



Written Testimony of

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**Hearing on
Racial Profiling and the Use of Suspect Classifications
in Law Enforcement Policy**

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Introduction

Muslim Advocates submits this testimony to the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, regarding racial profiling and the use of suspect classifications in law enforcement.

Muslim Advocates (www.muslimadvocates.org) is a national legal advocacy and educational organization dedicated to promoting freedom, justice and equality for all, regardless of faith, using the tools of legal advocacy, policy engagement and education and by serving as a legal resource to promote the full participation of Muslims in American civic life. Founded in 2005, Muslim Advocates is a sister entity to the National Association of Muslim Lawyers, a network of Muslim American legal professionals. Muslim Advocates seeks to protect the founding values of our nation and believes that America can be safe and secure without sacrificing constitutional rights and protections.

Law enforcement has a solemn responsibility to protect the American people consistent with the rights and protections guaranteed by the Constitution to *all* Americans, regardless of race, religion, or ethnicity. And Congress must ensure that they do so.

Muslim Americans, who number about six million today, are an important and vital part of our nation and its history. The first Muslims arrived in America on slave ships from Africa. Over time, some Americans have converted to Islam, and other Muslims have come as immigrants. We serve our country as lawyers, teachers, police and firefighters, members of our armed forces, and even as members of Congress. Our research and innovation adds to the progress of our nation in science, medicine, business and technology. We also keep America humming, staffing factories, driving taxis, and running corner shops.

Muslims have also embraced our nation's promise of life, liberty and the pursuit of happiness. But since 9/11, these hopes and dreams have been dashed, and fundamental rights infringed. Today we face government discrimination in our everyday lives – whether we enter a mosque to pray, get on a plane, cross the border, or log onto the Internet. We worry that we will be interrogated by government agents, or worse, arrested and detained, for no reason at all. Our nation has not seen such widespread abuse, discrimination and harassment by federal law enforcement since the J. Edgar Hoover era.

Muslim Americans are also affected by biased policing practices at the state and local levels. African-Americans and Latinos, some of whom are Muslim, are unfairly targeted for stops by law enforcement when driving or walking down the street. The New York Police Department recently released arrest data showing that stops and frisks of African-Americans and Latinos remain at disproportionate levels,

reminding us that racial profiling remains an urgent challenge.¹ The state of Arizona recently enacted a law that requires state and local police to demand proof of immigration status, raising fears of discriminatory policing. At the state, local and federal levels, racial profiling is wrong and counter-productive and must end.

As discussed in detail below, Muslim Advocates describes the problem and provides specific examples of innocent Americans who have been unfairly targeted by federal law enforcement. Muslim Advocates concludes with recommendations for steps Congress should take to protect Americans from being targeted for law enforcement scrutiny based on their race, ethnicity, religion or national origin.

Racial & Religious Profiling of Muslim Americans

Since 9/11, Muslim Americans and those perceived to be Muslim – including Arabs, South Asians, Middle Easterners, and Sikhs – have been subject to heightened scrutiny by federal law enforcement. Such discriminatory targeting includes: FBI interviews conducted in the community without suspicion of wrongdoing; extensive and invasive questioning and searches at the border; the surveillance of community organizations and the use of informants and undercover agents; and data gathering and mapping of the community based on cultural and ethnic behavior.

These discriminatory law enforcement policies and practices are contrary to our nation's promise of equal protection and equal treatment under the laws. President William J. Clinton, President George W. Bush, and President Barack H. Obama have all said racial profiling is wrong and should not take place in America. Indeed, President Bush pledged to end it and took an important step when the U.S. Department of Justice in 2003 issued guidance banning racial and ethnic profiling by federal law enforcement in certain contexts. But more must be done to end racial profiling by federal, state, and local enforcement in all investigatory activities.

Not only is racial profiling wrong, it is ineffective. Discriminatory policing practices divert valuable resources from legitimate investigations, increase fear and suspicion within the Muslim community towards law enforcement and make individuals more reluctant to call the authorities when needed. They also erode the trust between the community and law enforcement agencies, jeopardizing a vital relationship needed to counter actual criminal activity.

The following are examples of the type of discriminatory policing tactics practiced by federal law enforcement across the country.

FBI Interviews

Since 9/11, the FBI and other federal law enforcement agencies have been increasingly targeting Muslim Americans for questioning with no individualized suspicion of wrongdoing. These law-abiding citizens – who range from public

¹ See Al Baker, *New York Minorities More Likely to Be Frisked* (May 12, 2010), at <http://www.nytimes.com/2010/05/13/nyregion/13frisk.html>.

servants to students to professionals – are frequently approached by law enforcement not because they are the subject of an investigation, but, rather, because of a perception that – by virtue of their religion, ethnicity, race, or national origin – they are either engaged in, or will be able to provide evidence of, criminal activity.

These interviews are intimidating and cause immense fear within the community. FBI agents approach individuals for uninvited questioning in their homes and at work. Such unannounced, public interviews cast suspicion over a person's activities and jeopardize their personal and professional relationships.

Some examples of individuals who have been contacted by the FBI, with no apparent evidence of wrongdoing, and reported to Muslim Advocates:

- A young computer programmer and Muslim American in Northern California was approached for questioning, in his workplace, by the FBI after posting political articles from mainstream news sources on his Facebook page. His Facebook page had privacy settings limiting viewers of his posts to only those in his circle of Facebook friends. Although this young man had no criminal background and was not the subject of an investigation, the FBI contacted him because the articles were interpreted as threatening because of his religious and ethnic background. By approaching him at work, in front of his colleagues and managers, the FBI intimidated this young man and jeopardized his job.
- A physician of Pakistani descent in New England was contacted by the FBI for questioning after peaceful, non-violent comments he made about the political situation in Pakistan were published in his local newspaper. This physician is a law-abiding and civic-minded member of his community and was not under investigation. The FBI's interest in him appears to be motivated primarily by his ethnic and religious background.

Surveillance of Mosques & Community Events & Organizations

The FBI's asserted broad authority to target individuals, without reasonable suspicion, is codified in the latest version of the FBI's Domestic Investigations and Operations Guide (DIOGs), which was updated in December 2008. Specifically, the DIOGs allow for unprecedented, massive data gathering on racial and ethnic communities and for the use of informants or undercover agents to infiltrate houses of worship and religious and political groups and gatherings. The FBI asserts the power to open an investigation and send undercover agents and undisclosed participants into organizations with no factual predicate that criminality is afoot. These activities result in chilling First Amendment protected activities, as law-abiding Muslim Americans and community institutions across the country, including mosques, non-profits, and social service organizations, are subject to such surveillance tactics.

Furthermore, the DIOGs authorize the collection of racial and ethnic demographic data and cultural and behavioral information of racial and ethnic communities, without any evidence of wrongdoing. This type of data collection is based on perceived characteristics and activities of racial and ethnic communities, not individualized suspicion of criminal activity. The DIOGs allow for this racial and ethnic information to be mapped, heightening the concern that this information will be used by law enforcement agencies to unlawfully target innocent Muslim-Americans for further investigative activities.

Examples of the FBI's surveillance activities across the country:

- In Orange County, California, the FBI used an ex-felon as an informant to infiltrate a local mosque and spy on congregants. There was no evidence that there was criminal activity at the mosque. In fact, mosque leaders became alarmed when the informant began espousing violent ideas, and reported him to the local FBI office. This incident has resulted in fear within the American Muslim community and had the effect of limiting speech and decreasing attendance at mosques in Southern California and arguably across the country.
- FBI agents routinely attend cultural events hosted by an Arab American organization in the San Francisco Bay Area, without invitation, and interview employees and participants, sometimes without disclosing their identity. The FBI has also sought to meet with the organization's employees outside regular business hours and without consulting with the executive director or other leadership. The FBI's tactics have the effect of intimidating community members and leaders, who are afraid that speaking out about the surveillance will result in increased targeting and scrutiny of the organization, its members and activities.
- Muslim community leaders in Houston, Texas, were recently invited to a meeting with the FBI. During this meeting, FBI agents told community leaders that they were seeking information on the Muslim community in the area, and asked leaders to report any Muslims in their communities who were espousing conservative ideologies or adopting conservative religious practices for observation by the FBI. These requests appear to have been made based on generalized suspicion toward an entire faith and ethnic community, not in response to a particular investigation nor based on evidence of wrongdoing in that community.

Given the constitutional rights and freedoms implicated and the enormous power being wielded by the FBI, the FBI should be forthcoming about the guidance it has given its agents to infiltrate First Amendment protected gatherings and activities. Despite repeated informal requests, a (formal) Freedom of Information Act (FOIA) request, and later a FOIA lawsuit by Muslims Advocates, however, the FBI has failed

to disclose the DIOGs fully.² In particular, the FBI refuses to disclose Chapter 16 of the DIOGS in their entirety. Chapter 16 apparently describes the guidance to agents to surveil and send informants into houses of worship and other religious and political gatherings. Congress should urge the FBI to disclose Chapter 16 of the DIOGs without further delay.

Border Interrogations

Muslim American travelers returning home from international travel are being targeted for additional and extensive questioning by CBP, based on no more than their religion, ethnicity, race or national origin. Innocent Americans from all walks of life have been interrogated about their political views and activities, religious beliefs and practices, and associations with organizations, friends and relatives – all without any reasonable suspicion that the individuals were engaged in unlawful activity. Muslim travelers have been frequently asked questions such as, “what mosque do you attend?,” “how often do you pray?,” “why did you convert?,” “what is your view of the Iraq war?” They have also been asked about donations to, or affiliations with, lawful, U.S. charitable entities and mosques. This type of questioning suggests that racial, ethnic or religious profiling is taking place at the borders and airports. Muslim Advocates chronicled the stories of almost three dozen travelers in its report, *Unreasonable Intrusions: Investigating the Politics, Faith & Finances of Americans Returning Home*.³

A few recent examples of individuals who have been questioned at the border:

- An Asian-American Muslim man traveling back from Canada across the land border near Buffalo, New York, was stopped and questioned for approximately 3 hours about his political and religious beliefs, including his conversion to Islam. This young man is a law-abiding citizen and was not the subject of any investigation. He was targeted for detention and questioning because of his religion, causing him great humiliation and fear about openly practicing his faith.
- A respected Arab-American leader in Detroit, Michigan, returning home from a family trip to Connecticut and passing through Canada, was stopped at the Port Huron border crossing, north of Detroit. He and his wife were dragged from and thrown against their car by federal agents, in front of their two young daughters, and were handcuffed, detained, and separated from each other and their children. They were then aggressively interrogated for hours about lawful organizations they support, their work and political activities, and the names of family members and their locations. On subsequent trips, this man has experienced similar intensive and invasive questioning about his ethnicity and country of origin, confirming that he is being targeted for questioning because of his religious and racial background.

² The partially disclosed DIOGs can be viewed on our website at www.muslimadvocates.org.

³ Available at http://www.muslimadvocates.org/documents/Unreasonable_Intrusions_2009.pdf.

Border Searches

Muslim Americans returning home from international travel are subject to invasive searches at the border of their person and belongings, including electronic devices, without any individualized suspicion of wrongdoing. CBP agents look through pictures on digital cameras, documents on computers, and contacts and information in cell phones, Blackberries and iPhones, for no reason at all. CBP also asserts that they have the authority to seize these devices, including the data contained within the devices, without probable cause. The invasive nature of these searches – and the ability of the government to target individuals without any individualized suspicion – highlights the broad, abusive power being asserted by CBP agents.

Examples of individuals whose personal belongings, including electronic devices, were subject to search at the border include:

- A Muslim-American of South Asian descent who is an engineer in Silicon Valley had his personal belongings, including his checkbook and cell phone, searched and seized when returning home after an overseas business trip. His cell phone was confiscated from him during the search, and returned to him five months later in inoperable condition. He was never given a reason as to why he was subjected to such an intensive search of his belongings, but the questions asked by the CBP officer conducting the search – including questions about donations he had made to specific, lawful charitable and religious organizations – indicate that he was targeted because of his religion.
- A Californian businessman, who has been searched on numerous occasions upon his return to the United States, had his computer removed from his presence for several hours. During that time, all of his files, including letters from his wife and children, were reviewed. He was not informed as to why his computer was seized. However, the questions asked of him by the CBP agent during his detention, including questions about his recent Hajj pilgrimage to Saudi Arabia, suggest that his religious identity played a role.

Despite repeated requests to DHS by Muslim Advocates and other civil rights organizations to disclose CBP's policies for selecting individuals for secondary searches, DHS has not been fully candid and forthcoming, nor has it revealed the extent to which individuals are being targeted based on their race, religion, ethnicity or national origin. CBP should prohibit questioning about First Amendment protected beliefs and activities and should be required to collect data on individuals targeted for interrogations so that Congress and the public can fully understand how CBP is conducting questioning at the border. A Civil Liberties Impact Assessment solely on its electronic devices searches policy, ordered by the Secretary of Department of Homeland Security, has yet to be released, nearly six months after its completion.

Recommendations

Muslim Advocates urges Congress to enact legislation to:

1. Ban racial, ethnic, religious and national origin profiling by federal, state and local law enforcement;
2. Require training of federal, state and local law enforcement, to ensure that discriminatory policing does not take place;
3. Establish an effective redress mechanism for those aggrieved, to ensure accountability;
4. Require federal, state and local law enforcement to collect data on stops, interviews and all investigatory activities to allow the agency and the public to monitor whether racial, ethnic and religious profiling is taking place; and
5. Require the Attorney General to report to Congress on the implementation of such a law.

Legislation previously introduced by Congressman Conyers and Senator Feingold, the End Racial Profiling Act (ERPA), is a good place to start. ERPA should contain language that explicitly prohibits profiling in the types of law enforcement activities described above, specifically:

- Interviews, including FBI interviews and those by CBP agents at the border;
- Searches of persons and/or property; and
- Data collection and analysis, assessments, and predicated investigations.

ERPA should also contain a provision that requires data collection of individuals who are targeted by law enforcement activities. Such data is necessary to monitor the problem and determine whether policies, practices and training are preventing and ending racial, ethnic and religious profiling.

Conclusion

Racial, ethnic and religious profiling affects millions of Americans, including African American, Latino, Muslim, Arab and South Asian communities. Racial profiling is wrong and produces negative results. It erodes trust that the public should have in law enforcement. Simply put, racial and religious profiling is bad policing. It is time for Congress to act to ensure that all Americans, regardless of race, religion, ethnicity or national origin, are treated fairly and equally by law enforcement at the federal, state and local levels.