



LAW AND ORDER

When Is It Okay To Racially Profile?

For the first time, the government has a clear answer.

By MARGO SCHLANGER | December 18, 2014

 Lead image by Getty.

Suppose an FBI agent believes that Nigerian Americans are more likely than others to commit fraud, or a U.S. Park Police officer believes that transgender women are particularly likely to be prostitutes? Can those law enforcement officers act on those hunches in conducting a stop, search, or investigation? As of this month, for the first time, the answer is a clear no. The Department of Justice has finally issued long-awaited guidance for federal law enforcement agencies on how they can and cannot use race, ethnicity, and other factors in deciding whom to investigate, stop, question, and search. The new profiling guidance supersedes a substantially narrower 2003 document, written by political appointees in the Bush Administration's Civil Rights Division.

Attorney General Eric Holder's guidance takes several helpful steps forward. The 2003 version dealt with just race and ethnicity; the new version adds gender, national origin, religion, sexual orientation, and gender identity. Moreover, the new document reaches broader than the old one. It was not previously clear that federal law enforcement activities

that were not quite “investigations” were covered by the anti-profiling rules. Now it is. In addition, the new guidance usefully covers interior immigration enforcement.

Advocates in this area waited years for the revisions—pressing particularly hard for the new coverage of religion. And getting the guidance out was a major push for Holder, who started the revision process in 2009. Holder has announced his exit from the Department of Justice and evidently wanted this project completed before he left. He thinks of it as a legacy item, and in his statement that accompanied the new rules, he broadly condemned profiling: “Profiling by law enforcement is not only wrong,” he said, “it is profoundly misguided and ineffective because it wastes precious resources and undermines the public trust.”

The rules Holder announced, though, are quite a bit less broad than that condemnation. The Department of Justice was ready to issue the guidance months ago, but other agencies—particularly the Department of Homeland Security—pushed back. DHS wanted softer rules applied to its border and aviation screening activities. And so the DOJ’s new document acknowledges three key carve-outs: “non-law enforcement personnel, including U.S. military, intelligence, or diplomatic personnel, and their activities,” “interdiction activities in the vicinity of the border,” and “protective, inspection, or screening activities.”

Those aren’t minor exemptions. Just like the 2003 policy it replaces, that phrasing excludes the National Security Agency and other non-FBI intelligence agencies, as well as several key parts of the Department of Homeland Security—the offices that do border screening at international airports and other ports of entry; the Border Patrol, which operates between ports of entry within 100 miles of the border; and TSA, which conducts airport screening. (In addition, the new policy expressly allows the FBI to continue its controversial ethnic mapping activities without any additional regulation, so long as it does not “target only those persons or communities possessing a specific listed characteristic.”). In fact, all told, those seemingly minor phrases actually exclude the majority of federal law enforcement personnel. While the rules apply to the FBI’s 14,000 agents, the ATF’s 2,500 agents and the DEA’s 5,500 agents, among others, they don’t apply to TSA’s 47,000 screening officers or to the bulk of the activities of the 46,000 Customs and Border Protection officers, nor to the protective activities of the 3,200-strong Secret Service. Moreover, the guidance does not—and could not, legally—govern local and state law enforcement agencies, which between them employ over 450,000 sworn officers who perform the bulk of American policing. The new guidance covers local police only when they participate in federal law enforcement task forces. (Local police are, of course, bound by the Constitution, which forbids some but not all uses of race, ethnicity, gender, etc. And they may have additional state or local law or policy further constraining them.)

The Obama Administration's executive pronouncements are, here as in so many areas, the only game in town. The current Congress failed to pass the End Racial Profiling Act, which would have banned profiling by any federal law enforcement agency and allowed individuals to enforce that ban by federal injunctive lawsuits. The bill's prospects are even dimmer in the next, Republican-led Congress.

So far, reporting about the new federal policy has focused on its omissions, portraying the result as allowing racial profiling at the border. The *New York Times* headline was typical: "U.S. to Continue Racial, Ethnic Profiling in Border Policy." If that were true—if Holder's guidance were the only administrative constraint on discriminatory federal law enforcement and intelligence activities—its omissions would merit severe disappointment. But, happily, the just-announced DOJ guidance is *not* the only executive policy in operation. DHS already has in place a reasonable policy against race and ethnicity profiling by all its component agencies—including agencies like CBP and TSA. (In fact, as I'll describe below, DHS policy in one respect even goes further than the DOJ guidance, regulating use of particular nationalities as formal screening or investigative criteria.)

Critics who focus on the DOJ policy's border carve-outs, then, are missing the real problem, which is not the content of the anti-discrimination policy that applies to the border and the rest of DHS activities, but how to best enforce it.

While the Department of Justice was carrying out its multi-year review of its racial profiling guidance, DHS had a parallel process underway. In 2013, with no publicity, DHS issued its own anti-profiling policy. That policy covers all law enforcement and screening activities of the Department—including those at and near the border, as well as in the nation's airports. It "prohibit[s] the consideration of race or ethnicity in our investigation, screening, and enforcement activities in all but the most exceptional instances," allowing DHS personnel to "use race or ethnicity only when a compelling governmental interest is present, and only in a way narrowly tailored to meet that compelling interest." While the DOJ guidance disallows any consideration of race, ethnicity, etc., in routine situations, the DHS policy is a bit looser, but it is far from allowing free rein to stereotypes and bias. DHS argues that it needs the ability to consider ethnicity in rare cases, as part of a totality of circumstances that might justify investigative action. An unusual combination of country of origin and ethnic appearance, for example, might prompt some extra questions during a border search. This would be allowed under DHS's policy. But properly read, the 2013 DHS policy already bars the most commonly alleged kind of profiling—the routine association of apparent Latino or Asian ethnicity with suspicion of immigration violation.

Indeed, the 2013 DHS policy actually goes *beyond* the DOJ guidance just released in one crucial respect: DHS imposes some moderate restraints on the consideration of individuals' nationality—that is, country of citizenship—“as an investigative or screening criterion.” Rules requiring more thorough screening or investigative prioritization of people from a particular country, the DHS policy states, “should be reserved for situations in which such consideration is based on an assessment of intelligence and risk, and in which alternatives do not meet security needs, and such consideration should remain in place only as long as necessary.” DHS has not altogether banned the use of nationality as a screening or investigative criterion, but since 2010 it has implemented a process by which the Department's civil rights office (and general counsel's office, and privacy office) reviews such uses, to ensure that they are both well founded and limited in time. The 2013 anti-discrimination policy formalized that approach and applied it throughout the Department. This was an important civil rights policy advance.

The DOJ guidance, by contrast, does not regulate in any way federal law enforcement agencies' use of nationality as a factor for suspicion. This omission of nationality from Holder's list of protected characteristics was a foregone opportunity. After all, nationality discrimination can violate many of the same moral commitments as race, ethnicity, or national origin discrimination. Considering people of one or another nationality to be more crime-prone trades on stereotypes, fails to treat individuals as individuals, and can lead to intolerable unfairness. Indeed, one of the foundational American civil rights failures was nationality discrimination, when Japanese immigrants—some naturalized citizens, and also many Japanese nationals—were sent to internment camps during World War II. It makes sense to require law enforcement agencies to use more individualized investigative approaches when possible, as the DHS but not the DOJ policy does.

On the other hand, DHS does have one key policy gap compared to the DOJ guidance. DHS has no written agency-wide policy forbidding religious profiling. Forbidding DHS employees to take *any* account of religion (as the DOJ guidance does) would be inappropriate; people's religion may be relevant to their claims for asylum, for example. But a policy forbidding religious discrimination in border and airport screening in particular would be a useful pledge against bias.

But returning to race, ethnicity, and national origin profiling, DHS's policy is reasonably protective of civil rights. Its problem is not, as last week's headlines suggested, inadequate policy coverage. Rather, the problem is ensuring actual compliance. For example, both before and after 2013, CBP's border screening and its interdiction activities near the border have provoked many complaints of ethnic discrimination. For two years, I had the privilege of serving as the head of DHS's civil rights office, and I had a close-up view of those

complaints. Complaint investigation, while important, cannot be the only anti-discrimination implementation method, because ascertaining what really motivated contested individual stops or searches was often nearly impossible. What is needed as well is more comprehensive and routine oversight of the justification for stops and searches, and, as the DOJ guidance puts it, “targeted, data-driven research projects” to assess implementation.

Both CBP and TSA, exempt from the new DOJ guidance, should, in conjunction with DHS’s civil rights office, develop ways to test and demonstrate publically their rigorous compliance with DHS’s current anti-discrimination policy. TSA might, for example, develop protocols to record the demographics of airline passengers subjected to extra screening. And CBP could require its officers to record the reasons underlying any routine or nonroutine searches they perform, the apparent race or ethnicity of those subjected to such searches, and the results. Disparate results by race or ethnicity might suggest a need for closer supervision. In 2011, while I worked at DHS, I recommended that CBP conduct routine analysis of its port-of-entry laptop and cellphone searches, to assess whether those searches were disproportionately affecting people of any particular ethnicity (after controlling for factors like port traveler demographics, and inclusion in watchlists or lookouts). CBP agreed to do that. This kind of monitoring can help DHS detect problems. And releasing the results would promote accountability, too. Similarly, DHS should develop ways to report on its nationality screening compliance record. Even though this poses challenges because of necessary national security secrecy, CBP could, for example, demonstrate that it truly is minimizing use of nationality as a screening criterion by reporting periodically how many times and for how long nationality has been so used, and how many people were affected.

Overall both the DOJ guidance and the DHS policy are useful early steps, but the implementation will be challenging. Actually putting them into practice—now that would be a great legacy for the entire Obama administration.

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