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Jo Ann Jenkins

April 28, 2015

Deputy Commissioner Kevin K. McAleenan
U.S. Customs and Border Protection
1300 Pennsylvania Avenue NW
Washington, DC 20229

Re: Sample Training Scenarios for U.S. Customs and Border Protection that suggest impermissible and permissible use of certain characteristics by Office of Field Operations and Border Patrol

Dear Deputy Commissioner McAleenan:

We are writing to share possible scenarios of impermissible and permissible use of certain characteristics in both Office of Field Operations ("OFO") and Border Patrol activities. We believe you have an opportunity for CBP to craft guidelines that adequately advance the agency's mission without engaging in discriminatory profiling. As CBP continues to assess how the Department of Justice's December 2014 Guidance applies to its activities and seeks to update its internal guidance and training materials, we felt it important to provide a concrete definition of discriminatory profiling and provide examples of permissible and impermissible use of characteristics.

"Racial Profiling" refers to "the practice of a law enforcement agent or agency relying, to any degree, on race, gender, ethnicity, national origin, religion, sexual identity, or gender identity in selecting which individual to subject to routine or spontaneous investigatory activities or in deciding upon the scope and substance of law enforcement activity following the initial investigatory procedure, except when there is trustworthy information, relevant to the locality and timeframe, that links a person of a particular race, ethnicity, national origin, or religion to an identified criminal incident or scheme."

The following scenarios represent examples to help ensure CBP officers and agents do not engage in racial profiling. OFO and Border Patrol should not refer persons to additional and/or secondary screening in these circumstances absent reason(s) to do so independent of their protected characteristics.

Impermissible Use of Race, Ethnicity, Religion, or National Origin by Border Patrol

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- 1) A Border Patrol agent's personal experience from ten years on the job is that 95% of undocumented immigrants she apprehends are Hispanic. She therefore asks people she perceives as Latino/a more questions than white motorists or passengers when they drive through a checkpoint or she encounters them on the street. Doing so is impermissible because a law enforcement officer's stereotypical beliefs, even when based on experience or intuition, never provide a reasonable basis to undertake actions such as stops, searches, and other investigation or screening activities.
- 2) A Greyhound bus passes through a Border Patrol checkpoint and two agents board to ask passengers about their immigration status. The bus is full and there are other buses lined up behind it. To save time, the agents decide to focus their questioning on Spanish-speaking persons. Doing so is impermissible because it is based on a generalized assumption that Spanish speakers are more likely to be undocumented. Instead, the agents should ask all passengers the same initial question(s) and then, if necessary, focus on particular passengers based on the content of their answers and/or documents.
- 3) A Border Patrol agent on roving patrol pulls over a vehicle in part because its driver appears to be Latino/a. Although there are other, conduct-based reasons the agent observed for pulling over the vehicle, he would not have stopped it if the driver appeared white. This is impermissible because the agent has applied unequal treatment to the driver without any reasonable suspicion of an immigration violation. The use of skin color in routine law enforcement sends a message that those who are not white enjoy a lesser degree of constitutional protection—that they are assumed to be undocumented first and individuals second.
- 4) Border Patrol agents position their vehicles at the only entrance to a neighborhood predominantly occupied by people of a single race, and near a church known to be attended by a particular ethnic group. The choice of locations was not limited to specific, circumscribed places where violations like smuggling had recently been documented to occur with unusual regularity, but resulted from the general assumption that more undocumented people live in that neighborhood and attend that church because of its racial or ethnic composition. This positioning is improper because it is based on generalized stereotypes. Moreover, if this positioning were properly based on valid, documented trends, it would still not justify making *stops* based in part on race or ethnicity without individualized suspicion of criminal or immigration violations.
- 5) Border Patrol is contacted by a local law enforcement officer who pulled over a motorist for failing to use his turn signal. The officer called based on the motorist's Spanish-accented English. Border Patrol should not respond to this call because it is based on a broad profile that covers many lawful immigrants and U.S. citizens. CBP should not

engage in law enforcement activities that arise from impermissible profiling by another federal, state, or local agency.

Impermissible Use of Race, Ethnicity, Religion, or National Origin at Ports of Entry

- 1) A U.S. lawful permanent resident of apparent Arab descent seeks to enter the United States at a U.S.-Canada border crossing and presents the CBP officer at the port of entry with proof of his admissibility. Noting the individual's apparent Arab ethnicity, and despite the absence of any reasonable suspicion of wrongdoing, the officer redirects the individual for secondary inspection, where another CBP officer asks him questions about his religious beliefs and practices, including whether he attends a mosque, how often, and whether he is Shi'a or Sunni.

The CBP officers impermissibly considered the individual's race or ethnicity, and his assumed Muslim faith. The first officer relied on the individual's apparent ethnicity in determining that he should be subjected to additional questioning and searches, and the second officer questioned the individual about his protected religious beliefs and practices—subjects that are wholly irrelevant to whether the individual is admissible and/or poses a security threat.

- 2) An African-American girl wearing a hijab and her classmate, a white American boy with a beard and a kufi, are at Toronto Pearson International Airport in a school group that is returning home to New York City. The other students are all white and, in the eyes of an CBP officer, not apparently Muslim. The CBP officer takes the girl in the hijab and the boy with the beard aside for questioning but does not question any of the other classmates. The officer's conduct is impermissible. CBP officers should not make determinations about whom to subject to additional questioning on the basis of perceived ethnic or religious identity.
- 3) At a DHS-organized training, CBP officers are briefed on the current threat to the United States posed by ISIS, and the officers are informed that one particular city in Syria is a hotbed for ISIS activity. Upon returning to his post, one CBP officer interrogates all male travelers between 16 and 45 who appear to be of Arab descent—not other travelers—who are returning from or who passed through that city. The CBP officer's conduct is impermissible because he subjected travelers to additional screening based on national origin and perceived ethnicity, without regard to specific threat-based indicators.
- 4) CBP officers examine the passenger manifest of an arriving international flight before monitoring the passengers as they disembark. Noting that the manifest includes several passengers with Arabic names, the officers single out those passengers as they leave the jetway and briefly ask them questions about their countries of origin and destinations inside the United States. The officers improperly based their decisions about whom they

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questioned on the travelers' ethnic heritage, and treated those travelers differently without a valid, admissibility-related basis. The fact that the questions were brief and routine does not render the differential treatment of those travelers permissible.

The following scenarios and circumstances, each taken as a whole, could guide CBP officers about when additional questioning and/or screening may occur without inappropriately relying on certain characteristics.

- 1) OFO considers issuing a 10-day "look-out" for human smugglers at designated ports of entry based on specific, reliable, and current information linking an identified, international criminal syndicate with a distinctive ethnic character to smuggling operations. Before being issued, the look-out receives headquarters scrutiny for whether it is a permissible exception to the general rule that only suspect-specific descriptions justify use of impermissible characteristics.

Headquarters produces a written analysis that there is a compelling governmental interest present in countering this particular criminal threat and approves a look-out based in part on ethnicity as narrowly tailored to that interest. The analysis concludes that no other look-out based on neutral characteristics such as country of citizenship, originating airport, or cities of residence comes close to encompassing the syndicate's varied membership (if one of these look-outs were satisfactory, the proposed use of ethnicity is impermissible because it would not be narrowly tailored). On the tenth day, the look-out's expiry or renewal is reassessed using updated intelligence, and the decision is promptly and clearly communicated to field personnel. Details about this differential use of ethnicity are reported (with law-enforcement sensitive information redacted) in a semi-annual report that is made public.

- 2) At particular ports of entry, the last five years of data show that thousands of young women/girls have been identified as smuggled by human traffickers, while a significant number of screenings of travelers accompanying young men/boys have identified almost no trafficking victims. OFO considers issuing a 3-month directive to focus additional screening on persons accompanying young women/girls rather than young men/boys. Headquarters reviews the directive and concludes in writing that it implements a compelling governmental interest in fighting human trafficking and is narrowly tailored to that interest, weighing heavily that the directive uses the characteristic of gender to benefit the group of young women/girls adversely affected and that it does not rely on stereotyping.

Before three months expire, local OFO leadership and headquarters assess the directive's efficacy based on data collected and decide whether to renew it, communicating that decision promptly and clearly to field personnel. Details about this differential use of



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gender are recorded (with law-enforcement sensitive information redacted) in a semi-annual report that is made public.

We provide the preceding examples of permissible and impermissible use of certain characteristics in CBP's enforcement activities as a prelude to working together to achieve strong protections against impermissible profiling by CBP. We look forward to continuing this dialogue in order to ensure that CBP is meeting its stated goals, without prioritizing expedience and efficiency over equality and justice. Aside from these scenarios, we look forward to discussing definitional issues surrounding terms such as "nationality" and "national origin;" what CBP does and does not consider an "adverse" action based on a listed characteristic; as well as CBP's plans for data collection and monitoring of profiling.

Thank you for your consideration. If you have questions please feel free to contact Sakira Cook, Counsel, The Leadership Conference on Civil and Human Rights, at 202-263-2894/cook@civilrights.org or Chris Rickerd, Policy Counsel, ACLU Washington Legislative Office, at 202-675-2339/crickerd@aclu.org.

Sincerely,

American Civil Liberties Union

Arab-American Anti-Discrimination Committee

Asian Americans Advancing Justice (AAJC)

The Leadership Conference on Civil and Human Rights

Muslim Advocates

New York Immigration Coalition

Northern Borders Coalition

South Asian Americans Leading Together (SAALT)

Southern Border Communities Coalition

cc. Megan H. Mack, DHS Officer for Civil Rights and Civil Liberties

Serena Hoy, Senior Advisor to the Deputy Secretary, DHS

Mary Giovagnoli, Deputy Assistant Secretary for Immigration Policy, DHS

Jonathan Meyer, Deputy General Counsel, DHS



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Felicia Escobar, Special Assistant to the President for Immigration Policy, Domestic Policy Council

Roy L. Austin, Jr., Deputy Assistant to the President; Director, White House Office of Urban Affairs, Justice, and Opportunity