



# **SANCTIONED BIAS:**

## **Racial Profiling Since 9/11**



**ACLU**

AMERICAN CIVIL LIBERTIES UNION

**February 2004**

# **SANCTIONED BIAS: Racial Profiling Since 9/11**

Published February 2004

**THE AMERICAN CIVIL LIBERTIES UNION** is the nation's premier guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and freedoms guaranteed by the Constitution and the laws of the United States.

## **OFFICERS AND DIRECTORS**

Nadine Strossen, President  
Anthony Romero, Executive Director  
Kenneth B. Clark, Chair,  
Executive Advisory Council  
Richard Zacks, Treasurer



**National Headquarters**  
125 Broad Street, 18th Fl.  
New York, NY 10004-2400  
(212) 549-2500  
[www.aclu.org](http://www.aclu.org)

# Table of Contents

- Introduction .....1
- Ethnic Profiling Has Become Official Government Policy .....4
  - The Secret Roundup .....4
  - FBI Questioning of Arab, Muslim and South Asian Men .....5
  - Special Registration Program .....6
- “Racial Profiling Is a Lazy Method of Law Enforcement” .....8
- The Human Costs .....11
- Recommendations .....16
- Conclusion .....18



### Foreword

The fight to keep bias from influencing law enforcement actions is as old as the Constitution itself. And, tragically, for much of our history, biased policing – based on fear instead of fact – has been widespread and ineffective.

The ACLU was founded in 1920, in response to the broad suppression of dissent in World War I and a series of huge mass detentions and deportations, largely of recent immigrants from eastern Europe, initiated by Attorney General A. Mitchell Palmer in 1919. The Palmer Raids, as they are now known, came in response to a series of terrorist acts, including the bombing of Palmer's house, that were attributed to left-wing anarchists and socialists.

In response, Palmer ordered federal agents to round up thousands of immigrants based not on evidence of any conspiracy, but on their ethnicity, and in the case of the many Jews who were detained and deported, their religion. It was racial profiling before the term was coined.

Eighty years later, history is repeating itself. Since the tragedy of 9/11, we have seen an increase in the nation's willingness to condone law enforcement and security actions based primarily on skin color or other immutable characteristics, and a clear willingness on the part of the Bush administration to implement such programs.

The nation's Arab, Muslim and South Asian populations are most affected by these new initiatives. Policies primarily designed to impact certain groups often result in the destruction of civil liberties for us all. Moreover, racial profiling makes us less safe as a country, since we are

diverting limited law enforcement resources and singling out individuals who ought not fall under government scrutiny.

This report details how the trauma of 9/11 has made general anti-immigrant sentiment acceptable in the guise of law enforcement and how national security initiatives incorporate discrimination into their application.

Just as troubling is Congress' inability to pass legislation to address the problem of bias-based policing both in the contexts of post-9/11 security measures and the traditional "driving while black or brown" turnpike racial profiling. A bill called the End Racial Profiling Act (ERPA) is pending in Congress today – and it deserves our support.

Among other things, the ERPA is a good first step toward addressing traditional racial profiling, driving while black or brown and some post-9/11 selective enforcement. It provides victims a legal recourse, implements and funds key data collection programs to identify and track discriminatory policing and gives the attorney general the ability to deny funds to police departments that refuse to comply. Please visit [www.aclu.org/action](http://www.aclu.org/action) to find out how you can encourage your members of Congress to sign on to this necessary legislation.

We can, and must, be both safe *and* free. To accomplish this, we must replenish security policies that depend on old fashioned policing, based on evidence and fact, and respect the tradition of minority and individual rights in America. By allowing base prejudice to decide who gets pulled over on our highways or who gets detained and strip searched in our airports, we betray that fundamental promise.

And, most tragically, we do so unnecessarily.

ANTHONY D. ROMERO  
Executive Director  
American Civil Liberties Union

# SANCTIONED BIAS:

## RACIAL PROFILING SINCE 9/11

### Introduction

On June 17, 2003 President Bush publicly released a set of guidelines promulgated by the Civil Rights Division of the Department of Justice entitled, *Regarding the Use of Race by Federal Law Enforcement Agencies*. The introduction to the guidelines alluded to the president's February 2001 address to Congress in which he declared that racial profiling is "wrong and we will end it in America." The accompanying Fact Sheet on Racial Profiling issued by the Department of Justice contains phrases like:

- "racial profiling is wrong and will not be tolerated;"
- "America has a moral obligation to prohibit racial profiling;" and
- "stereotyping certain races as having a greater propensity to commit crimes is absolutely prohibited."

But the guidelines themselves fall far short of the Bush administration's rhetorical posturing. Since they are only a set of guidelines, rather than a law or an executive order, they have no teeth. They acknowledge racial profiling as a national concern, but they provide no enforcement mechanisms or methods for tracking whether or not federal law enforcement agencies are in compliance.

The guidelines' most serious flaw, however, is that they carve out a huge national security loophole. The guidelines specify:

"The above standards do not affect current Federal policy with respect to law enforcement activities and other efforts to defend and safeguard against threats to national security or the integrity of the Nation's borders..."

Since the 9/11 terrorist attacks, it has been the official policy of the United States government to stop, interrogate and detain individuals without criminal charge – often for long periods of time on the basis of their national origin, ethnicity and religion. In fact, the very inclusion of a national security exception in the guidelines is an admission by the Department of Justice that it relies upon racial and ethnic profiling in its domestic counterterrorism efforts.

In response to the severe shortcomings in the president's guidelines, a bipartisan group of lawmakers in both the House of Representatives and the Senate has introduced the "End Racial Profiling Act," a comprehensive package designed to track and provide steps toward eliminating racial, ethnic, religious and national origin profiling. As this report went to print, nearly 100 members of Congress had co-sponsored the measure and a large coalition of public advocates from many points on the political spectrum, including several law enforcement organizations, were actively working to ensure it receives its due consideration in Washington.

Specifically, the bill would define racial, ethnic, religious and national origin profiling, ban their use and provide a cause of action for individuals

## **SANCTIONED BIAS: Racial Profiling Since 9/11**

harmful by these forms of profiling. It would permit the attorney general to withhold funds from non-compliant police departments and government agencies and would provide grants to aid compliance. And, crucially, it would require data collection to ensure police accountability and provide police executives with a needed management tool.

Congress should act expediently to make this legislation law. Only through federal legislation can the problem of racial profiling be comprehensively identified and ended.

This report is the latest in a series issued by the ACLU on government actions since 9/11 that threaten fundamental rights and freedoms and fail to make us safer. The ACLU opposes all racial, religious and ethnic profiling, whether in the context of routine law enforcement, or domestic counterterrorism. As we have argued repeatedly in our litigation, legislative advocacy and public statements over the years, racial profiling is in every instance inconsistent with this country's core constitutional principles of equality and fairness.

We have also argued that law enforcement based on general characteristics such as race, religion and national origin, rather than on the observation of an individual's behavior, is an inefficient and ineffective strategy for ensuring public safety. The strength of this argument has been borne out over and over again by data that has been collected by individual police departments throughout the country in response to ACLU lawsuits and the public's demands for answers and police accountability.

We now have incontrovertible proof that racial profiling does not, in fact, give the police a "leg up" in fighting crime. The

premise upon which it is based – that certain ethnic minorities are more likely than whites to be in violation of the law – is simply wrong. Studies consistently show that "hit rates" – the discovery of contraband or evidence of other illegal conduct – among minorities stopped and searched by the police are lower than "hit rates" for whites who are stopped and searched. Indeed, the findings of numerous studies throughout the country have been so consistent that police officials are starting to recognize that racial profiling, while still practiced broadly, is ineffective and should be rejected. The International Association of Chiefs of Police, the world's oldest and largest nonprofit membership organization of police executives, has adopted a resolution condemning racial profiling:

"We must ensure that racial and ethnic profiling is not substituted for reasonable suspicion in traffic stops and other law enforcement activities. The best way to ensure the trust of citizens and the courts, and to protect our officers from unfair criticism, is to develop an anti-profiling policy that delineates approved techniques for professional traffic stops, and makes a clear statement that profiling is not one of those techniques." <sup>1</sup>

There is no reason to believe that a counterterrorism strategy based on ethnic profiling will be any more effective. The overwhelming majority of Muslims, Middle Easterners and South Asians are hardworking, law-abiding people. Singling them out for special law enforcement scrutiny will produce the same low "hit rates" as has racial profiling in the context of drug law enforcement.

---

<sup>1</sup> IACP Resolutions: Condemning Racial and Ethnic Profiling in Traffic Stops (1999); Condemnation of Bias-Based Policing (2001).

Not long after the 9/11 attacks, a group of senior U.S. intelligence specialists combating terrorism circulated a memo to American law enforcement agents worldwide cautioning against relying on ethnic profiling as a counterterrorism tool. As reported in the Oct. 12 issue of *The Boston Globe*, “the four-page memo warns that looking for a type of person who fits a profile of a terrorist is not as useful as looking for behavior that might precede another attack.” One of the authors of the memo, all of whom spoke on condition of anonymity, said,

“There are at least a million people of Middle Eastern descent in the U.S. Do we consider them all potential terrorists?”

Another explained,

“...Fundamentally, believing that you can achieve safety by looking at characteristics instead of behaviors is silly. If your goal is preventing attacks...you want your eyes and ears looking for pre-attack behaviors, not characteristics.”<sup>2</sup>

Another expert, Vincent Cannistano, the former head of counterterrorism at the CIA, told *Newsweek*, “It’s a false lead. It may be intuitive to stereotype people, but

<sup>2</sup> Bill Dedham, “Fighting Terror/Words of Caution on Airport Security: Memo warns against use of profiling as a defense,” *The Boston Globe*, Oct. 12, 2001.

## THE END RACIAL PROFILING ACT OF 2004

The End Racial Profiling Act (ERPA) has several key provisions, each one of which would work in tandem with the others to procedurally root out, discourage and end bias-informed police stops. Sponsored by Reps. John Conyers, D-MI, and Christopher Shays, R-CT, this bipartisan bill has, at the time of writing, garnered nearly 100 co-sponsors.

Highlights in the current legislation include sections that would:

- Define racial profiling as the practice of relying on race, ethnicity, religion or national origin to select which individuals to subject to a law enforcement encounter.
- Make such conduct illegal.
- Provide victims of such profiling with the right to sue.
- Introduce a nationally uniform data collection that would – like the Uniform Crime Reports – track and monitor bias-based policing. Providing a baseline of information through which the public can identify bias-based policing, it would increase police accountability and ensure the legitimacy of challenges to bias-based policing. This system is also being heralded by some police executives as a necessary management tool.
- Allow the attorney general to withhold funds from police departments that refuse to comply with the law, an enforcement mechanism notably lacking from the president’s racial profiling guidelines.
- Provide grants to help police departments comply with the law.

profiling is too crude to be effective. I can't think of any examples where profiling has caught a terrorist.”<sup>3</sup>

But in spite of the overwhelming evidence that racial profiling is counterproductive, and in spite of the counsel of intelligence experts that the better method for identifying potential terrorists is through observation of “pre-attack” behaviors, Attorney General John Ashcroft immediately launched a counterterrorism strategy that centers on profiling based on national origin. Moreover, even as it became obvious that the strategy was not producing results, the attorney general continued to conceive and implement increasingly grandiose schemes based on ethnic profiling. These are the “activities and other efforts” President Bush has exempted from his guidelines. The purpose of this report is to demonstrate that the exemption is both unnecessary and unwise.

### **ETHNIC PROFILING HAS BECOME OFFICIAL GOVERNMENT POLICY**

#### **The Secret Roundup**

In the hours and days immediately following 9/11, the Department of Justice launched what amounted to an extensive program of preventive detention. It was the first large-scale detention of a group of people based on country of origin or ancestry since the internment of Japanese-Americans during World War II. Within hours of the terrorist attacks, federal agents swept through Arab, Muslim and South Asian neighborhoods throughout the country, snatching men from sidewalks, as well as their homes, workplaces and mosques.

The roundup and incarceration of thousands of men were carried out under an unprecedented

veil of secrecy, leaving wives, children, classmates and employers wondering where these people had been taken, and who would be next. The Federal Bureau of Prisons imposed a communications blackout that prevented the detainees from contacting family, friends, the press and even attorneys. And in another act of almost unprecedented secrecy, the attorney general ordered that the deportation hearings of immigrants deemed of “special interest” to the government be closed to the public and the press, effectively concealing all immigration hearings of Arabs and Muslims. In a scenario eerily reminiscent of the “disappearances” of labor and student activists in Argentina during the 1980s, Arab, Muslim and South Asian men were plucked off the streets of American cities. America now had its own “disappeared.”

Once it became clear that scores of individuals in New York City and elsewhere were being arrested and detained, the ACLU and other immigrant rights organizations immediately took steps to learn the identities and locations of the detainees, and the charges upon which they were being held. We wanted this information, which is routinely accessible in immigration cases, in order to determine whether or not the roundup was within constitutional bounds. But we were met with a wall of silence.

On Oct. 17, 2001 the ACLU wrote to the attorney general asking him for information about the detainees. He did not respond. We posed the same questions to FBI Director Robert Mueller at two meetings on Sept. 25 and Oct. 25, but were once again rebuffed. On Oct. 29, 2003 the ACLU and several other organizations filed a Freedom of Information Act (FOIA) request for the names and locations of the detainees. But Attorney General Ashcroft, in a radical departure from past practice and basic democratic principles of

---

<sup>3</sup> Fareed Zakaria, "Freedom vs. Security," *Newsweek*, July 8, 2002, p.30.

open government, issued a directive discouraging federal agencies from releasing the information requested.

On Dec. 5, 2001 the ACLU and several other organizations filed a lawsuit in federal court under the FOIA demanding that the government disclose the names and whereabouts of the detainees. Judge Gladys Kessler ordered the government to release the information on the grounds that “secret arrests are ‘a concept odious to a democratic society,’ and profoundly antithetical to the bedrock values that characterize a free and open one such as ours.” But soon after her ruling, the government appealed and Judge Kessler issued a stay of her order.<sup>4</sup>

As the days turned into weeks and then months, information began to trickle out as some of the detainees were released or deported, and immigration lawyers fought for, and sometimes won, access to the detention centers. It soon became clear that most, if not all, of the several thousand detainees picked up by federal agents in the immediate aftermath of 9/11 were guilty of little more than being Arab, Muslim or South Asian, and in the wrong place at the wrong time.<sup>5</sup> The “tips” leading to their arrests were often tainted with ethnic bias. The vast majority of the men were detained on pretexts: They may have been guilty of minor immigration law offenses for which they would not have been detained, much less deported, under normal circumstances. The men were held for months on end under extraordinarily restrictive and, in some cases, abusive conditions. **Of the thousands of men who were detained and questioned, not one has been publicly charged with terrorism.**

## FBI Questioning of Arab, Muslim and South Asian Men

On Nov. 9, 2001 Attorney General Ashcroft directed the FBI and other law enforcement officials to search out and interview at least 5,000 men between the ages of 18 and 33 who had legally entered the U.S. on non-immigrant visas in the past two years, and who came from specific countries linked by the government to terrorism. The list of individuals was compiled solely on the basis of national origin, and even the Justice Department acknowledged that it had no basis for believing that any of these men had any knowledge relevant to a terrorism investigation. Unannounced, the FBI descended upon thousands of Arabs, Muslims and South Asians at their workplaces, homes, universities and mosques. Although called “voluntary,” the interviews were inherently coercive and few felt free to refuse. The FBI agents, sometimes accompanied by immigration officials, asked questions about sensitive activities protected by the First Amendment such as religious practice, mosque attendance and feelings towards the United States.

In March 2002, the Department of Justice announced another round of interviews of an additional 3,000 Arab, Muslim and South Asian men legally in the U.S. as visitors or students. The federal government requested that local police departments assist in this dragnet. While many police departments enthusiastically participated in the biased targeting of innocent individuals, some police officials publicly declined to take on the task of immigration enforcement. In

<sup>4</sup> On Jan. 12, 2004, the United States Supreme Court refused to consider whether the government properly withheld names and other details about the hundreds detained.

<sup>5</sup> We cannot be sure of the numbers because our government refuses to release them. On Nov. 5, 2001, Attorney General Ashcroft announced that in the two months since Sept. 11, law enforcement had in custody 1,200 detainees. After that he refused to disclose what appeared to be the growing number of men in custody. Hundreds more Arab and Muslim men continued to disappear into detention. Immigration advocacy groups estimate the number of detainees to be around 3,000.

addition to concerns that racial, religious and ethnic profiling are bad law enforcement techniques, some police officials expressed concern that this would destroy the trust, cooperation and faith that it takes years to build. A sampling follows:

“We’ve been trying to get the immigrants in our town to believe that we’re not like many of the governments in their old countries, governments that were corrupt and wanted to railroad them, not serve them.” (Sgt. Robert Francaviglia, Hillsdale, New Jersey Police Department)<sup>6</sup>

“Because of our immigrant population here and our diverse communities, we don’t want to alienate anybody, or give anybody fear...That’s just not our policy. Hasn’t been for twenty years.” (Sgt. John Pasquariello, Los Angeles Police Department)<sup>7</sup>

“Communication is big in inner-city neighborhoods and the underpinning of that is trust. If a victim thinks they’re going to be a suspect in an immigration violation, they’re not going to call us, and that’s just going to separate us even further.” (Chief Gerry Whitman, Denver Police Department)<sup>8</sup>

In an effort to encourage voluntary cooperation with the FBI, the attorney general promised that he would help non-citizens with their visas in exchange for providing useful information to the government. But this promise bore all the hallmarks of a sting operation, as individuals with even minor

visa violations were arrested on the spot and sent to detention facilities. In fact, the attorney general’s memorandum governing the conduct of the questioning specifically instructed FBI agents to contact the nearest Immigration and Naturalization Service official if they had any suspicion about someone’s immigration status.<sup>9</sup>

### Special Registration Program

In June 2002, Attorney General John Ashcroft announced the implementation of NSEERS, the National Security Entry Exit Registration System, which established a series of regulations and registration requirements. One of the most ambitious aspects of this program is Special Registration. In a massive operation reminiscent of the Nazis’ requirements for Jews living in Germany and countries under German occupation, all male nationals over the age of 15 from 25 countries were ordered to report to the government to register and be fingerprinted, photographed and questioned. With the exception of North Korea, all targeted countries are Arab and Muslim. Despite the fact that the government gave no individualized notice for this poorly publicized requirement, all those who failed to register were made vulnerable to deportation and criminal penalties. The ACLU denounced the plan as a thinly veiled effort to trigger massive and discriminatory deportations of certain immigrants.

NSEERS is a discriminatory and poorly implemented plan that neither advances national security nor improves the efficiency of the country’s immigration system. Not all

<sup>6</sup> "Policing Immigration," *Bergen Record*, April 22, 2002.

<sup>7</sup> "Police Want No Part In Enforcing Immigration," *Los Angeles Times*, April 5, 2002.

<sup>8</sup> "Immigration Bill Has Police Uneasy," *Denver Post*, April 22, 2002.

<sup>9</sup> Nadine Strossen, "Department of Justice Oversight: The Massive, Secretive Detention and Dragnet Questioning of People Based on National Origin in the Wake of September 11," Testimony before the Senate Judiciary Committee, Dec. 4, 2001.

of its requirements have been adequately publicized or translated into all appropriate languages. Many people are not even aware that continuing regulations require registration upon change of address, employment or academic institution and when leaving and entering the country.

In December, 2002 up to 700 men and boys from Iran, Iraq, Libya, Sudan and Syria were arrested in Southern California by federal immigration authorities after they voluntarily complied with the NSEERS “Call-In” program. In many cases, the men were arrested for minor visa problems caused by the INS – a federal agency whose incompetence is legendary. Some were awaiting the approval of their green card applications. Others were students who had allegedly not attended enough classes at the universities where they were enrolled. The summary arrests of so many people spread panic in Arab, Muslim and South Asian communities across the country and discouraged men from other countries from reporting on successive registration dates.<sup>10</sup> In December 2003, the Department of Homeland Security suspended two parts of the registration requirement, but most of the program’s discriminatory provisions remain in effect, and there is no relief for the thousands who fell afoul of the program’s confusing requirements.<sup>11</sup> In one year, the Special Registration program registered 83,310 foreign nationals, placing 13,740 into deportation proceedings. **Not a single one of these individuals was ever publicly charged with terrorism.**

<sup>10</sup> In addition to Iran, Iraq, Libya, Sudan and Syria, Special Registration countries include Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, Yemen, Pakistan, Saudi Arabia, Bangladesh, Egypt, Indonesia, Jordan and Kuwait.

<sup>11</sup> The Department of Homeland Security subsequently implemented a new immigrant tracking program, US VISIT. It is an addition to, not a substitute for, Special Registration.

## TWO YOUNG VICTIMS OF NSEERS

Ahmad and Hassan Amin think of themselves as regular American teenagers. Ahmad, 17, is a star on his Cupertino high school’s football team. His brother, Hassan, 19, is studying accounting at De Anza College in Cupertino. They live with their mother, Tahira Manzur, who is a full-time teacher at a children’s development center. “We sold our house in Pakistan to come to this country so that my sons could have a better education and a better life,” she explains. “Our life is here.”

But Ahmad and Hassan may be forced to return to Pakistan – a country they no longer know and where they have no family. “I don’t even know if I remember how to write my language,” says Hassan.

The boys and their mother believed they were in the U.S. legally and in the process of becoming permanent residents. But unbeknownst to them, their visas had expired because of bad advice from an immigration lawyer. When they reported for Special Registration, Hassan was detained, arrested and sent to Yuba County Jail, where he was held overnight in a criminal cell until he was released on \$4,000 bail. Ahmad is now required to miss school every third Wednesday to register with the INS offices. Both brothers will likely soon face deportation.<sup>12</sup>

<sup>12</sup> ACLU of Northern California, [www.aclunc.org/aclunews/news0309/backlash.html](http://www.aclunc.org/aclunews/news0309/backlash.html)

### “RACIAL PROFILING IS A LAZY METHOD OF LAW ENFORCEMENT.”

Veterans of law enforcement who were police officers during the 1980s and 1990s, when the “war on drugs” was in full swing and racial profiling was rampant, are among the country’s most knowledgeable experts on the effectiveness of racial profiling in fighting crime. Here are some of their comments:

The Houston Chronicle



**Barbara A. Markham**

**Barbara A. Markham** has been a police officer with the Oak Point Police Department in North Texas since 1983. She

has been an undercover narcotics investigator since 1986, and is the recipient of awards and letters of commendation from the Department of Treasury-Bureau of Alcohol, Tobacco and Firearms for her investigative work. She has also been an outspoken critic of the Texas police for engaging in racial profiling in the enforcement of narcotics laws – profiling that has focused virtually exclusively on African Americans. In a recent interview, Officer Markham told the ACLU:

“Racial profiling is utilized when you have no intelligence and you’re just casting a wide net and having to use a process of elimination out of that wide net. Racial profiling is a lazy method for law enforcement. You’re not using investigative leads; you’re not using any investigative skill, all you’re doing is casting a wide net against one group, one segment of society, and that’s what we call ‘going fishing,’ and you’re going to come up empty-handed. The better way is to simply investigate terrorism by behaviors exhibited by specific individuals. It’s not the color of one’s skin or their ethnicity that should indict them or bring them under police scrutiny. It should be their behaviors or actions – what they do.”<sup>13</sup>

**Hiram Monserrate** was a patrol officer with the New York Police Department for twelve years. Today, he is a prominent member of the New York City Council, where he sits on the Public Safety Committee. Councilman Monserrate also founded the Latino Officers Association. He is an ardent critic of racial profiling by the police, and, like Barbara Markham, he does not believe ethnic profiling is effective as a law enforcement tool. He told the ACLU:

<sup>13</sup> Telephone interview, Oct. 21, 2003.



**Hiram Monserrate**

“It’s easy to go to an area like Jackson Heights [Queens, New York] searching out South Asian males under the guise of counterterrorism. It’s easy to do that. It’s also easy to detain lots of innocent people. I think that is neither a good course of action, nor is it the best use of law enforcement resources. The better way is to do the intelligence work and investigation that needs to be done, and be able to identify individuals where there is reasonable suspicion to believe they are in fact engaged in some type of criminal activity, and then go to those

individuals and stop them to question them and ultimately detain them. Good police work is not about cutting corners. It’s about using resources and being intelligent. Law enforcement going out and engaging in sweeps and random stops really produces very little in quality arrests.”<sup>14</sup>

**Jerry Sanders** was a member of the San Diego Police Department for 26 years, and for the last six of those years he served as the department’s chief of police. Chief Sanders was credited with bringing about a dramatic reduction in crime and for building community-police partnerships. He was also the first chief of police to announce that he would begin collecting traffic stops data on a voluntary basis in order to determine whether or not his department’s officers were engaging in racial profiling. He told the ACLU:

“One of the things I can remember being up on the bulletin boards at work was a sign that said, ‘Random patrol produces random results.’ If you’re doing this randomly, just trying to blanket places, I think you get pretty random results. I don’t think you get a high hit rate. Right after 9/11 everybody wanted a quick fix. I was certainly concerned and I wanted things done quickly, too. But it takes time to investigate, to find out who was involved in these things, and good investigative techniques are not always fast. I don’t think you get a quick fix by stopping everybody and getting their names, and then trying to figure out what’s going on. I think a much more targeted response would be a much better way of doing that without alienating huge parts of the community.”<sup>15</sup>

<sup>14</sup> Live interview at councilman’s office, Oct. 16, 2003.

<sup>15</sup> Telephone interview, Oct. 15, 2003.



**Jerry Sanders**

All three police officers also expressed their concern that current counterterrorism practices that rely on ethnic profiling actually compromise public safety. First, such practices lead to the misuse of scarce police resources. Officer Markham explained:

“When you’re engaged in racial profiling in counterterrorism you’re casting a wide net, and then by process of elimination you have to look at every person in that wide net, and you’re going to waste a lot of time, manpower and energy.”

This is an accurate description of the Justice Department’s post-9/11 investigation. In April 2003 the Office of the Inspector General of the Department of Justice issued a comprehensive 198-page report revealing in detail for the first time the Justice Department’s policies, directives, and activities in the wake of the Sept. 11 attacks. Entitled *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* (the OIG report), it was based on a year-long investigation that included extensive interviews with federal law enforcement officials and agents, and with some of the detainees. One of the OIG report’s findings was that since the attorney general issued a “hold until cleared” policy for all aliens arrested in the 9/11 investigation, law enforcement personnel had to spend time identifying the detainees, investigating their backgrounds and analyzing whatever information came in from the CIA and other agencies. And each of these investigations was so time-consuming that “[t]he FBI

cleared less than 3 percent of the September 11 detainees within three weeks of their arrest.” (OIG report, p. 51) The report paints a vivid picture of the time and resources wasted clearing individuals who in large part were “suspicious” only because of their national origin:

“[The FBI’s] resources were insufficient to permit the group to analyze the CIA information in a more timely manner for a number of reasons. First, according to one of the SSAs (supervisory special agent) assigned to the project, the volume of cases was simply too great. One of the FBI requests to the CIA for information contained the names of 190 detainees. Second, the SSA pointed to many technical difficulties and ‘growing pains’ they faced when they first started in late November 2001...Third, many of the people working on this project were not focused exclusively on this task, due to the many demands on the FBI. Finally, some of the cases required contacting FBI offices overseas or other agencies, which took time, especially because the FBI offices in the Middle Eastern countries also were over-burdened at the time.” (OIG report, p. 61)

At a time when every investigator could have been following up real leads based on observation of “pre-attack” behaviors, many were tied to their desks, clearing individuals about whom there was no reason to be suspicious. What’s more, the futility of this effort became clear early in the process. According to the report, “A variety of INS, FBI and Department officials who worked on these September 11 detainee cases told the OIG that it soon became evident that many of the people arrested during the PENTTBOM<sup>16</sup> investigation might not have a nexus to terrorism.” (OIG report, p.45) But because of the “hold until cleared” policy, the

<sup>16</sup> PENTTBOM is an acronym for Pentagon/Twin Towers Bombings.

investigators had to go through this futile and time-consuming process.

As was the case with racial profiling during the “war on drugs,” ethnic profiling alienates the communities whose cooperation is essential to the gathering of good intelligence. As Police Chief Sanders explained:

“Whole communities get very upset when they see that pretty soon everybody that they love has been arrested, and I think that creates far more problems. The issue is one of community trust. If you’re relying on the public to assist you in just about any way, and if you’re stopping people in communities of color, and your stops are out of sync with the way they are in every other community because you’re simply stopping people because you think they may look suspicious, we found that it’s awfully difficult for those communities to support and trust the efforts of what the police are doing.”

Councilman Monserrate, whose district is comprised of a section of New York City with a large South Asian population, also commented on this problem:

“I do know that in the South Asian community, there is a lot of concern about people being taken off the street and detained without charge. That leaves an aura of fear and suspicion. And I think that fear and suspicion largely hampers the police mandate to help protect property and lives. The best way is for the communities to be partners with the police and not to be in fear of the police, because that hampers public safety.”

## THE HUMAN COSTS

The human costs of our government’s ethnic profiling policies are incalculable: hard-working, law-abiding men suddenly finding themselves shackled hand and foot, held incommunicado in solitary confinement for months at a time; families separated; homes and businesses lost; and lives turned upside down. For many, the greatest loss of all was the bitter discovery that their adopted country, which promised freedom and opportunity, no longer wanted them.

In November 2002, frustrated by the continuing refusal of the Department of Justice to reveal the identities and happenstances of most of the post-9/11 detainees, the ACLU decided to conduct its own investigation. With the assistance of the Human Rights Commission of Pakistan, we located 21 detainees who had been deported to Pakistan, or who had left the U.S. voluntarily to avoid indefinite detention. We met with these men in Lahore, Karachi and Islamabad.<sup>17</sup> Their accounts, one of which is detailed below, are a powerful indictment of our government’s abuse of power. Justice Thurgood Marshall once wrote:

“History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II camp cases, and the Red Scare and McCarthy-era internal subversion cases, are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.”<sup>18</sup>

In the post-9/11 era, the treatment of Arabs, Muslims and South Asians can be added to Justice Marshall’s list of “extreme reminders.”

<sup>17</sup> “America’s Disappeared: Seeking International Justice for Immigrants Detained After September 11,” (January 2004)

<sup>18</sup> *Skinner v. Rainway Labor Executives’ Association*, 109 S.Ct. 1402 (1989)

## **OIG REPORT SHOWS THE FUTILITY OF ETHNIC PROFILING**

The report by the Office of the Inspector General, released to the public in April 2003, confirmed the ACLU's long-held view that the Department of Justice engaged in deliberate and wholesale civil rights violations in the aftermath of 9/11. According to news reports, the release of the report was delayed for almost a year because of ongoing negotiations with the attorney general's office over who would shoulder blame for the abuses it described. The report reveals a stark pattern of ethnic profiling from the earliest days of the investigation:

- Many of the tips and leads that resulted in detentions were based on little more than ethnic profiling by members of the public and local police. For example, an alien "was arrested, detained on immigration charges *and treated as a September 11 detainee*<sup>19</sup> because a person called the FBI to report that a grocery store in which the alien worked, 'is operated by numerous Middle Eastern men, 24 hrs-7 days a week. Each shift daily has 2 or 3 men...Store was closed day after crash, reopened days and evenings. Then later on opened during midnight hours. Too many people to run a small store.'" (OIG report, p.17) Had the storekeepers been other than Middle Eastern, it is unlikely that their activities would have aroused any suspicion at all.
- Men of Middle Eastern and South Asian ethnicity who happened to be in the vicinity of the subject of a "lead" were also arrested. The OIG report found that, "[i]f Joint Terrorism Task Force agents searching for a particular person on a lead arrived at a location and found a dozen individuals out of immigration status, *each of them were considered to be arrested in connection with the September 11 investigation... no distinction generally was made between the subjects of the lead and any other individuals encountered at the scene 'incidentally' because the FBI wanted to be certain that no terrorist was inadvertently set free.*" (OIG report, p.16)
- As a result, the secret detention centers quickly filled up with people who had absolutely no connection to terrorism. The OIG report cites the following examples of fruitless arrests:
  - Several Middle Eastern men were arrested and *treated as connected to the 9/11 investigation* when local law enforcement authorities discovered "suspicious items," such as pictures of the World Trade Center and other famous buildings during traffic stops. (OIG report, p.16)

<sup>19</sup> Italics in this section added for emphasis.

- Another man was arrested on immigration charges and *labeled a 9/11 detainee* when authorities discovered that he had taken a roll of film to be developed and the film had multiple pictures of the World Trade Center on it but no other Manhattan sites. This man's roommates were also arrested when law enforcement authorities found out they were in the United States illegally, *and they too were considered 9/11 detainees.* (OIG report, p. 16)

- On Sept. 15, 2001 New York City police stopped a group of three Middle Eastern men in Manhattan on a traffic violation. The men had the plans to a public school in their car. The next day, their employer confirmed that the men were working on construction at the school and that it was appropriate for them to have the plans. *Nonetheless, they were arrested and became 9/11 detainees.* (OIG report, p. 42)

Of the 762 cases reviewed by the OIG, all the detainees came from countries in the Middle East or from Pakistan. Although the average length of detention was 80 days under extremely restrictive, and in many instances abusive, conditions, *not one of these men was ever charged with participating in, or lending support to terrorist activities.*

## SYED WASIM ABBAS

Syed Wasim Abbas came to the United States from Pakistan to attend college. "It was 1992, March 27 when I first landed in New York. I went there as a student on an F-1 visa. I went to Brooklyn College and I worked in between." At the time of his arrest Abbas had a temporary work authorization card and was in the process of applying for a green card. He was running his own business: "I had a gas station, a Sunoco gas station right on Route 30 West. And I had my apartment there and I wanted to settle down there, bring my wife to Pennsylvania. But the circumstances didn't give me a chance to do it."



**Syed Wasim Abbas**

On June 11, 2002 Abbas was driving home to Pennsylvania when he was pulled over by an INS agent. "When he pulled me over he came

and said to turn the car off. He got the key from me and said, 'I'm from INS.' Then he showed me the paper in his hand and he said, 'Is this you, a-hole?' I said, 'Yeah. That's me.' He used really bad language, so I was scared because this was the first time ever I faced somebody pulling me over like that. He said, 'You have a deportation order.' Then he handcuffed me and he searched my car. He took my passport, my license, my social security card, my wallet and everything. He searched the back of the car, the trunk and then they left my car right there and took me to the INS office in Newark."

Abbas was shackled at the INS office: "They put chains on my legs and real tight handcuffs and stuff. I told them that it's really hurting, you know? Can you just open it up and you can handcuff me in front? But they said, 'We can't do it. This is how we do it.' It was very hard to walk and I wasn't a criminal. I never, you know, was involved in any crime or anything but I was like suddenly I just broke down, I cried. I can't express how I felt at that time."

After 29 days in the Bergen County Jail, Abbas, who had spent his entire adult life in America, was deported to Pakistan. His gas station is gone, and his wife, an American citizen, is living with relatives in New York. He now lives in London in a state of limbo. When we met him in Pakistan, he told us, "I could not and cannot take this out of my mind the fact that I've been to jail, I've been handcuffed and I've been chained. I do get nightmares sometimes and I get scared and when I wake up I'm all sweaty and scared and that stays there. Another thing is financially. Although my dad he's pretty good; I can't ask him for money because I'm 32 years old and those days are gone when I asked money from my parents. Unfortunately there aren't much opportunities here to work."

### MUHAMMAD SIDDIQUI

Muhammad Siddiqui is an architect in Houston, husband to a busy physician and father of two young children. When two of his family members called him to say the FBI had questioned them, he was understandably concerned. He contacted Texas ACLU attorney Annette Lamoreaux, who agreed to represent Siddiqui should the authorities contact him. On a Monday evening Siddiqui, who was home with his children, received a visit from two FBI agents.



**ACLU attorney Annette Lamoreaux represents Muhammad Siddiqui.**

Siddiqui opened the door to the agents and responded to their request to question him by saying, "I'd be happy to talk to you, but I'd like to have my attorney present." One of the agents told Siddiqui that he

did not need an attorney and that getting an attorney would only make him look guilty. The FBI agent insisted that Siddiqui submit to the interview "now." Siddiqui repeated the phrase that Lamoreaux had advised him to say: "I'd be happy to talk to you, but I'd like to have my attorney present." When the FBI agent responded angrily, Siddiqui called Lamoreaux from his cell phone. She asked to speak to one of the agents and explained that Siddiqui did not want to speak with the FBI at that time, but if the agent called her office during the day, he might set up an appointment.

"I do this all the time," Lamoreaux said. "As soon as there is a lawyer in the picture, they have to play by a different set of rules." But the

FBI agent on the phone did not seem to be paying attention to the rules. He screamed at Lamoreaux that Siddiqui did not have the right to counsel, to which she replied, “That is absolutely not the law. My client is not going to talk to you without a lawyer present. Call me on Monday morning and we’ll set up a time if he is going to talk to you, but he’s not going to talk to you right now and you are to leave the house immediately.” The agent refused to talk with her any further and gave the phone back to Siddiqui.

Lamoreaux informed Siddiqui of his rights and advised him to insist that the agents leave the house. But he did not feel comfortable telling them to leave. He was standing in front of a very agitated FBI agent and was afraid that if he shut the door, the two of them would break it down. Again and again, Siddiqui repeated that he would only talk to them with his lawyer present. One agent shouted, “Turn off that cell phone!” Siddiqui refused, telling the agent that he wanted his attorney to hear everything that was being said. The agents remained in the doorway of Siddiqui’s apartment, one of them pulling his coat back to reveal a gun. Siddiqui, whose children were inside, was afraid. Finally, the agents saw they were getting nowhere and left. As they were walking away, one agent turned back to Siddiqui threatening, “We will talk to you. We are watching you. Don’t leave town.”

The next morning Lamoreaux received a call from the agent with whom she had spoken. Siddiqui had already decided that it would be better to talk to the FBI agents so they would see that he had nothing to hide. Lamoreaux suggested that they meet on Thursday, when Siddiqui was free from work and childcare responsibilities. The agent insisted on meeting that day and told her that he would stand outside of Siddiqui’s house until he came out and talked to him. Later that day, the interview was

held in Lamoreaux’s office. The meeting lasted 15 minutes, and an FBI agent confirmed that Siddiqui was never a criminal target. Having representation made all the difference, said Siddiqui. “Once there was counsel involved, attitudes changed dramatically. Laws started to mean something. It was like back home [in Pakistan], a guy with a police uniform thinks that he is God. I saw it make a difference.” Government officials have not contacted Siddiqui since this interview, but others who do not have legal representation continue to be targeted. As Siddiqui commented, “It is sad that people go back home to Pakistan and find that the system is fairer there than it is here. People never would have said that two years ago.”

## **BANAFSHEH AKHLAGHI**

In September of 2001, law school professor Banafsheh Akhlaghi abandoned her position teaching the Constitution to work overtime defending it. As an activist attorney fighting for the civil liberties of Arabs, Muslims and South Asians, Akhlaghi had represented hundreds of men targeted by the government solely because of their ethnicity and religion. She was still swamped with clients over a year later, when the first round of Special Registration began. On Dec. 16, the deadline for the first call-in group, she spent all day at the San Francisco District INS Office, providing free legal counsel for registrants.

By the end of the day, Akhlaghi watched, helpless, as dozens of her newly retained clients found themselves detained. Shackled at the hands and feet, 12 of the men were shoved onto a bus to Oakland, Calif., then flown around the country. Akhlaghi explains, “They are the very faces that our government and the media continue to feed us with as the faces of terror. They are Stanford students, they are business owners, they are shoe salesmen, they



**Banafsheh Akhlaghi**

are working for high technology firms as engineers, they are in the food industry, they are just normal, normal folks.”

Two days passed before one of Akhlaghi’s clients was able to contact her. He told her that the men, blindfolded and shackled, had been flown from California to Arizona, to Kentucky, to Chicago, then back to Arizona, then to Bakersfield, Calif., then back to Oakland, before crossing the state again to end up in San Diego – all over the course of 36 hours. Federal officials had been looking for vacant jail cells. The men had not eaten, showered or slept at any point during the 72 hours in which they had been held.

When she learned what had happened, Akhlaghi immediately jumped in her car and drove 10 hours south to San Diego to get in front of the immigration court and secure release dates for her clients who had yet to see an immigration judge. But she was unsuccessful because her clients had not yet been processed into the system that would allow them to have an immigration hearing. To make matters worse, the judges were on vacation and not coming back until after New Year’s Day. Despite these setbacks, Akhlaghi was able to

convince a district director to issue bonds to her clients, releasing most of them on Dec. 23 and one man on the 24th. Their cases were finally heard on Feb. 17. But for Akhlaghi’s extraordinary efforts, these men would have remained in detention until that date. Unfortunately, there were many other men who did not have access to such an advocate. Akhlaghi remains hopeful despite the present crises before her. “After September 11, we all lost our minds here in America, we numbed ourselves out to what is just and what is fair. Hopefully, since time has passed we have started to come back to what is just.”

### RECOMMENDATIONS

Abbas, Siddiqui and Akhlaghi’s stories are not unusual. They are representative of the thousands of people racially, religiously and ethnically profiled. As detailed in the report, not only is racial profiling unnecessary and ineffective, but it destroys countless lives every year. Racial profiling is a misguided technique in the well-intentioned goal of improving security. We must take the important steps toward eradicating this destructive practice. The following are measures the government must adopt to ensure our safety and freedom:

*Target terrorists, not immigrants.* This administration is using immigration law as its chief instrument in the “war on terror.” This is ineffective. There is a huge difference, operationally and legally, between immigration enforcement and counterterrorism. Terrorism must be pursued through legitimate criminal investigation not blatant targeting based on race, religion or ethnicity.

*Stop selective enforcement of immigration laws against people of certain national origins or religious background.* Immigration violations are found in similar percentages across all immigrant groups.

Eliminate the “national security” loophole in the Bush administration’s guidelines, *Regarding the Use of Race by Federal Law Enforcement Agencies*, that allows for blatant and discriminatory targeting of innocent Arabs, Muslims and South Asians. Further, these guidelines must be made stronger through law and executive order.

*Pass the End Racial Profiling Act (ERPA).* While the racial profiling epidemic has become more pervasive since 9/11, Congress has yet to act to put an end to this unlawful practice. ERPA is a good first step toward addressing traditional racial profiling, driving while black or brown and some post-9/11 selective enforcement. It moves beyond the rhetorical statements included in the unenforceable guidelines issued by the Department of Justice and implements vigorous enforcement mechanisms, including providing legal recourse for victims injured by racial profiling.

*End all registration.* The continuing requirements, including restricted entry and exit for those who registered, are discriminatory and ineffective. The government must give adequate and fair notice of immigration regulations and leniency where it has failed in that respect.

*Reverse the Justice Department’s legal opinion in support of state and local enforcement of immigration laws.* One of the foremost recommendations to ameliorate the harmful effects of racial, ethnic and religious origin based profiling is the repeal of the Justice Department’s Office of Legal Counsel opinion that seeks to permit, and force, local, state and regional police officers to enforce immigration law, a task for which they are not trained, not funded and is contrary to the scope of their purpose. Immigration law is

extremely complex and difficult to understand. Poor enforcement carries with it countless damaging consequences, including improper and inconsistent enforcement, destruction of community trust and cooperation and corrosive effects to the ability of police to identify and interdict crime and terrorism in America’s cities.

*Do not conflate criminal law enforcement with civil immigration law enforcement.* Names of people with minor immigration violations should not be entered into National Crime Information Center system. This database is accessed by state and local police millions of times each day, and will subject immigrants to the risk of unlawful arrest by state and local police.

*Abandon mandatory detention policies for non-citizens.* Today it costs more than a million dollars a day to hold non-citizens in detention.<sup>20</sup> Most of these detainees, however, pose no threat to society and pose little flight risk if released. The mandatory detention laws should be moderated to relieve strain on the system and comport with basic notions of justice and the prevention of arbitrary detention.

*Return to open government.* The administration has consistently refused to release the names of the detainees. Who are they and what happened to them? We may never know because the Supreme Court declined to hear our claim that the Freedom of Information Act and the First Amendment grants the public the right to obtain access to the names of the people detained. The court’s refusal to hear the case means that this could happen again, but it doesn’t have to. The blanket closing of immigration hearings of Arab and Muslim men must end, and be replaced by a case-by-case analysis.

<sup>20</sup> Vanessa Waldref, Catholic Legal Immigration Network, Inc. Telephone interviews. Jan. 27, 2004.

### **CONCLUSION**

The practice of profiling by race, ethnicity, religion or national origin runs counter to what is arguably the core principle of American democracy: that humans are created equal, and are entitled to be treated equally by the government, irrespective of immutable characteristics like skin color, faith and ethnic or national origin.

The argument for bias in policing is a self-fulfilling prophecy. If blacks are considered by police to be more likely to commit crimes, they will be stopped and investigated more than whites, and the “crime rate” among blacks will increase. Likewise, if the police concentrated their efforts on white citizens, they would find an increased hit rate among whites as well. If Arabs or Muslims are considered by the

Department of Justice more likely to be terrorists, it will investigate, detain, interrogate and deport more Muslims or Arabs, consequently creating a numerical basis for the initial belief.

Numerous law enforcement officials believe that racial, ethnic, religious or national origin profiling actually poses a national security risk. If you are an airport screener and you believe that every terrorist is going to be Middle Eastern, you are not going to look as hard at people of other ethnicities. In addition, bias-based profiling – because of its lack of specificity – wastes resources and ineffectively allocates personnel.

At stake in the fight to end racial profiling are the fundamental principles of democracy upon which our country is based. Those principles deserve our vigorous protection.

## **OTHER SAFE AND FREE REPORTS**

America's Disappeared: Seeking International Justice For Immigrants Detained After September 11 (January 2004)

A New Era of Discrimination? Why African Americans Should Be Alarmed About the Ashcroft Terrorism Laws (September 2003)

Unpatriotic Acts: The FBI's Power to Rifle Through Your Records and Personal Belongings Without Telling You (July 2003)

Seeking Truth From Justice: PATRIOT Propaganda—The Justice Department's Campaign to Mislead The Public About the USA PATRIOT Act (July 2003)

Independence Day 2003: Main Street America Fights the Federal Government's Insatiable Appetite for New Powers in the Post 9/11 Era (July 2003)

Freedom Under Fire: Dissent in Post-9/11 America (May 2003)

Bigger Monster, Weaker Chains: The Growth of an American Surveillance Society (January 2003)

Insatiable Appetite: The Government's Demand for Unnecessary Powers After September 11 (October 2002)

Civil Liberties After 9/11: The ACLU Defends Freedom (September 2002)



**National Headquarters**  
125 Broad Street, 18th Fl.  
New York, NY 10004-2400  
(212) 549-2500  
[www.aclu.org](http://www.aclu.org)