

From: [Chen, Winnie](#)
To: [Johnson, Martina](#)
Cc: [Prosnitz, Susan <TSA OCC>](#); [Bandy, Kimberly J](#)
Subject: FW: Anti-Profiling Working Group
Date: Monday, October 21, 2013 1:09:03 PM
Attachments: [971657 attachment 13-0239 Attachment A Implementation Guidance 04 30 13 .docx](#)
[971657 attachment 13-0239 S1 Signed Memo to Component Heads 04 26 13 v2 \(2\).pdf](#)
Importance: High

Hi Martina,

I hope you've been well and that these last few weeks weren't too stressful. Before the shutdown I was tasked to be a part of the Anti-Profiling Working Group, headed by Susan Prosnitz (OCC) and Kim Bandy (CRL). This Working Group is part of a larger initiative by DHS and includes all of the Department's components. In our first meeting we discussed other divisions at TSA that have a vested interest in the Working Group and its outcome, and ER was a logical and important division to include in the group. We are currently responding to a DHS data call, where Susan and Kim are gathering documents, training materials, policies, etc. from all of us (OSO, OSC, OTWE) that relate to/or should include language against profiling based on an individual's characteristics. The goal is to update all documents to reflect TSA and DHS's stance against profiling, to be in-line with DHS mandates, and to have clear guidance on the repercussions for employees found profiling passengers inappropriately.

Can you participate in this Working Group, or is there someone you'd like to assign to the group from your team? We haven't had our second meeting yet but Susan and Kim will include you (or whoever you designate) in future correspondence and meetings. If there's anyone else from OHC you think should be involved, please let us know. I've CCed Susan and Kim to connect you with them directly.

Please let us know if you have any questions! I look forward to hearing from you soon.

Thanks in advance.

Best,
Winnie

Behavior Detection & Analysis Program
Transportation Security Administration
U.S. Department of Homeland Security

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From: Prosnitz, Susan <TSA OCC>
Sent: Friday, September 20, 2013 10:23 AM

To: Tauber, Sarah; Cobey, Matt (James); Mokhtar, Engie <TSA-OTWE>; Cotton, Brent
Cc: Harvey, Melanie; Hoggan, Kelly (TSA); Sanders, John P.<TSA OSC>; Tashiro, Susan; Novak, Michael R <TSA-OTWE>; Newhouse, Victoria; Bandy, Kimberly J; Walton, Kimberly; Bester, Margot <TSA OCC>
Subject: Anti-Profilng Working Group
Importance: High

All,

Kim Bandy and I serve as TSA's representatives on a new Anti-Profilng Working Group formed for the purpose of implementing the Secretary's policy memorandum on nondiscriminatory law enforcement and screening activities. Each agency has been asked to:

- a. Undertake an assessment or inventory of what sorts of policies, directives, manuals, guidelines, and training materials may require revision to reflect the new policy statement. For components where this task could not reasonably be completed in a month, it will suffice to identify categories of documents and estimate the scope of items affected, rather than to complete a thorough inventory in that time; and
- b. Assess what steps (development, clearance) your component will need to complete revision to those documents, and to develop appropriate training and standards.

The first item is due within 30 days. We therefore ask that you provide any responsive materials or "categories of materials" to us by October 4th to allow time to compile and index the documents. For your reference, the Secretary's policy statement and implementation guidance are attached.

As to the second item, it was suggested that we form an internal working group to help prepare the agency's response and to otherwise provide feedback. We would greatly appreciate your participation in this working group. If you think anyone else should be added to the list, please let us know. Our first meeting will take place on September 25th at 1pm in E12-002. Outlook invitation to follow.

Thank you in advance for your assistance.

Susan and Kim

Susan M. Prosnitz, Esq.

Assistant Chief Counsel for Legal Policy and Education

Office of Chief Counsel

Transportation Security Administration

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THE DEPARTMENT OF HOMELAND SECURITY'S
COMMITMENT TO NONDISCRIMINATORY
LAW ENFORCEMENT AND SCREENING ACTIVITIES

IMPLEMENTATION GUIDANCE

The Secretary has directed Components to develop Component-specific policy and procedures to implement the attached policy on Nondiscriminatory Law Enforcement and Screening Activities, dated April 26, 2013. This document offers additional guidance for such policy and procedures regarding the use of race, ethnicity, country of birth, and nationality¹ for law enforcement, national security and transportation security purposes:

A. DHS programs that use race, ethnicity, or country of birth as a security screening, enforcement, or investigative criterion:

1. Race- or ethnicity-based screening, whether based on appearance, name, or country of birth, should be limited to situations in which there is a compelling interest and the screening protocol is narrowly tailored to meet that interest. National security is *per se* a compelling interest, but use of race and ethnicity must nonetheless be narrowly tailored to the particular national security concern involved in a proposed use.
2. All tools, policies, directives, and rules utilizing ethnic or country of birth factors should remain in effect no longer than necessary. To ensure that this is so, any such tools, policies, directives, and rules should be subject to periodic review by the relevant Component's leadership, intelligence office, and counsel, which should include particular focus on timeliness and validity. Each Component should develop a review process to implement this requirement.
3. Racial, ethnic, or country of birth criteria should be coupled with other characteristics, if practicable, to better focus law enforcement or screening attention. Approaches that respond to actual travel itineraries, or combine race, ethnicity, or country of birth with additional limiting characteristics (age, sex, travel history, known affiliations), are preferable to those that draw distinctions among individuals on the basis of ethnicity or country of birth alone.
4. Reasonably available alternatives are preferred over protocols that depend on DHS enforcement, investigation, and screening personnel's subjective estimation of individuals' likely race or ethnicity. If such protocols cannot be avoided, they too should be reviewed periodically. In addition, DHS officers and agents who conduct security screening, enforcement and investigative functions should receive necessary instruction

¹ These four terms are used here in their most ordinary senses, which are somewhat different from the technical meanings they have acquired in equal employment and other domestic nondiscrimination law (where, in particular, "national origin" is sometimes a term of art meaning "ethnicity"). Here, "ethnicity" means ancestry, language, culture, or other similar social characteristics; "country of birth" means the political entity where the individual was born; and "nationality" means a country to which an individual has a relationship along the lines of citizenship. The expression "national origin" is not used here, to avoid confusion.

or training to make sensible identifications of relevant characteristics, rather than relying on their general expectations about ethnic groups, and officer or agent perceptions should be supported, where possible, by computerized name analysis.

B. DHS programs that use nationality as a security screening, enforcement or investigative criterion:

1. Many of the statutes DHS implements or enforces draw explicit nationality distinctions. For example, under the customs laws, the nationality of a person can affect duty exemptions; under the immigration laws, nationality affects an alien's eligibility for admission under the visa waiver program or for temporary protected status; and under the embargo laws, nationality can affect the ability of a person to import or export merchandise. Other examples include the Trading with the Enemy Act, 50 U.S.C. App. §§ 1 *et seq.*; the International Economic Emergency Powers Act, 50 U.S.C. §§ 1701-1707; the Cuban Adjustment Act of 1966; and the Nicaraguan Adjustment and Central American Relief Act of 1997. Using nationality for antiterrorism, customs, or immigration activities in which nationality is expressly relevant to the administration or enforcement of a statute, regulation, or executive order to, for example, trigger screening, inspection, or investigative steps is entirely appropriate and needs no further justification; it is excluded from sections B.3 and B.4, below. If nationality is not expressly relevant to the administration or enforcement of a statute, regulation, or executive order, a proposed use of nationality may still be permissible but must comply with the requirements in sections B.3 and B.4, below.
2. In addition, individualized discretionary use of nationality as a screening, enforcement, or investigative factor—for example by an officer or agent using his or her training and experience to conduct an inspection at or near the border—is not limited by the requirements of sections B.3 and B.4, below, which are directed at more general tools, policies, directives, and rules.
3. In other settings, in which nationality is used for security screening, enforcement, or investigative decisions, rules or policies establishing nationality-based criteria are preferable, from a civil rights perspective, to those establishing ethnicity-based criteria. However, unless use of nationality-based rules is part of an operation to protect particular at-risk populations, such use should be limited if limits are consistent with security objectives. In the other settings covered by this paragraph, rules or policies that require consideration of nationality should be reserved for situations in which that consideration is based on an assessment of intelligence and risk, should not remain in effect longer than necessary, and should be subject to periodic review to further that outcome. Each Component should develop a review process to implement this requirement.
4. Use of nationality criteria (when not connected to a nationality-specific legal requirement or where nationality is not expressly relevant to the administration and enforcement of a statute, regulation, or executive order) should be coupled with other characteristics, if relevant and practicable, to better focus law enforcement or screening efforts. Approaches that respond to actual travel itineraries, or combine nationality with additional limiting characteristics (for example, age, sex, travel history, known

affiliations), are preferable, when relevant and appropriate, to those that draw distinctions among individuals on the basis of nationality alone.

C. General

The Department's policy and guidance on these topics are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

Secretary


U.S. Department of Homeland Security
Washington, DC 20528



Homeland
Security

April 26, 2013

MEMORANDUM FOR COMPONENT HEADS

FROM: Secretary Napolitano 

Subject: The Department of Homeland Security's Commitment to
Nondiscriminatory Law Enforcement and Screening Activities

The Department of Homeland Security's mission is to ensure that the Nation remains a safe, secure, resilient place where the American way of life can thrive. As former Secretary Ridge explained in the predecessor to this policy, "In all we do to secure America, our strategies and our actions must be consistent with the individual rights and civil liberties protected by the Constitution and the rule of law."

The Department of Homeland Security's policy is to prohibit the consideration of race or ethnicity in our investigation, screening, and enforcement activities in all but the most exceptional instances. The following is the Department's official policy on this issue:

"Racial profiling" is the invidious use of race or ethnicity as a criterion in conducting stops, searches, and other law enforcement, investigation, or screening activities. It is premised on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of another race or ethnicity. The Department of Homeland Security (DHS) has explicitly adopted the Department of Justice's "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies," issued in June 2003. It is the policy of DHS to prohibit the consideration of race or ethnicity in our daily law enforcement and screening activities in all but the most exceptional instances, as defined in the DOJ Guidance. DHS personnel may use race or ethnicity only when a compelling governmental interest is present, and only in a way narrowly tailored to meet that compelling interest. Of course, race- or ethnicity-based information that is specific to particular suspects or incidents, or ongoing criminal activities, schemes or enterprises, may be considered, as stated in the DOJ Guidance.

Except as noted below, it is DHS policy, although not required by the Constitution, that tools, policies, directives, and rules in law enforcement and security settings that consider, as an investigative or screening criterion, an individual's simple connection to a particular country, by birth or citizenship, should be reserved for situations in which such consideration is based on an assessment of intelligence and risk, and in which alternatives do not meet security needs, and

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such consideration should remain in place only as long as necessary. These self-imposed limits, however, do not apply to antiterrorism, immigration, or customs activities in which nationality is expressly relevant to the administration or enforcement of a statute, regulation, or executive order, or in individualized discretionary use of nationality as a screening, investigation, or enforcement factor).

All Components should include the DHS policy stated above in all manuals, policies, directives, and guidelines regarding any activity in which the use of race, ethnicity, or nationality may arise as a security screening, enforcement, or investigative criterion. Each Component, in coordination with the Department's Office for Civil Rights and Civil Liberties, should implement Component-specific policy and procedures to implement this guidance for law enforcement, investigation, and security activities. Moreover, all Components should ensure that all law enforcement personnel, including supervisors and managers, are trained to the standards set forth in the DOJ Guidance and the DHS policy stated above, and are held accountable for meeting those standards.