

Congress of the United States
Washington, DC 20515

October 8, 2015

The Honorable Jeh Johnson
Secretary of Homeland Security
U.S. Department of Homeland Security
3801 Nebraska Ave., NW
Washington, DC 20528

Dear Secretary Johnson:

We write to urge the Department of Homeland Security (DHS) and Customs and Border Protection (CBP) to take additional measures to end discriminatory profiling by removing remaining loopholes in federal law enforcement guidance. In addition, we respectfully request an opportunity to meet with you to discuss CBP's plans for addressing this important issue.

Border communities, like all American communities, desire to live freely and safely, protected by law enforcement, not in fear of it. At a critical moment of national dialogue about community trust in police, we are deeply disappointed that many CBP activities at and away from ports of entry were exempted from profiling restrictions contained in the Department of Justice's revised *Guidance for Federal Law Enforcement Agencies*, released in December 2014.

CBP's exemption has exacerbated mistrust in border communities, hindering the agency's mission and tarnishing the reputations of all CBP personnel, including the many officers and agents who carry out their duties professionally and courageously. We write to urge CBP and the Department of Homeland Security to issue guidance that ensures discriminatory profiling based on race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity is unacceptable.

Furthermore, the Guidance does not limit the FBI, DHS, the Department of Justice, and local law enforcement from using surveillance to map and infiltrate Muslim communities simply based on religious identity. Surveillance based on religious affiliation violates our basic Constitutional principles and creates the harmful perception that there is a link between religious communities and criminal activity. We support giving law enforcement the tools they need to prevent crime, but we are deeply concerned about illegal surveillance without reasonable suspicion.

The 2014 DOJ *Guidance* stresses that profiling the public based on intrinsic characteristics is "simply not good law enforcement." It is also contrary to our constitutional principles. In *Montero-Camargo*, the Ninth Circuit noted that "[s]tops based on race or ethnic appearance send the underlying message to all our citizens that those who are not white are judged by the color of their skin alone . . . that those who are not white enjoy a lesser degree of constitutional protection[,] assumed to be potential criminals first and individuals second."ⁱ Profiling degrades the dignity of individuals and groups singled out based on immutable traits.

We are experiencing a profound moment of national reflection about police practices. CBP—our nation's largest law enforcement agency—must not stand as an exception to unbiased law

enforcement. CBP can carry out its mission without engaging in discriminatory practices. The agency has an opportunity to build trust with border residents and the traveling public by complying fully with the DOJ *Guidance*'s two key profiling standards: (1) profiling will not play any part in routine or spontaneous law enforcement decisions, "even where the use of a listed characteristic might otherwise be lawful;" and (2) profiling may occur only when there is "trustworthy information, relevant to the locality or time frame, that links persons possessing a particular listed characteristic" to specific law enforcement, security, or intelligence threats (and even then not in all circumstances).

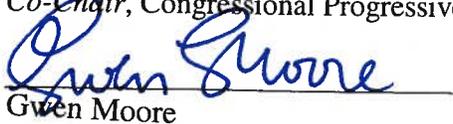
DOJ's *Guidance* includes vital components beyond its profiling standards, emphasizing the importance of training, data collection, and accountability. CBP must promptly implement each of these elements to demonstrate a clear commitment to bias-free law enforcement. Border communities eagerly await these improvements, for example, a recent editorial in the *Watertown (NY) Daily Times* calls for proper CBP data collection and expresses surprise that protocols are not already in place: "Given the questions raised over the past few years about racial and ethnic profiling by law enforcement agencies across the country, it's difficult to understand why documenting specific information about people who are stopped by border patrol personnel isn't being done. . . . Detailing who is being stopped, why they are being stopped and what resulted from the stop would go a long way toward ensuring CBP agents are staying within the law."ⁱⁱ The *Arizona Republic* expressed concern that "[r]esidents of border communities south of Tucson have long complained about racial profiling and harassment at Border Patrol checkpoints. Their demands for information about the effectiveness of individual stops have been rebuffed."ⁱⁱⁱ These recommendations are consistent with conclusions reached by the President's own *Task Force on 21st Century Policing* about data collection and additional measures to combat racial and other profiling.^{iv}

We urge DHS and CBP to lead by example in adopting, training, and ensuring accountability to the highest law-enforcement standards to prevent discriminatory profiling. We look forward to meeting with you to discuss how CBP can carry out its mission without engaging in discriminatory practices.

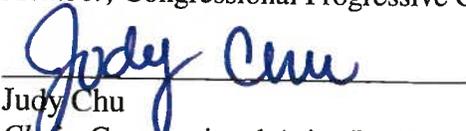
Sincerely



Raúl M. Grijalva
Co-Chair, Congressional Progressive Caucus



Gwen Moore
Member, Congressional Progressive Caucus



Judy Chu
Chair, Congressional Asian Pacific American Caucus



Keith Ellison
Co-Chair, Congressional Progressive Caucus



Linda T. Sánchez
Chair, Congressional Hispanic Caucus

cc:

R. Gil Kerlikowske, Commissioner, U.S. Customs and Border Protection

ⁱ *United States v. Montero-Camargo*, 208 F.3d 1122, 1135 (9th Cir. 2000) (en banc).

ⁱⁱ “Write it up: Bill requiring border patrol to document stops is long overdue.” *Watertown Daily Times* (June 6, 2015), <http://www.watertowndailytimes.com/opinion/write-it-up-bill-requiring-border-patrol-to-document-stops-is-long-overdue-20150606>

ⁱⁱⁱ “You aren’t above the law, Border Patrol.” *Arizona Republic* (June 10, 2015), <http://www.azcentral.com/story/opinion/editorial/2015/06/10/you-arent-above-the-law-border-patrol/71036582/>

^{iv} See, e.g., Recommendation 2.6 (Law enforcement agencies should collect, maintain, and analyze demographic data on all detentions (stops, frisks, searches, summons, and arrests)), http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf