

# United States Senate

WASHINGTON, DC 20510

November 17, 2022

The Honorable Alejandro Mayorkas  
Secretary  
Department of Homeland Security  
Washington, DC 20528

The Honorable Merrick Garland  
Attorney General  
Department of Justice  
Washington, DC 20530

Dear Secretary Mayorkas and Attorney General Garland:

We welcomed President Joe Biden’s May 2022 Executive Order on “Advancing Effective, Accountable Policing and Criminal Justice Practices to Enhance Public Trust and Public Safety.” This letter provides recommendations regarding the ongoing review of current anti-discriminatory profiling guidance from both the Department of Homeland Security (DHS) and the Department of Justice (DOJ) as a part of that order.

We strongly agree with the Biden Administration that “two years ago, the murder of George Floyd exposed for many what Black and Brown communities have long known and experienced — that we must do more to ensure that our Nation lives up to its founding promise of fair and impartial justice for all... Building trust between law enforcement agencies and the communities they are sworn to protect and serve also requires accountability for misconduct and transparency through data collection and public reporting. It requires proactive measures to prevent profiling based on actual or perceived race, ethnicity, national origin, religion, sex (including sexual orientation and gender identity), or disability, including by ensuring that new law enforcement technologies do not exacerbate disparities based on these characteristics. It includes ending discriminatory pretextual stops...”

Discriminatory profiling is unjust in its targeting of minority communities, ineffective in stopping criminal or terrorist activities, inconsistent with American values, and wasteful of limited government resources.

While the House of Representatives passed the George Floyd Justice in Policing Act on March 9, 2021, the Senate has yet to do so. The Biden Administration has strongly supported passage of this legislation, stating that “to make our communities safer, we must begin by rebuilding trust between law enforcement and the people they are entrusted to serve and protect. We cannot rebuild that trust if we do not hold police officers accountable for abuses of power and tackle systemic misconduct – and systemic racism – in police departments.” Among other important provisions, this legislative package includes the End Racial and Religious Profiling Act to ban discriminatory profiling by federal, state and local law enforcement nationwide. It also includes the Law Enforcement Trust and Integrity Act, which would require DOJ to develop uniform accreditation standards and best practices relating to anti-bias training and collection of use-of-force and officer misconduct data in state and local law enforcement agencies.

President Biden directed both of your agencies to assess the implementation and effects of the DOJ's December 2014 Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity (hereinafter "2014 DOJ Guidance"). In particular, the President asked your agencies to consider whether this guidance should be updated and to report any recommended changes by late November. We therefore urge your agencies to recommend stronger, comprehensive anti-discrimination guidance to the White House, pursuant to President Biden's directive.

Guidance on the DOJ's use of discriminatory profiling published in 2003 under the Bush Administration placed some limits on when federal law enforcement officers can consider race or ethnicity in their activities. However, that 2003 guidance carved out loopholes permitting officers to consider race and ethnicity in the national security and border contexts, in which discriminatory profiling often occurs. The Obama Administration built on that guidance in 2014, adding important protections for religion, national origin, gender and gender identity, and sexual orientation. However, the 2014 DOJ Guidance did not include protection for nationality and largely kept exceptions for national security, intelligence activities, and the border.

Although the 2014 DOJ Guidance expanded the range of law enforcement officers and activities covered – including some at DHS – it also left significant loopholes in its coverage of a wide range of DHS operations and federally-funded state and local law enforcement agencies and partnerships. Partnerships between federal, state, and local law enforcement, such as Federal Bureau of Investigation (FBI)-led Joint Terrorism Task Forces and DHS-led Fusion Centers, collect and share substantial amounts of personal data about individuals and carry out surveillance and investigative activities that can be particularly opaque to public oversight.

In September 2021, DHS issued guidelines for immigration enforcement, declaring that "race, religion, gender, sexual orientation or gender identity [and] national origin...shall never be factors" when making decisions about whom to apprehend and deport. This recent guidance is an important step forward in terms of ensuring compliance with anti-discrimination directives, and includes instituting audits of individual enforcement decisions to ensure consistency, the collection of comprehensive data on enforcement actions to facilitate systemic accountability, and a process for obtaining review of individual decisions. We note that these guidelines are not currently in effect due to pending legal challenges.

Both DHS and DOJ should play a leading role in carrying out the Biden Administration's "proactive measures" to "prevent profiling based on actual or perceived" protected categories by issuing comprehensive and meaningful anti-discrimination rules. DHS plays a leading role in screening travelers, inspecting people as they enter the United States, and conducting enforcement and intelligence activities. We therefore urge DHS to address biased practices across all DHS activities. In particular, DHS's current department-wide guidance on discriminatory profiling fails to cover religion and gives frontline agents discretion to inappropriately consider race, ethnicity, religion, national origin, and nationality. DHS needs stronger measures in place both to measure and to ensure compliance with guidance to combat invidious profiling.

Notably, because the 2014 DOJ Guidance exempts large swaths of DHS's activities, it can be interpreted to authorize discriminatory profiling in many situations. We encourage DHS and DOJ to review the model DHS guidance on discriminatory profiling proposal that is detailed in the recent Brennan Center for Justice report, "DHS at 20: An Agenda for Reform; Stronger Rules Against Bias: A Proposal for a New DHS Nondiscrimination Policy." In particular, each Department's revised guidance should:

1. Explicitly prohibit discrimination based on actual or perceived race, ethnicity, religion, national origin and nationality, sexual orientation, gender (including gender identity and expression), without any loopholes.
2. Explicitly close loopholes that allow for stereotypes about race and ethnicity to enter into day-to-day operations; treat "routine or spontaneous activities law enforcement activities" differently than other activities; or treat the border region differently than the rest of the nation.
3. Add protections to ensure that a person's nationality and national origin are not used as a proxy to discriminate against them based on their race, ethnicity, or religion.
4. Explicitly apply updated DOJ and DHS guidance to federal law enforcement agencies, as well as state and local law enforcement agencies that participate in joint operations or partnerships with federal law enforcement agencies.
5. Provide for data collection, training, and accountability measures (similar to the 2014 DOJ Guidance) to ensure the promise of equal rights under law is realized in the interactions millions of people have with DHS and DOJ every day.

Thank you for your consideration on this important issue. We look forward to your timely response.

Sincerely,



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Benjamin L. Cardin  
United States Senator



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Richard Blumenthal  
United States Senator



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Cory A. Booker  
United States Senator



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Dianne Feinstein  
United States Senator



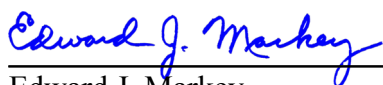
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Mazie K. Hirono  
United States Senator



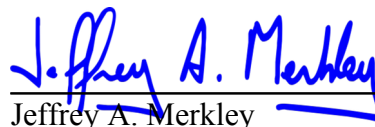
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Tim Kaine  
United States Senator



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Bernard Sanders  
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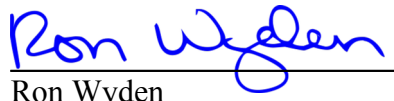
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Chris Van Hollen  
United States Senator



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Elizabeth Warren  
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Ron Wyden

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