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**Hearing on
“Ending Racial Profiling in America”**

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Written Testimony of

Faiza Patel and Elizabeth Goitein
Co-Directors, Liberty and National Security Program

Supporting the End Racial Profiling Act (S. 1670)
and suggesting that Congress urge the U.S. Department of Justice to amend its
Guidance Regarding the Use of Race by Federal Law Enforcement Agencies.

Brennan Center for Justice *at New York University School of Law*
161 Avenue of the Americas | 12th Floor | New York, New York | 10013
<http://www.brennancenter.org>

Testimony of Faiza Patel and Elizabeth Goitein in Support of the End Racial Profiling Act

The Brennan Center for Justice at New York University School of Law (Brennan Center) submits this statement on racial and religious profiling to the U.S. Senate Judiciary Committee, Subcommittee on the Constitution, Civil Rights and Human Rights. The Brennan Center commends Chairman Durbin for his leadership in holding this crucial hearing, “Ending Racial Profiling in America,” and urges the Committee to take the necessary steps to eliminate racial and religious profiling by federal, state, and local law enforcement. Such profiling undermines our nation’s historical commitment to religious freedom and equal protection under the law and jeopardizes our counterterrorism efforts by alienating the very communities whose cooperation is most valuable in thwarting attempts to attack our country.

The Brennan Center is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice.¹ Our work ranges from racial justice in criminal law to ensuring that our counterterrorism efforts are consistent with our Constitutional values to voting rights to campaign finance reform. We use a range of tools, including scholarship, public education, and legislative and legal advocacy, to win meaningful reform.

Introduction

Our country is founded on the principle that all Americans — regardless of race, religion or ethnicity — will be treated equally by our government. Many of us, or our ancestors, came to America fleeing religious persecution and discrimination and in search of a country that would allow us to follow our consciences free from harassment. As our law enforcement agencies carry out the enormous responsibility of keeping us safe, they must do so consistent with these values and relying on the strength of our communities.

Selecting individuals for law enforcement scrutiny on the basis of race has long been recognized as both wrong and ineffective. Nonetheless, racial profiling persists and, since 9/11, has been joined by the equally invidious practice of religious profiling. In particular, evidence is mounting that law enforcement agencies deliberately target American Muslims for surveillance without any basis to suspect wrongdoing. Recent revelations about the New York City Police Department’s (NYPD) years-long operations to map and monitor the everyday lives of American Muslim communities, infiltrate mosques to keep tabs on how people are practicing their religion, and track Muslim student groups are just the most recent and egregious examples of such discrimination. Such operations are not only unfair in singling out an entire faith for enhanced scrutiny but also singularly unproductive. Terrorists come from diverse ethnic and religious backgrounds, and those who commit terrorist acts are aware of profiles and can avoid them. Instead of relying on stereotypes, our law enforcement agencies should use their limited resources to conduct smart, targeted, behavior-based investigations. And they should build strong, trusting relationships with American Muslim communities, so those communities continue cooperating with law enforcement agencies to foil terrorist plots.

¹ More information about the Brennan Center’s work can be found at <http://www.brennancenter.org>.

Racial profiling is wrong and ineffective

Racial or ethnic profiling occurs when law enforcement officers use race or ethnicity to determine whether a particular individual warrants police attention, such as a detention or search.² In the late 1990s, numerous studies established that police targeted African American and Latino communities based on race or ethnic appearance and that using race or ethnicity as a proxy for criminality was unproductive. A study of police searches on Maryland's main highway showed that even though African Americans and Latinos were vastly more likely to be stopped and searched for the drugs or other contraband, the likelihood of finding contraband was roughly the same for targeted minorities and for whites.³ More recently, an analysis of the NYPD's burgeoning stop and frisk program (more than 685,000 New Yorkers were stopped in 2011) shows that, although the individuals stopped are overwhelming African American and Latino, the "hit rate" — i.e., number of arrests resulting from stops — is actually lower for minority targets.⁴ The ineffectiveness of choosing targets on the basis of race or ethnicity has also been demonstrated in other contexts. For example, when the United States Customs Service changed its stop and search procedures to focus on race-neutral behavioral indicators, it conducted two-thirds fewer searches and tripled its hit rate.⁵

By the end of the twentieth century, national surveys showed that more than 80 percent of Americans disapproved of racial profiling.⁶ Many states enacted statutes against racial profiling, and many police departments — recognizing the inefficacy of profiling — mounted internal anti-profiling efforts.⁷ In June 2003, the United States Department of Justice issued a Policy Guidance (DOJ Guidance) prohibiting racial and ethnic profiling by federal law enforcement agencies. The DOJ Guidance stated that racial profiling by law enforcement was both wrong and ineffective:

Race-based assumptions in law enforcement perpetuate negative racial stereotypes that are harmful to our rich and diverse democracy, and materially impair our efforts to maintain a fair and just society. The use of race as the basis for law enforcement decision-making clearly has a terrible cost, both to the individuals who suffer invidious discrimination and to the Nation, whose goal of 'liberty and justice for all' recedes with every act of such discrimination."⁸

² Racial profiling does not include the use of racial or ethnic characteristics as part of a physical description of a particular person observed by police or other witnesses. Thus, the description of a suspect, which includes his or her probable race or ethnicity as reported by someone who has seen the suspect, violates no principle against racial profiling.

³ See Report of Dr. John Lamberth (plaintiff's expert), *Wilkins v. Maryland State Police, et al.*, Civil No. MJG-93-468 (D. Md. 1996).

⁴ Andrew Gelman, Jeffrey Fagan & Alex Kiss, *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. OF THE AM. STAT. ASS'N 813, 820-21 (2007). See also ELIOT SPITZER, ATTORNEY GEN. OF N.Y., THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES 111, 115, tbl. IB.2 (1999); DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (The New Press, 2002), Chapter 4, *The Hard Numbers: Why Racial Profiling Doesn't Add Up*.

⁵ Deborah A. Ramirez, Jennifer Hoopes & Tara Lai Quinlan, *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1213 (2003).

⁶ Frank Newport, *Racial Profiling Seen as Widespread, Particularly Among Young Black Men*, GALLUP, December 9, 1999, available at <http://www.gallup.com/poll/3421/racial-profiling-seen-widespread-particularly-among-young-black-men.aspx>.

⁷ The Data Resource Collection Center at Northeastern University features a current national survey of jurisdictions with anti-profiling laws. See *Background and Current Data Collection Efforts*, DATA COLLECTION RESOURCE CTR., <http://www.racialprofilinganalysis.neu.edu/background/jurisdictions.php>, (last accessed March 27, 2012).

⁸ See U.S. DEP'T OF JUSTICE, GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENICES 1 (2003), available at http://www.justice.gov/crt/about/spl/documents/guidance_on_race.pdf.

The DOJ Guidance prohibits federal agencies from considering race or ethnicity, alone or in conjunction with other factors, in routine law enforcement activities. But the Guidance contains several glaring loopholes that, along with changes to the rules governing intelligence collection by domestic law enforcement agencies, have permitted profiling to continue in certain contexts. The DOJ Guidance is deficient in three ways:

- The Guidance does not cover profiling on the basis of religion or national origin.
- The Guidance does not cover law enforcement activities relating to threats to national security or at the border.
- The Guidance regulates only federal agencies, and thus does not cover the state and local police departments.

Since 9/11, law enforcement agencies have instituted policies that target individuals for scrutiny because of their religion

Until 9/11, the public debate and consensus on racial profiling was focused almost exclusively on the profiling of African Americans and Latinos. Since the 9/11 attacks, however, the ongoing struggle to eliminate racial bias from policing has been presented with a new challenge: the systematic religious profiling of American Muslims.

In the immediate aftermath of 9/11, for instance, the FBI interviewed thousands of people from Muslim countries, often under coercive conditions.⁹ Also during this period, more than a thousand Muslims, both citizens and non-citizens, were detained — some for long periods of time and under harsh conditions — while the government determined whether they had any connection to the 9/11 attacks.¹⁰ None did.¹¹ Echoes of this initial “round-up” could be seen three years later in “Operation Front Line,” in which immigration officials interviewed more than 2,500 immigrants in an effort to stave off any potential terrorist attack around the presidential election. A substantial majority of those interviewed — 79 percent — were from countries with majority-Muslim populations.¹²

Even more troubling than these one-time operations is the extent to which broad gauge surveillance of American Muslims with no apparent links to criminal or terrorist activity has become the norm among certain federal, state, and local law enforcement agencies.

A months-long investigation by the Associated Press (AP) revealed that the NYPD has for years run a program that monitors American Muslim communities living in the tri-state (New York, New Jersey, and Connecticut) area. This surveillance appears to be based on religion, rather than any specific leads or other objective reasons to suspect wrongdoing.

⁹ See David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L.J. 1, 16 (2006).

¹⁰ See generally U.S. DEPT OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (April 2003) (hereinafter “SEPTEMBER 11 DETAINEES REPORT”), available at <http://www.justice.gov/oig/special/0306/full.pdf>.

¹¹ See CTR. FOR DEMOCRACY AND TECH., CTR. FOR AM. PROGRESS & CTR. FOR NAT’L SEC. STUDIES, STRENGTHENING AMERICA BY DEFENDING OUR LIBERTIES: AN AGENDA FOR REFORM 8 (2003), available at <http://www.cnss.org/Defending%20our%20Liberties%20report.pdf>.

¹² Eric Lichtblau, *Inquiry Targeted 2,000 Foreign Muslims in 2004*, N.Y. TIMES, Oct. 31, 2008, at A17.

Internal NYPD documents¹³ released by the AP illustrate this apparent religious based monitoring:

- The NYPD's Intelligence Division, which was established and is run by a former CIA officer, operated a "Demographics Unit." This Unit conducted a "mapping" program to identify neighborhoods with large Muslim populations.¹⁴ The NYPD's community maps included information about places like mosques, schools, gyms, restaurants, bookstores, and travel agencies. Nothing in the documents obtained by the AP suggests that the mapping program was prompted by suspicions of terrorist activity. Nor do the documents include information that suggests that the police officers — who no doubt spent weeks conducting this mapping — came across anything related to terrorism. Nonetheless, the NYPD sent undercover agents, called "rakers," to report on the American Muslim patrons of cafes, clubs, barber shops, and other business establishments identified through the mapping program.¹⁵ Demographics Unit documents released by the AP show that the NYPD kept detailed information about the everyday lives of American Muslims whose families came to this country from Albania, Egypt, Morocco, and Syria.¹⁶
- The NYPD's mapping activities were not confined to New York City. They extended to other parts of the state, as well as to New Jersey.¹⁷ For example, the AP made public a sixty-page NYPD report on Newark, New Jersey, which states that the NYPD's goal there was to "identify the existence of population centers and business districts of communities of interest" — i.e., where American Muslims lived and the location of businesses that they owned and frequented.¹⁸ Another goal of the report was to identify "Locations of Concern," which are described as "locations [that] provide the maximum ability to assess the general opinions and the general activity of these communities"¹⁹ — i.e., what American Muslims were saying and doing.
- The NYPD's surveillance specifically targeted American Muslim places of worship. The police produced an analytical report on every mosque within 100 miles of New York City²⁰ and employed "mosque crawlers" to infiltrate mosques and monitor sermons in city mosques.²¹ These mosque crawlers, who were either confidential informants or undercover officers, reported back to the NYPD about what people in the mosques were saying. For example, when protests flared across the Muslim world in response to a Danish newspaper's publication of cartoons depicting the Prophet Mohammed, NYPD agents gathered information about how religious leaders and those who attended prayers at mosques reacted. They noted the names of the various Imams and worshippers who supported a boycott of Danish goods, those who deplored both the cartoons and

¹³ All NYPD documents released by the AP are found at *Highlights of AP's Probe Into NYPD Intelligence Operations*, ASSOCIATED PRESS, <http://ap.org/media-center/nypd/investigation> (last accessed March 27, 2012).

¹⁴ See Adam Goldman & Matt Apuzzo, *Inside the Spy Unit that NYPD Says Doesn't Exist*, ASSOCIATED PRESS, Aug. 31, 2011, available at <http://ap.org/Content/AP-In-The-News/2011/Inside-the-spy-unit-that-NYPD-says-doesnt-exist>; Matt Apuzzo, Eileen Sullivan & Adam Goldman, *NYPD Eyed U.S. Citizens in Intel Effort*, ASSOCIATED PRESS, Sept. 22, 2011, available at <http://ap.org/Content/AP-In-The-News/2011/NYPD-eyed-US-citizens-in-intel-effort>.

¹⁵ See *id.*

¹⁶ *Highlights, supra* note 13.

¹⁷ Adam Goldman & Matt Apuzzo, *NYPD Built Secret Files on Mosques Outside NY*, ASSOCIATED PRESS, Feb. 22, 2012, available at <http://ap.org/Content/AP-In-The-News/2012/NYPD-built-secret-files-on-mosques-outside-NY>.

¹⁸ *Highlights, supra* note 13.

¹⁹ *Id.*

²⁰ See Adam Goldman & Matt Apuzzo, *With CIA Help, NYPD Moves Covertly in Muslim Areas*, ASSOCIATED PRESS, Aug. 24, 2011, available at <http://ap.org/Content/AP-In-The-News/2011/With-CIA-help-NYPD-moves-covertly-in-Muslim-areas>.

²¹ See *Highlights, supra* note 13.

the violence they had precipitated, and those who sought a permit for a planned protest.²² In other words, the NYPD gathered information on core First Amendment protected speech taking place inside a house of worship and with no apparent criminal or terrorist nexus. In New Jersey, the AP documented an NYPD plan to conduct surveillance at a mosque before and during Friday prayers and to “record license plates and capture video and photographic record of those in attendance.”²³

- NYPD officers infiltrated not only Muslim student associations at college campuses in New York City but also throughout the Northeast. A document discovered by the AP shows that an NYPD officer was assigned to provide the Police Commissioner with daily reports on the “websites, blogs and Forums” of Muslim student associations at Albany University, Baruch College, Brooklyn College, Clarkson University, Columbia University, Stony Brook, LaGuardia Community College, New York University, the University of Pennsylvania, Rutgers, various campuses of the State University of New York, Syracuse University, Queens College, and Yale University.²⁴ In one case, an agent attended a Muslim student association’s whitewater rafting trip and reported back on the number of times students had prayed.²⁵

Unfortunately, the NYPD is not alone in its efforts to map American Muslim communities. The FBI has carried out similar programs. The American Civil Liberties Union has documented how FBI analysts have used crude stereotypes regarding the types of crimes committed by different racial and ethnic groups and then collected demographic data to map where those groups live. For example, a memorandum entitled “Detroit Domain Management” asserts that “[b]ecause Michigan has a large Middle-Eastern and Muslim population, it is prime territory for attempted radicalization and recruitment” by State Department-designated terrorist groups originating in the Middle East and Southeast Asia. Based on this overbroad and unsubstantiated assertion of a threat, the Detroit FBI sought to open a “Domain Assessment” in Michigan “for the purpose of collecting information and evaluating the threat.”²⁶

Like the NYPD, the FBI has not limited its scrutiny of American Muslims to “mapping,” and has on several occasions assigned informants to infiltrate groups of mosques and report on what they heard from congregants. For instance, in the case of “the Newburgh Four,” the FBI’s informant testified that he was sent to several mosques to find out what the Muslim community was saying and doing, rather than to uncover particular criminal or terrorist activity.²⁷ His assignment was to “listen [and] talk to ... the attendees of the mosque” and report back to his FBI handler “[i]f somebody was expressing radical views or extreme views.”²⁸ Another informant has claimed in a civil case against the FBI that he infiltrated several mosques and Islamic centers in Orange, Los Angeles, and San Bernardino counties with an assignment similar to the one given to the Newburgh Four informant.²⁹ Documents obtained through Freedom of Information Act litigation in 2009 show that the FBI’s Southern California office kept tabs on a variety of lawful First Amendment activities of American Muslims, including the subject and tenor of sermons given

²² *Highlights*, *supra* note 13.

²³ NYPD Surveillance Report on Majid Omar, obtained by the Associated Press, http://hosted.ap.org/specials/interactives/documents/nypd/nypd_omar.pdf.

²⁴ Chris Hawley, *NYPD Monitored Muslim Students All Over Northeast*, ASSOCIATED PRESS, Feb. 18, 2012, *available at* <http://ap.org/Content/AP-In-The-News/2012/NYPD-monitored-Muslim-students-all-over-Northeast>.

²⁵ *See id.*

²⁶ Memorandum on Detroit Domain Management, FBI (July 6, 2009), *available at* <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011609.pdf>.

²⁷ Transcript of Record at 668, *United States v. Cromitie*, No. 09-558 (S.D.N.Y. Oct. 18, 2010).

²⁸ *Id.* at 669, 674, 2452.

²⁹ Second Amended Complaint at 24-25, *Monteilh v. FBI*, No. 8:2010-cv-00102 (C.D. Cal. Sept. 2, 2010).

at mosques.³⁰ These activities form the basis of a federal class action lawsuit against the FBI for infiltrating mosques in Southern California and targeting Muslim Americans for surveillance solely because of their religion.³¹

Another example of religious profiling by federal law enforcement officials can be seen at the border, where Muslims who reside in the United States report being subjected to lengthy and intrusive screening interviews — and occasionally, searches of their laptops or other electronic devices — as they return from overseas travel. Questions asked by customs and immigration enforcement officials have included, “What is your religion?” “What mosque do you attend?” “How often do you pray?” “Why did you convert to Islam?” “Do you recruit people for Islam?” and “Do you think [American Muslim religious scholar] is moderate, or an extremist?”³²

This type of institutionalized religious profiling draws upon the explicit connection some law enforcement agencies, particularly the NYPD and the FBI, have drawn between religiosity and terrorism.

The Brennan Center’s report, *Rethinking Radicalization*, demonstrates how unsupported and simplistic theories about how people turn to terrorism support law enforcement’s monitoring of American Muslim communities.³³ These theories suggest, contrary to social science research, that there is a sort of “religious conveyor belt” that leads American Muslims who harbor grievances against our society or who suffer from a personal crisis to become more religious, then to adopt “radical” beliefs, and, finally, to commit acts of terrorism. Both the FBI and the NYPD apparently subscribe to these theories.³⁴ They posit that each step along this continuum is identifiable by law enforcement officials who know how to recognize the signs of incipient terrorism. The hallmarks of this process, which is frequently dubbed “radicalization,” are by and large expressions of the Muslim faith that are likely to be found in millions of American Muslims. In other words, these theories treat religiosity in Muslims as signs of incipient terrorism.

For example, one of the “indicators” of extremism identified by the FBI is “[f]requent attendance at a mosque or a prayer group.”³⁵ A Gallup Study published last year shows that 44 percent of American Muslims attend a mosque at least once a week.³⁶ If we were to apply the FBI’s theory, this would mean that almost half of all American Muslims were on the road to becoming terrorists and should be closely watched. FBI field offices use this theory as a basis for collecting information about law-abiding American Muslims. At a 2010 presentation by the FBI’s Houston Division to Muslim community leaders, agents asked attendees to report on community members who were “taking extreme positions” and “trying to enforce a limited understanding of religion.” An example of such behavior, according to the agents, was if someone

³⁰ Records Mgmt. Div., FBI, FOI/PA No. 1071083-001, Response to Freedom of Information Act Request by American Civil Liberties Union for Surveillance Records ACLU-25.

³¹ See Complaint, *Fazaga v. FBI*, No. 11-00301 (C.D. Cal. Feb. 22, 2011), available at <http://www.courthousenews.com/2011/02/24/FBI.pdf>.

³² See Muslim Advocates, *Unreasonable Intrusions: Investigating the Politics, Faith, and Finances of Americans Returning Home* (April 2009), available at http://www.muslimadvocates.org/documents/Unreasonable_Intrusions_2009.pdf.

³³ FAIZA PATEL, *RETHINKING RADICALIZATION* (2011), available at <http://www.brennancenter.org/page/-RethinkingRadicalization.pdf>.

³⁴ Carol Dyer et al., *Countering Violent Extremism*, FBI L. ENFORCEMENT BULL., Dec. 2007, at 5, available at <http://www.fbi.gov/stats-services/publications/law-enforcement-bulletin/2007-pdfs/dec07leb.pdf>; MITCHELL D. SILBER & ARVIN BHATT, NYPD INTELLIGENCE DIV., *RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT* (revised 2009), available at http://www.nyc.gov/html/nypd/downloads/pdf/public_information/NYPD_Report-Radicalization_in_the_West.pdf.

³⁵ FBI COUNTERTERRORISM DIV., *THE RADICALIZATION PROCESS: FROM CONVERSION TO JIHAD* (2006), available at <http://cryptome.org/fbi-jihad.pdf>.

³⁶ *Religious Perceptions in America: With an In-Depth Analysis of U.S. Attitudes Toward Muslims and Islam*, GALLUP CTR. FOR MUSLIM STUDIES, at 45, available at <http://www.gallup.com/se/148805/Muslim-Americans-Faith-Freedom-Future.aspx>.

asked women in the congregation to wear a *hijab* (head scarf) or veil.³⁷ Muslims frequently cover their heads in mosques, and 60 percent of American Muslim women wear headscarves some or all the time.³⁸

The NYPD targets religious behavior even more explicitly. For example, its 2007 report on homegrown terrorism identifies a variety of normal Muslim religious behaviors, such as wearing traditional Islamic clothing, growing a beard, and giving up cigarettes and drinking, as potential indicators of a person who is on the path to becoming a terrorist.³⁹

By equating these expressions of religious belief with signs of radicalization to terrorism, the FBI and the NYPD perpetuate the view that the Islamic faith is intrinsically connected to terrorism.

At the same time, the press has exposed law enforcement training materials that portray Islam and/or Muslims as inherently violent and suggest that the threat to the United States is not limited to terrorism but rather comes from Islam itself. In 2011, materials from FBI training sessions came to light that included a range of inaccurate and highly offensive pronouncements, including statements that “main stream” [sic] American Muslims are likely to be terrorist sympathizers, that the Prophet Mohammed was a “cult leader,” that the Islamic practice of giving charity is no more than a “funding mechanism for combat,” that “[a]ny war against non-believers is justified” under Muslim law, and that a “moderating process cannot happen if the Koran continues to be regarded as the unalterable word of Allah.”⁴⁰ The materials even included a chart that purported to graphically represent the connection between adherence to Islam and violence.

The DOJ was also found to have used training materials that warn of a “Civilizational Jihad” stretching back to the dawn of Islam and waged today in the United States by “civilians, juries, lawyers, media, academia and charities” who threaten “our values.”⁴² These revelations led the Department to review training materials and the White House to order a government-wide review of counterterrorism training late last year. The FBI has indicated that its review led to the purging of some 700 pages of training materials,⁴³ but the Bureau has not responded to requests to also review the “radicalization” intelligence products that display the same biases.⁴⁴

Training materials used by local police departments also display strong anti-Muslim biases. Most recently, it was revealed that the NYPD had shown the film *The Third Jihad* during training. Like the FBI and DOJ training materials described above, *The Third Jihad* carries the message that the real enemy of the United States is Islam and describes representative Muslim groups as engaged in a stealth war against American democracy. Prominent former government officials, as well as New York’s Police Commissioner, Raymond Kelly, are featured in the film, lending an imprimatur of credibility to its outlandish claims. In January 2011, when reports of the NYPD’s use of *The Third Jihad* first emerged, the NYPD claimed that the film had been

³⁷ *FBI Meet Houston Community Leaders*, MUSLIM OBSERVER, May 20, 2010, available at <http://muslimmedianetwork.com/mmn/?p=6225>.

³⁸ PEW RESEARCH CTR., MUSLIM AMERICANS: NO SIGNS OF GROWTH IN ALIENATION OR SUPPORT FOR EXTREMISM (August 2011), available at <http://www.people-press.org/files/2011/08/muslim-american-report.pdf>.

³⁹ SILBER, RADICALIZATION IN THE WEST, *supra* note 34, at 38-39.

⁴⁰ See Spencer Ackerman, *FBI Teaches Agents: “Mainstream” Muslims Are “Violent, Radical,”* WIRED, Sept. 14, 2011, available at <http://www.wired.com/dangerroom/2011/09/fbi-muslims-radical/all/1>.

⁴² Spencer Ackerman, *Justice Department Official: Muslim ‘Juries’ Threaten ‘Our Values,’* WIRED, Oct. 5, 2011, available at <http://www.wired.com/dangerroom/2011/10/islamophobia-beyond-fbi/all/1>.

⁴³ Spencer Ackerman, *FBI Purges Hundreds of Terrorism Documents in Islamophobia Probe,* WIRED, Feb. 15, 2012, available at <http://www.wired.com/dangerroom/2012/02/hundreds-fbi-documents-muslims/>.

⁴⁴ Letter from Am. Civil Liberties Union, et al., to Robert S. Mueller, III, Dir., Fed. Bureau of Investigation (Oct. 4, 2011), available at http://www.aclu.org/files/assets/sign_on_letter_to_dir_mueller_re_radicalization_report_10_4_11.pdf.

shown once or twice by mistake and that the clip of the Police Commissioner was lifted from old footage. A year later, documents obtained by the Brennan Center through New York's Freedom of Information Law showed that the film had been screened over the course of at least three months to at least 1,500 officers.⁴⁵ And the makers of the film stepped forward to reveal that the Police Commissioner had in fact participated in the making of the film. While the Commissioner has apologized, there is no indication that the NYPD is reviewing its training materials to weed out this type of material or is taking any steps to ensure that only appropriate materials are used in its trainings going forward.

In sum, since 9/11, many federal and local law enforcement agencies have embraced the assumption that expressions of religiosity among American Muslims may indicate a propensity to terrorism. This has resulted in enhanced scrutiny of American Muslim communities by local and federal law enforcement officials based on their religion.

Policing on the basis of religion burdens our ability to freely exercise our faith and is counterproductive

Profiling on the basis of an American's faith is as pernicious and ineffective as profiling on the basis of race or ethnicity. Religious profiling assumes that a person's exercise of his fundamental right to practice his religion is a basis for law enforcement scrutiny even where there is no suspicion of wrongdoing. The chilling effect of such enhanced scrutiny is reflected in American Muslims' cutting back on contributions to religious charities,⁴⁶ refraining from joining mosques or community organizations,⁴⁷ and avoiding political gatherings or conversations about politics (especially U.S. foreign policy).⁴⁸ In other words, the religious bias displayed by some law enforcement policies prevents American Muslims from freely adhering to the tenets of their faith and from expressing views about issues that are of concern to them.

Policing based on religion is not only inconsistent with our Constitutional values but also less effective than behavior-based policing. As noted earlier, numerous studies have found that law enforcement action based on racial or ethnic characteristics is less effective than law enforcement that focuses on potentially criminal behavior. Religious profiling appears to be equally ineffective. The mass interviews and detention of Muslims after 9/11 failed to turn up a single known connection to the 9/11 attacks; similarly, no terrorism or national security charges resulted from the mass interviews of Muslim immigrants leading up to the 2004 election.⁴⁹ There is no evidence that the NYPD's widespread mosque infiltration has uncovered any existing terrorist plots,⁵⁰ and indeed, senior CIA officials have described a similar program of mosque infiltration that the CIA undertook overseas as ineffective.⁵¹

⁴⁵ See Michael Powell, *In Police Training, A Dark Film on U.S. Muslims*, N.Y. TIMES, Jan. 23, 2012, at A1, available at <http://www.nytimes.com/2012/01/24/nyregion/in-police-training-a-dark-film-on-us-muslims.html?pagewanted=all>.

⁴⁶ See AM. CIVIL LIBERTIES UNION, BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE "WAR ON TERRORISM FINANCING" 97-100 (2009), available at <http://www.aclu.org/pdfs/humanrights/blockingfaith.pdf>.

⁴⁷ Tom Tyler et al., *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365, 396.

⁴⁸ *Id.* at 396; NICOLE J. HENDERSON ET AL., VERA INST. OF JUSTICE, LAW ENFORCEMENT AND ARAB-AMERICAN COMMUNITY RELATIONS AFTER SEPTEMBER 11, 2001: ENGAGEMENT IN A TIME OF UNCERTAINTY (2006), available at <http://www.vera.org/content/law-enforcement-and-arab-american-community-relations-after-september-11-2001-engagement-tim>.

⁴⁹ See Lichtblau, *supra* note 12.

⁵⁰ Seth Freed Wessler, *A Closer Look at Ray Kelly's Multi-Billion Dollar Army of Spies*, COLORLINES, Mar. 1, 2012, available at http://colorlines.com/archives/2012/03/ray_kelly_multi-billion_dollar_army_profiling_spying_muslims.html.

⁵¹ See Matt Apuzzo, Adam Goldman & Eileen Sullivan, *NYPD Spying Program Yielded Only Mixed Results*, ASSOCIATED PRESS, Dec. 23, 2011, available at <http://ap.org/Content/AP-In-The-News/2011/NYPD-spying-programs-yielded-only-mixed-results>.

One widely acknowledged harm that stems from racial and ethnic profiling is that profiled groups come to resent and fear the police in their communities.⁵² The same holds true for religious profiling, and there is ample evidence that the above activities have triggered — as one national Muslim organization testified before Congress — “fear and suspicion within the Muslim community toward law enforcement.”⁵³ A representative of another major American Muslim group testified that “[t]he perception of the community has become one where they believe they are viewed as suspect rather than partner in the War on Terror, and that their civil liberties are ‘justifiably’ sacrificed upon the decisions of federal agents.”⁵⁴ A 2008 Vera Institute report on the effect of post-9/11 policing on sixteen Arab-American communities across the United States found that some Arab-American communities “were more afraid of law enforcement agencies — especially federal law enforcement agencies — than they were of acts of hate or violence, despite an increase in hate crimes.”⁵⁵ FBI officials themselves acknowledge that American Muslim communities “almost unanimously feel that government agents treat them as suspects and view all Muslims as extremists.”⁵⁶

American Muslims’ perception that law enforcement agencies treat them as a suspect community may lead them to become less cooperative and thus jeopardize our counterterrorism efforts. American Muslims have an exemplary record of cooperation with law enforcement: they have provided information on about 35 percent of the terrorist plots that have been foiled in the past decade.⁵⁷ But a recent empirical study of American Muslims in the New York area found that willingness to cooperate with law enforcement was closely tied to perceptions about whether law enforcement’s efforts were carried out in a just and legitimate manner. Today, in light of Muslim communities’ growing apprehension about law enforcement, community leaders report that individuals are “more reluctant to call the authorities when needed.”⁵⁸ A prominent Muslim organization advised community members not to speak with law enforcement attorneys without the presence or advice of an attorney,⁵⁹ and a national coalition of American Muslim organizations indicated that it would no longer cooperate with the FBI if the FBI continued surveilling mosques.⁶⁰

⁵² David A. Harris, *The Stories, the Statistics, and the Law: Why ‘Driving While Black’ Matters*, 84 MINN. L.R. 265, 289-99 (1999).

⁵³ See *Racial Profiling and the Use of Suspect Classifications in Law Enforcement Policy: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 62 (2010) (written testimony of Farhana Khera, President and Exec. Dir., Muslim Advocates) (hereinafter “Khera June 2010 Testimony”).

⁵⁴ *Radicalization, Information Sharing and Community Outreach: Protecting the Homeland from Homegrown Terror: Hearing before the Subcomm. on Intelligence, Info. Sharing and Terrorism Risk Assessment of the H. Comm. on Homeland Sec.*, 110th Cong. 6 (2007) (statement for the record of Sireen Sawaf, Gov’t Relations Dir., S. Cal. Muslim Pub. Affairs Council), available at <http://hsc-democrats.house.gov/SiteDocuments/20070405120720-29895.pdf>.

⁵⁵ NICOLE J. HENDERSON ET AL., U.S. DEP’T OF JUSTICE, *POLICING IN ARAB-AMERICAN COMMUNITIES AFTER SEPTEMBER 11* ii (2008), available at <http://www.ncjrs.gov/pdffiles1/nij/221706.pdf>. For the full study, see NICOLE J. HENDERSON ET AL., *supra* note 48.

⁵⁶ Dyer et al., *supra* note 34, at 8.

⁵⁷ See, e.g., CHARLES KURZMAN, TRIANGLE CTR. ON TERRORISM AND HOMELAND SEC., *MUSLIM-AMERICAN TERRORISM SINCE 9/11: AN ACCOUNTING* 7 (2011), available at http://sanford.duke.edu/centers/tcths/about/documents/Kurzman_Muslim-American_Terrorism_Since_911_An_Accounting.pdf; KEVIN STROM ET AL., INST. FOR HOMELAND SEC. SOLUTIONS, *BUILDING ON CLUES: EXAMINING SUCCESSES AND FAILURES IN DETECTING U.S. TERRORIST PLOTS, 1999-2009* 19 (2010), available at https://www.ihssnc.org/portals/0/Building_on_Clues_Strom.pdf.

⁵⁸ Khera June 2010 Testimony, *supra* note 53.

⁵⁹ See, e.g., Muslim Advocates, *Urgent Community Alert: Seek Legal Advice Before Talking to the FBI*, available at http://www.muslimadvocates.org/FBI_IVU_COMMUNITY%20ALERT.pdf; see also Council on American-Islamic Relations Action Ctr., *Reports of FBI Visits Prompt Reminder of Legal Rights*, May 21, 2010, available at http://www.cair-ny.org/content/?content_id=279&PHPSESSID=a3pojgfokvmdfnl6odqdtng2; *Know Your Rights: If Federal Law Enforcement Contacts You*, in AM. MUSLIM CIVIC POCKET GUIDE (Council on American-Islamic Relations ed., 2010), available at <http://www.cair.com/CivilRights/KnowYourRights.aspx#9>.

⁶⁰ Press Release, Council on American-Islamic Relations & Ctr. for Constitutional Rights, *‘Newburgh Four’ Raises Concern of FBI Tactics in Terror Cases*, Oct. 21, 2010, available at http://www.cair-ny.org/content/?content_id=407.

This dynamic is also apparent in New York and New Jersey where, following the AP's revelations of the NYPD's blanket surveillance of American Muslim New Yorkers, prominent Muslim religious leaders boycotted the Mayor's traditional New Year's interfaith breakfast and have declined to meet with the Commissioner.⁶¹ The top FBI official in New Jersey observed, "We're starting to see cooperation pulled back. People are concerned that they're being followed, they're concerned that they can't trust law enforcement, and it's having a negative impact."⁶²

Religious Profiling Perpetuates Negative Stereotypes About American Muslims

The DOJ Guidance on racial profiling notes that "[r]ace-based assumptions in law enforcement perpetuate negative racial stereotypes that are harmful to our rich and diverse democracy, and materially impair our efforts to maintain a fair and just society." Religious profiling similarly perpetuates negative stereotypes about Muslims, and those stereotypes are reflected in the how the American public views fellow Americans who follow the Muslim faith. A 2010 survey by the Public Religion Research Institute found that 45 percent of Americans believe that the values of Islam are at odds with the American way of life.⁶³ Gallup reported that a majority of Americans say that their opinion of Islam is unfavorable.⁶⁴ This sentiment manifests itself in increasing numbers of hate crimes against Muslims, opposition to building mosques, and the spurious anti-Sharia movement.

Last month a thirty-two year old Iraqi immigrant and mother of five, Shaima Alawadi, was found lying unconscious in a pool of her own blood. While the perpetrator has not yet been identified, it is reported that lying beside her body was a note saying, "Go back to your own country. You're a terrorist."⁶⁵ In the midst of the controversy over building a mosque near the location of the World Trade Center towers in New York, a cab driver responded to his passenger's question by identifying himself as a Muslim. He was stabbed repeatedly by the passenger.⁶⁶ These are not just isolated instances. The FBI reports that between 2001 and 2010 there were more than 1,700 incidents of hate crimes based on "anti-Islamic" bias.⁶⁷

Another sign of the mounting Islamophobia in our country is the rising opposition to the building of mosques and Islamic community centers. We are all familiar with the public opposition to the so-called "Park 51 proposal," involving the establishment of an Islamic center two blocks from the former location of the World Trade Center towers. That is unfortunately not an isolated example. Similar protests, if on a smaller scale, have attended the building of mosques across the country, and some cities and towns have even changed their laws to prevent mosques from being built.⁶⁸ In many cases, the opposition is galvanized

⁶¹ Kate Taylor, *14 Muslim Leaders Plan Boycott of Breakfast With Mayor*, N.Y. TIMES, Dec. 28, 2011, at A23, available at <http://www.nytimes.com/2011/12/29/nyregion/14-muslim-leaders-plan-boycott-of-bloomberg-interfaith-breakfast.html>.

⁶² Samantha Henry, *NJ FBI: NYPD Monitoring Damaged Public Trust*, ASSOCIATED PRESS, Mar. 7, 2012, available at <http://ap.org/Content/AP-In-The-News/2012/NJ-FBI-NYPD-monitoring-damaged-public-trust>.

⁶³ *Old Alignment, Emerging Fault Lines: Religion in the 2010 Election and Beyond*, Public Religion Research Institute, slide 19, 2010, available at <http://www.publicreligion.org.research/?id=294>.

⁶⁴ Gallup Ctr. for Muslim Studies *supra* note 31, at 7.

⁶⁵ Nina Burleigh, *Shaima Alawadi's Murder: A Hate Crime Against Women?*, TIME, Apr. 10, 2012, available at <http://ideas.time.com/2012/04/10/shaima-alawadis-murder-a-hate-crime-against-women/?xid=gonewsedit>.

⁶⁶ N.R. Kleinfeld, *Rider Asks If Cabby Is Muslim, Then Stabs Him*, N.Y. TIMES, Aug. 25, 2010, at A19.

⁶⁷ The FBI publishes yearly reports on hate crimes in the United States. These reports are often criticized for under-reporting the actual number of hate crimes in the United States, so the number in text is likely low. The reports can be found at *Hate Crimes*, FBI, http://www.fbi.gov/about-us/investigate/civilrights/hate_crimes.

⁶⁸ See, e.g., Editorial, *No Room for Tolerance*, N.Y. TIMES, Sept. 19, 2011, at A26, available at <http://www.nytimes.com/2011/09/19/opinion/no-room-for-tolerance.html>; Am. Civil Liberties Union, *Map – Nationwide Anti-Mosque Activity*, <http://www.aclu.org/map-nationwide-anti-mosque-activity> (last accessed Mar. 27, 2012).

by anti-Muslim groups that have been classified as hate groups by the Southern Poverty Law Center, and objections center on fears of Islam and terrorism.⁶⁹

Yet another sign of Islamophobia is the growing fear of Sharia, or Islamic, law. State and local lawmakers have put forward legislation to prohibit courts from considering Sharia, and some proposed laws would go so far as to treat groups that practice Sharia as terrorists, by criminalizing the provision of “material support” to such groups.⁷⁰ While these efforts have mostly been beaten back through lawsuits and organized opposition (including from the business community), the anti-Sharia movement—and the anti-Muslim bias that it represents—remains troublingly strong in our country.

In short, religious profiling creates the same injustices and harms that are generated by racial and ethnic profiling. It burdens American Muslims’ fundamental right to practice their religion without unwarranted government scrutiny. Religious profiling is ineffective in preventing criminal and terrorist activity. It may be counterproductive because it breeds resentment among Muslim communities and therefore discourages their cooperation with law enforcement. Finally, it perpetuates negative stereotypes about Muslims and thus feeds into a poisonous dynamic of bias and intolerance.

Recommendations

The Brennan Center is heartened by the Subcommittee’s leadership in holding this hearing and we are grateful for the opportunity to present our position on the unjust and counterproductive practice of racial profiling. We urge Congress to move swiftly and take concrete actions to prohibit discriminatory policing at the federal, state, and local level. In particular, we recommend that

- the Judiciary Committee move promptly to report out the End Racial Profiling Act (S. 1670), which would institute a federal ban on profiling based on race, religion, ethnicity, and national origin at the federal, state, and local levels;
- and the Subcommittee urge the Department of Justice to amend its 2003 Guidance Regarding the Use of Race by Federal Law Enforcement Agencies to include 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.

Thank you again for this opportunity to express the views of the Brennan Center for Justice at New York University School of Law on this critical issue.

⁶⁹ Ben Forer, *Hate Groups on the Rise in U.S., Report Says*, ABC NEWS, Mar. 8, 2012, *available at* <http://abcnews.go.com/blogs/headlines/2012/03/hate-groups-on-the-rise-in-u-s-report-says/>; Mark Potok, *The ‘Patriot’ Movement Explodes*, SOUTHERN POVERTY LAW CTR. INTELLIGENCE REPORT, Spring 2012, *available at* <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/spring/the-year-in-hate-and-extremism>.

⁷⁰ See Bob Smietana, *Tennessee Bill Would Jail Shariah Followers*, USA TODAY, Feb. 23, 2011, *available at* http://www.usatoday.com/news/nation/2011-02-23-tennessee-law-shariah_N.htm; Omar Sacirbey, *Anti-Shariah Movement Loses Steam in State Legislatures*, HUFFINGTON POST, Mar. 25, 2012, *available at* http://www.huffingtonpost.com/2012/03/25/anti-shariah-movement-loses-steam_n_1374083.html.