal Law

Enforcement Agencies, with a view to avoiding any ambiguous language that may provide a loophole allowing for actions that constitute racial profiling.” The CERD committee also “stresses the need to review the National Entry and Exit Registration System, NSEERS, with the view to avoiding racial profiling in migration policies,” and to “reconsider its policy under 287(g) of the Immigration and Nationality Act.”

The previous examples are a sad commentary on how far we still must travel to eliminate racial profiling from law enforcement practices. In a democratic society, it is sobering that individuals continue to be presumed guilty and subject to the arbitrary use of police force and abuse of power because of immutable characteristics. Racial profiling is unconstitutional, violates our international treaty obligations, and misdirects government resources depriving entire communities of the protection of the law as all of our communities are less healthy and less safe if some of us feel that we cannot rely on the authorities to protect us equally. We hope that this important hearing will serve as a starting point for further discussions and legislative action to combat the widespread, pervasive problem of racial, ethnic and religious profiling in the United States.

Sincerely,



Laura W. Murphy
Director, Washington Legislative Office



Jennifer Bellamy
Legislative Counsel