



Written Statement of the American Civil Liberties Union

Submitted to the Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights
Hearing on “Hate Crimes and the Threat of Domestic Extremism”

September 19, 2012

The ACLU is a nationwide, non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of liberty and equality embodied in our Constitution and our laws. The ACLU has a long history of supporting civil rights legislation, including legislation responding to criminal civil rights violations. At the same time, no other organization in the country has a longer and more consistent record in protecting the freedoms embodied in the First Amendment to the Constitution. Thank you for the opportunity to submit a statement for the record for today’s hearing.

Equal Protection under the Law

Crimes committed against victims because of their race, color, religion, gender, national origin, sexual orientation, gender identity, or disability are particularly invidious. Violence (or the threat of violence) perpetrated against one member of a community impedes that person’s—as well as her entire community’s—full participation in society and ability to realize the promise of liberty. The impact is especially acute when people are targeted for exercising their constitutionally protected rights, such as practicing their faith. Religious freedom is one of our most treasured liberties, a fundamental and defining feature of our national character. Our nation has also long recognized that human rights standards, set forth in the International Convention on the Elimination of All

Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR),¹ also compel us to protect everyone's freedom of religion and belief.

Given our robust, longstanding commitment to the freedom of religion and belief, it is no surprise that the United States is among the most religious, and religiously diverse, nations in the world. Thus, the recent murders at the gurdwara in Oak Creek, the alleged arson at the mosque in Joplin and other recent attacks on Islamic institutions, and the fact that the Jewish community continues to experience hate crimes at a disturbing rate are particularly troubling for so many.

Engagement by law enforcement with religious communities targeted for bias-motivated crimes can be a valuable response to this invidious discrimination. When conducted properly, these programs are a crucial mechanism for establishing communication, mutual understanding, and trust between government agencies and the public they serve. Since 9/11, the FBI has engaged in extensive community outreach efforts within the Muslim, South Asian, and Arab American communities. As part of its outreach efforts to these communities, the FBI often highlights its civil rights enforcement role, and asks members of the community to report problems they may face. But, documents obtained by the ACLU of Northern California, the Asian Law Caucus and *The San Francisco Bay Guardian* through the Freedom of Information Act indicate that the FBI sometimes exploits outreach programs directed at Muslim, South Asian, or Arab American communities to gather intelligence,² including at mosques. This information, which included congregants' religious activities and the names and contact information of religious leaders, was classified as "secret," marked as "positive intelligence" and disseminated outside of the FBI, in a manner that appears to violate the federal Privacy Act.³ The FBI's goal of enhancing communication and trust is severely undermined when the agency exploits its outreach programs to gather intelligence against religious and community organizations and their members.

As worrisome as the misuse of community outreach is, the documents also reveal troubling cases in which Muslims did report possible hate crimes but the San Francisco FBI chose not to pursue investigations. In one instance, a mosque reported property damage from several gunshots and told responding FBI agents of prior threats and vandalism that had been reported to the police.⁴ The FBI declined to open an investigation of the shooting, declaring there was no evidence it was a hate crime. Tragically, eight months later, the mosque was severely damaged by arson, which remains unsolved.⁵ In another incident the FBI failed to pursue a civil rights case referred by the Department of Housing and Urban Development in which a Pakistani Muslim family living in

¹ International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) (ratified by the U.S. in 1994); International Covenant on Civil and Political Rights, art. 18, 27, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171 (ratified by the U.S. in 1992).

² ACLU, *Eye on the FBI: Community Outreach*, (Dec. 1, 2011), https://www.aclu.org/files/assets/aclu_eye_on_the_fbi_alert_-_community_outreach_as_intelligence_gathering_0.pdf.

³ ACLU, *Eye on the FBI: Mosque Outreach*, (Mar. 27, 2012), http://www.aclu.org/files/assets/aclu_eye_on_the_fbi_-_mosque_outreach_03272012_0_0.pdf.

⁴ Federal Bureau of Investigation, Criminal Investigative Report from San Francisco Office (Mar. 28, 2007), <http://www.aclu.org/files/fbimappingfoia/20111110/ACLURM011741.pdf>.

⁵ Henry K. Lee & Marisa Lagos, *Muslim leaders call Antioch mosque fire 'act of terror'*, S.F. Chron., Aug. 13, 2007, <http://www.sfgate.com/bayarea/article/Muslim-leaders-call-Antioch-mosque-fire-act-of-2510791.php>.

public housing was racially harassed by neighbors.⁶ Finally, the FBI failed to open an investigation regarding a racist threatening message left on a Muslim student activist's telephone after he organized an anti-war protest.⁷ The agent's memo declining to open an investigation referenced items in FBI files that documented the victim's political viewpoints, raising the likelihood that these views played a role in the decision not to investigate. The FBI may have been entirely justified in its decision not to pursue any or all of these cases, but coming as they did during a period of aggressive outreach to Muslim, South Asian, and Arab American communities, they appear to be missed opportunities for the FBI to demonstrate its willingness to protect members of these communities. Failure to investigate serious threats and actual violence based on bias, combined with a disingenuous community outreach programs, seriously impedes effective law enforcement and is an affront to religious liberty and equal protection of the law.

Bias-motivated crimes aren't, of course, committed only against religious, racial, and national origin minorities. They are committed against many groups for many reasons. Federal investigations and prosecutions of all hate crimes serve as a significant deterrent, as well as recognition of our national consensus that it is abhorrent for people to be targeted because of the way they look, how they worship, where they come from, or who they love. Yet, there is evidence that hate crimes are under-investigated when comparing victims' own reports with data collected by the FBI. From 2003–2009, the FBI reports an average of 7,433 hate crime incidents per year, which is compiled from data voluntarily submitted to the FBI by law enforcement agencies throughout the nation.⁸ The Department of Justice's Bureau of Justice Statistics, however, indicates that crime victims reported an average number of 179,300 hate crime incidents per year over the same time period.⁹ This number is *24 times higher* than the official statistics reported by the FBI.

Everyone who is a victim of a hate crime deserves the protections of our laws and when hate crimes are investigated and prosecuted, basic due process and First Amendment principles must be upheld. Laws that impose a penalty for committing a hate crime should only apply when a defendant selected a victim for violence, or a threat of violence, based on discrimination and when the underlying conduct itself would be *criminal*.¹⁰ A defendant's racist or other bigoted views or membership in an objectionable group should only be taken into consideration when that viewpoint or association is admissible as evidence related to the particular crime being investigated to prove, beyond a reasonable doubt, that the defendant selected the victim on the basis of invidiously discriminatory factors.¹¹ Hate crimes cannot be proved by claiming "guilt by association" because of the defendant's affiliation with groups whose bigoted views we may all find repugnant—but which may have had no role in committing the violent act. People's political persuasion, religious beliefs—or lack of beliefs, or membership in an objectionable group *alone* is simply not relevant.

⁶ Federal Bureau of Investigation, Criminal Investigative Report from San Francisco Office (Apr. 4, 2007), <http://www.aclu.org/files/fbimappingfoia/20111110/ACLURM011748.pdf>.

⁷ Federal Bureau of Investigation, Criminal Investigative Report from San Francisco Office (Feb 5, 2007), <http://www.aclu.org/files/fbimappingfoia/20111110/ACLURM011728.pdf>.

⁸ See U.S. Dep't of Justice, Federal Bureau of Investigation, Hate Crimes Statistics, 2003–2009.

⁹ U.S. Dep't of Justice, Office of Justice Programs, Bureau of Justice Statistics, Hate Crime, 2003–2009 (June 2011).

¹⁰ That is, they should be limited to cases involving harassment or injury (or threat thereof) to person or property.

¹¹ The ACLU did not support the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act, but did support an earlier version of the legislation that included an evidentiary provision that would have prohibited the use of evidence of a defendant's speech or association unless specifically related to the crime.

One person's advocacy group is another person's extremist group and evidence of association could just as easily focus on groups¹² representing the very persons that the hate crimes statutes are designed to protect.

History tells us that conflating the expression of unorthodox or even hostile beliefs with legitimate threats or violence only misdirects resources and risks violating the rights of the innocent. The basis for investigating and prosecuting crimes must be acts, not ideology. Ideological or religious beliefs, even extreme ones, are entitled to the full protection of the First Amendment to the U. S. Constitution. Instead of focusing on ideology or First Amendment protected activities, our government officials and law enforcement should be concentrating their efforts on the concrete steps that they can take to ensure that their actions are not contributing to existing bigotry and bias.

The Impact of Biased Policing and Political Rhetoric

Crimes motivated by religious, racial or other biases do not occur in a vacuum. They occur in the context of a broader public discourse in which members of minority communities are frequently vilified, stereotyped, and demeaned. Our elected officials and law enforcement authorities have the power to significantly shape that discourse and to send a strong message to the American public that fundamental principles such as equal protection and religious liberty must be defended. As we have observed, they also have the proven capacity to aggravate existing prejudices and reinforce intolerance.

When police engage in profiling on the basis of race, religion, or national origin it deepens divisions in American communities and sends the message that some U.S. citizens are less entitled to equal protection under the law. Communities that fear the police are less likely to report criminal activity taking place in their neighborhoods.¹³ Not only is law enforcement less effective, but it is also harder to combat biased violence when law enforcement is engaged in biased practices.

Racial, religious, and national origin profiling remains a troubling problem nationwide, persistent throughout the country and members of minority communities continue to be unfairly targeted. For more than a century, black men and women traveling through predominantly white neighborhoods

¹² For example, many of the principal First Amendment association decisions arose from challenges to governmental investigations of civil rights and civil liberties organizations. *See, e.g., Gibson v. Fla. Leg. Investigation Comm.*, 372 U.S. 539 (1962) (holding that the NAACP could refuse to disclose its membership list to a state legislature investigating alleged Communist infiltration of civil rights groups); *Bates v. Little Rock*, 361 U.S. 516 (1960) (reversing a conviction of NAACP officials who refused to comply with local ordinances requiring disclosure of membership lists); *NAACP v. Alabama*, 357 U.S. 449 (1958) (holding as unconstitutional a judgment of contempt and fine on the NAACP for failure to produce its membership lists); *N.J. Citizen Action v. Edison*, 797 F.2d 1250 (3rd Cir. 1986) (refusing to require the fingerprinting of door-to-door canvassers for a consumer rights group), *cert. denied sub nom. Piscataway v. N.J. Citizen Action*, 479 U.S. 1103 (1987); *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980) (refusing a request to compel the disclosure of the membership list of a public school reform group); *Comm. in Solidarity with the People of El Salvador v. Sessions*, 705 F. Supp. 25 (D.D.C. 1989) (denying a request for preliminary injunction against FBI's dissemination of information collected on foreign policy group); *Alliance to End Repression v. Chicago*, 627 F. Supp. 1044 (1985) (police infiltrated and photographed activities of a civil liberties group and an anti-war group).

¹³ Commission on Human Relations, Los Angeles County, Hate Crime Report, 2008, http://css.lacounty.gov/Data/Sites/1/documentlibrary/HRC/hatecrimereport2008_reduced.pdf (citing “[f]ear of insensitive treatment or prior negative experience with government agencies” as one of the top five reasons that victims underreport hate crimes).

have been questioned for no reason—simply because police officers felt they didn't belong there. Immigration and border enforcement practices continue to promote racial profiling of those who look or sound foreign. During the past decade, as international terrorism has become a subject of intense concern, those of Muslim and Arab and South Asian descent have been spied upon, stopped, questioned, and subjected to intensified police scrutiny based on racial characteristics or religious belief, not on any evidence of wrongdoing.

For example, according to a series of Associated Press articles that began in August 2011, the New York City Police Department (NYPD) has for years targeted Muslims, South Asians and Arab Americans in New York, Connecticut, and New Jersey for intrusive surveillance without suspicion of any criminal activity. The NYPD had been sending undercover officers to neighborhoods in which Muslims and those who appear to be Muslim are concentrated to monitor daily life in bookstores, cafes, and nightclubs, and infiltrating Muslim student organizations and mosques—again, without any evidence of wrongdoing. The NYPD also engaged in pretextual stops of Muslim residents.¹⁴

Such biased practices are not limited to state and local police. The ACLU has documented widespread FBI monitoring of ethnic and racial communities and use of biased and inaccurate training materials.

The FBI practice of “geo-mapping” allows FBI agents to collect and analyze racial and ethnic demographic information to identify particular neighborhoods and communities. They can even monitor and record the location of businesses and community centers and organizations, “if these locations will reasonably aid in the analysis of potential threats and vulnerabilities, and, overall, assist domain awareness for the purpose of performing intelligence analysis.”¹⁵ Based on information the ACLU has received through Freedom of Information Act requests, the FBI collects racial and ethnic demographic information, mapping communities where people might live who fit the profile that the Bureau associates with a particular criminal activity.¹⁶ Locating and mapping

¹⁴ For a listing of the Associated Press series on this issue, see Associated Press, *Highlights of AP's probe into NYPD intelligence operations*, <http://www.ap.org/media-center/nypd/investigation>. See also New York Civil Liberties Union, “NYCLU Urges City Council to Investigate NYPD Spying on Muslim New Yorkers,” Oct. 6, 2011, <http://www.nyclu.org/news/nyclu-urges-city-council-investigate-nypd-spying-muslim-new-yorkers>; New York Civil Liberties Union, “NYCLU and ACLU Call For Investigation into NYPD Profiling of Muslims and Ethnic Groups,” Feb. 22, 2012 <http://www.nyclu.org/news/nyclu-and-aclu-call-investigation-nypd-profiling-of-muslims-and-ethnic-groups>.

¹⁵ Federal Bureau of Investigation, *Domestic Investigations and Operations Guide* (Dec. 16, 2008), <http://graphics8.nytimes.com/packages/images/nytint/docs/the-new-operations-manual-from-the-f-b-i/original.pdf>.

¹⁶ See e.g., Memorandum from Detroit Domain Management Federal Bureau of Investigation (July 6, 2009), <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011609.pdf>; Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to Mara Salvatrucha Threat (Jan. 21, 2009), <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM009170.pdf>; Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to MS-13Threat (Dec. 15, 2008), <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM011388.pdf>; Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to MS-13 Locations (Sept. 22, 2008), <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM008040.pdf>; Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to Mara Salvatrucha (MS-13) (Sept. 4, 2008), <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM007857.pdf>; Federal Bureau of Investigation, Intelligence Note from Domain Management: Intelligence Related to Mara Salvatrucha Threat (Jan. 21, 2009), <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM009170.pdf>.

such communities will undoubtedly lead to disparate treatment in FBI investigative activity and may have already done so.

The FBI has further contributed to racial and religious profiling across the country by providing religiously biased training to federal, state, and local law enforcement personnel. In 2012, the ACLU and news outlets uncovered shockingly inaccurate and highly biased materials that were being used by federal agencies in training federal, state and local law enforcement.¹⁷ The materials falsely and inappropriately portray Arab and Muslim communities as monolithic, alien, backward, violent, and supporters of terrorism. While many of these training materials have since been purged following a government-wide review, that they were used at all remains troubling, as officers who attended the trainings continue to serve in law enforcement, and biased training inevitably leads to biased policing. Despite repeated calls by the ACLU and other groups for remedial training, no such training appears to have been implemented.

In addition, the conduct and comments of certain members of Congress, unfortunately, have contributed to biases against American Muslim communities. For example, members have held hearings that target American Muslims communities as the source of terrorism threats, made unsubstantiated accusation against American Muslim government advisors, and asserted that law enforcement should continue to be trained with inaccurate and offensive materials. Such biased conduct by elected officials pollutes the public's perceptions of the targeted group. When elected officials perpetuate religious, racial, or ethnic stereotypes they become part of the problem when they should be part of the solution.

Congress has the authority to profoundly impact the way that Americans understand racial, ethnic, and religious differences and to advance values that embrace inclusion and equality. At a minimum, members can cease utilizing biased rhetoric and perpetuating harmful stereotypes in their discussion of security risks. Congress also has a responsibility to take affirmative action to end biased law enforcement tactics that deepens racial and religious divisions throughout the country. To this end, Congress should:

- Pass the End Racial Profiling Act (S. 1670 and H.R. 3618), which would ban the use of racial profiling and provide law enforcement officers with the tools they need to develop more effective practice;
- Urge the Administration to strengthen the Department of Justice Guidance Regarding the Use of Race by Federal Law Enforcement Agencies to address profiling by religion and national origin, close loopholes for the border and national security, and make the guidance enforceable;
- Demand the Attorney General modify the Domestic Investigations and Operations Guide (DIOG) to eliminate the FBI's authority to engage in suspicion-less "assessments," and prohibit racial and ethnic mapping; and

¹⁷ See e.g., Memorandum from San Francisco Division of the Federal Bureau of Investigation (Nov. 3, 2003),: <http://www.aclu.org/files/fbimappingfoia/20111019/ACLURM013039.pdf>; Spencer Ackerman & Noah Shachtman, *FBI Memo: Agents Can 'Suspend the Law'*, wired.com, Mar, 28, 2012, <http://www.wired.com/dangerroom/2012/03/fbi-memo-bend-suspend-law/>; Spencer Ackerman, *FBI Teaches Agents: 'Mainstream' Muslims Are 'Violent, Radical,'* wired.com, Sept. 14, 2011, <http://www.wired.com/dangerroom/2011/09/fbi-muslims-radical/>.

- Compel the DOJ Inspector General to investigate the apparent Privacy Act violations within the FBI's San Francisco and Sacramento Divisions and initiate a broader audit of FBI practices nationwide to determine the scope of the problem.

Conclusion

We are pleased that the Committee is seriously examining the occurrence of bias-motivated crimes in American communities. We urge the Committee to use this hearing as an opportunity to advance concrete congressional action to ensure that everyone in the United States enjoys the protections of the law, including the right to be protected from acts of violence and the fundamental First Amendment rights of free speech and religious liberty.