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HEARING OF THE

**SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL
LIBERTIES**

**ENDING RACIAL PROFILING: NECESSARY FOR PUBLIC
SAFETY AND THE PROTECTION OF CIVIL RIGHTS**

TESTIMONY OF

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I thank Subcommittee Chairman Nadler and Ranking Member Sensenbrenner for convening this important hearing today and for allowing me to address this Subcommittee. The American people need to know that ending racial profiling is necessary for *both* the enhancement of public safety *and* the protection of civil rights. The use of racial or ethnic appearance as a way to target law enforcement efforts does not help police catch more criminals; rather, racial targeting nets fewer criminals, and in the bargain turns the public against police efforts. Protecting civil rights by ending racial profiling will help make us safer, and honor our country's commitment to equal justice under law.

The Connection Between Racial Profiling and Public Safety

The practice of racial profiling—defined as using racial or ethnic appearance as one factor (among others) in deciding who to stop, question, search, frisk or the like—has a very direct impact on the quality of the work police officers can do. In a nutshell, police departments that use racial or ethnic targeting do a poorer job at finding lawbreakers than departments that do not use this method. Just as important, departments that use racial targeting cut themselves off from the communities they serve, making their jobs more difficult and dangerous.

From those who advocate racial profiling, one frequently hears what we may call the profiling hypothesis: we know who the criminals are and what they look like, because we know what societal groups they come from; therefore using racial or ethnic appearance will allow police to better target their enforcement efforts; and when police target those efforts, they will be more effective, because they will get higher rates of “hits”—finding guns, drugs, criminals—than when they do not use racial targeting. Many people both inside and outside law enforcement have long assumed the truth of this idea. But the data produced in study after study

since the late 1990s prove otherwise. When a police department uses race or ethnic appearance to target its enforcement efforts—and to be sure, not all police departments do this—the rate of hits for the targeted group does *not* go up; it does not even stay the same. In fact, the rate of hits *drops*, by a statistically significant, measurable amount. This has proven true across multiple studies, in numerous locations, and in many different kinds of police agencies. Therefore, whatever people may believe, the data do not support the profiling hypothesis; the data contradict it. It is not, in fact, an effective crime-fighting strategy.

The reasons for these results originate with what profiling is supposed to be: a predictive tool that increases the odds of police finding the “right” people to stop, question, or search. Using race or ethnic appearance as part of a description of a person seen by a witness is absolutely fine, because that kind of information helps police identify a particular individual. On the other hand, using race as a predictor of criminal behavior, in situations in which we do not yet know about the criminal conduct—for example, when we wonder which of the thousands of vehicles on a busy highway is loaded with drugs, or which passenger among tens of thousands in an airport may be trying to smuggle a weapon onto an airplane—throws police work off. That is because using race or ethnic appearance as a short cut takes the eye of law enforcement off of what really counts. And what really matters in finding as-yet-unknown criminal conduct is the close observation of behavior. Paying attention to race as a way to more easily figure out who is worthy of extra police attention takes police attention off of behavior and focuses it on appearance, which predicts nothing.

The other reason that racial or ethnic profiling interferes with public safety is that using this tactic drives a wedge between police and those they serve, and this cuts off the police officer from the most important thing the officer needs to succeed: information. For more than two

decades, the mantra of successful local law enforcement has been community policing. One hears about community policing efforts in every department in every state. The phrase means different things in different police agencies. But wherever community policing really takes root, it comes down to one central principle: the police and the community must work together to create and maintain real and lasting gains in public safety. Neither the police nor the public can make the streets safe by themselves; police work without public support will not do the whole job. The police and those they serve must have a real partnership, based on trust, dedicated to the common goal of suppressing crime and making the community a good place to live and work. The police have their law enforcement expertise and powers, but what the community brings to the police—information about what the real problems on the ground are, who the predators are, and what the community really wants—can only come from the public. Thus the relationship of trust between the public and the police always remains of paramount importance. This kind of partnership is difficult to build, but it is neither utopian nor unrealistic to strive for this kind of working relationship. In other words, this is not an effort to be politically correct or sensitive to the feelings of one or another group. Thus these trust-based partnerships are essential for public safety, and therefore well worth the effort to build.

When racial profiling becomes common practice in a law enforcement agency, all of this is put in jeopardy. When one group is targeted by police, this erodes the basic elements of the relationship police need to have with that group. It replaces trust with fear and suspicion. And fear and suspicion cut off the flow of communication. This is true whether the problem we face is drug dealers on the corner, or terrorism on our own soil. Information from the community is the one essential ingredient of any successful effort to get ahead of criminals or terrorists; using profiling against these communities is therefore counterproductive.

Protecting Civil Rights

When police use racial or ethnic targeting, we put a government-created burden on the targeted communities. We effectively say to them that being frisked on the way to the grocery store or thoroughly searched in the airport, on the basis of their racial or ethnic appearance, is only “a minor inconvenience” they have to tolerate so that we can all be safe.

Surely, being frisked or having one’s belongings searched in public is more than just a minor inconvenience, even if these actions do not amount to arrest. The Supreme Court itself has said that being stopped and frisked is in fact not a minor annoyance but an intrusion on one’s Fourth Amendment rights, no matter how brief the incident may be. *Terry v. Ohio*, 392 U.S. 1 (1968). But even assuming for the sake of argument that the intrusion is minimal, it is a far greater problem when such an intrusion is based on race or ethnic heritage. To say our law frowns on government imposition of burdens on just one racial or ethnic group is far too gentle; as the Supreme Court has said, “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect...[C]ourts must subject them to the most rigid scrutiny.” *Korematsu v. U.S.*, 323 U.S. 214 (1944). The federal government—our ultimate guarantor of constitutional rights in this country—must do all it can to assure that people in every state and local jurisdiction enjoy the right to equal protection at the hands of their police, and that is the goal that legislation against racial profiling will advance. Equal protection of the law is one of the highest ideals of our constitutional republic, and a worthy goal for that reason alone. But the assurance that government actors (such as police officers) will obey the law as they enforce it not only honors our highest principles; it helps assure that every person will obey the law in his or her everyday conduct. Research has demonstrated the connection between law-abiding behavior

by police, and the feeling among citizens that they should obey the law as well. Conversely, when people see the police disregard the law, they see less reason to follow it themselves.

The Continuing Need for National Legislation

Some may ask whether any need exists for national legislation on racial profiling. More than half the states have passed some kind of law against racial profiling or mandated some kind of study of the problem, and many police departments have, on their own, adopted policies and procedures designed to combat the practice. Nevertheless, a strong need for federal legislation persists.

First, many states have not acted, and far more police departments have done less than they might have, on this problem. Therefore many Americans have not had the benefits of improvements in this area, though they deserve good law enforcement and equal treatment as much as those who live in places where the law or police practice has not changed. This makes passage of the national legislation a continuing priority.

Second, the passage of national legislation against racial profiling would serve as a clear and unambiguous statement that the American people deserve fair and equal treatment under the law. We have heard Attorney General Eric Holder and his deputies announce to the country that the Department of Justice's Civil Rights Division is open for business. The passage of anti-profiling legislation is of a piece with that focus. That makes this the right time for this effort.

Third, in a series of decisions dating back more than a decade, the Supreme Court has created great police power and discretion to engage in traffic enforcement based on pretexts, and we have seen time and again, in state after state, how this discretion easily morphs into the tactic of profiling. These cases allow police to stop any driver violating any observed traffic offense,

even if the goal of the stop has nothing whatsoever to do with traffic enforcement (*Whren v. U.S.* 517 U.S. 806 (1996)); to order the driver (*Pennsylvania v. Mimms*, 434 U.S. 106 (1977)) and the passenger (*Maryland v. Wilson*, 519 U.S. 408 (1997)) out of any vehicle the police stop, without any evidence of danger or wrongdoing; and to ask for consent to a search of a driver's car without informing the driver that he or she has a right to refuse (*Ohio v. Robinette*, 519 U.S. 33 (1996)). In addition, the Court has allowed police to arrest drivers for traffic offenses even when the penalties for these infractions do not include imprisonment (*Atwater v. Lago Vista* 532 U.S. 318 (2001)), and has decided that police do not violate the Fourth Amendment even if their search or seizure conduct violates state law (*Virginia v. Moore*, 553 U.S. ____ (2008)) . There is no sign from the Supreme Court that it plans to change direction, and we must therefore anticipate that in some police departments, racial and ethnic profiling will go on. This means that national legislation to end racial profiling is needed now as much as it ever has been.

Fourth, we have recently seen the passage of a law in Arizona that *requires* police officers to inquire about immigration status based on the reasonable suspicion that a person they encounter may be present in the country illegally. See S.B. 1070, State of Arizona, Forty-ninth Legislature, Second Regular Session (enacted April 23, 2010). Amending legislation, passed just days later, H.B. 2162, State of Arizona, Forty-ninth Legislature, Second Regular Session (enacted April 30, 2010), purported to prohibit any police activity under the law based on race or ethnicity, but simply saying this will not change the reality. Police officers without extensive training in immigration law will be forced to make judgments based on ethnic appearance and the use of the Spanish language. They will have no alternative, since immigration status cannot be determined by any other observable means before questioning begins. Therefore, those who “look Latino” will be targeted by this law, even American citizens whose families have lived

here for generations. And according to numerous reports, “copycat” versions of S.B. 1070 have now been introduced in the legislatures of multiple states. David Weigel, Arizona Law Inspires Copycats in Texas, Georgia, Colorado, *Washington Post*, April 29, 2010, accessed June 14, 2010 at http://voices.washingtonpost.com/right-now/2010/04/arizona_bill_inspires_copycats.html; Alan Gomez, Arizona Immigration Policy Sets Off Polarizing Debate; Opponents of Law Plan Boycotts While Other States Propose Copycat Bills, *ABC News*, May 3, 2010, accessed June 14, 2010, at <http://abcnews.go.com/Politics/arizona-immigration-law-sets-off-polarizing-debate/story?id=10539061>; Andy Birkey, Minnesota Republicans Offer Arizona-style Immigration Bill, *Minnesota Independent*, May 7, 2010, accessed June 14, 2010, at <http://minnesotaindependent.com/58565/minnesota-republicans-offer-arizona-style-immigration-bill>. Thus passing national legislation against racial and ethnic profiling has become more important than ever.

Conclusion

I thank the Subcommittee for the opportunity to share my views, and I look forward to answering any questions you may have.