Subcommittee on Aviation

Hearing on

Aviation Security with a Focus on Passenger Profiling

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PURPOSE

The purpose of this hearing is to examine the need for, and improvements to, airline passenger profiling.

BACKGROUND

Since enactment of the Aviation and Transportation Security Act on November 19, 2001, the Subcommittee has held two oversight hearings on the law's implementation. The first, on December 7, 2001 looked at the difficulties in meeting the December 31, 2002 deadline for screening all checked baggage with explosive detection equipment. The second hearing, on January 23, 2002 focused on the 60-day deadline for screening checked baggage by other approved means.

Some security experts have suggested that focusing on baggage is not the best approach. Rather, they suggest the focus should be on the person. This usually means profiling to try to determine in advance which passengers pose the greatest risk.

Passenger profiling is not new to aviation. For example, Sam Husseini, a spokesman for the American-Arab Anti-Discrimination Committee, was quoted in the January 2, 1998 New York Times as stating that profiling has been going on for 20 years, administered by individual airline employees. He suggested that a more objective system might be preferable, as it would tend to eliminate the biases of an individual.

Also, because of the limitations of existing bomb detection technology, aviation security experts have sought to use profiling to reduce the number of passengers to be screened. This would allow airport security to focus on those passengers who are most likely to pose a threat.

In 1994, Northwest Airlines began to develop a computer-assisted passenger pre-screening system (CAPPS). This automated screening system was designed to separate out that small percentage of passengers who should be subject to additional security measures.

After the TWA flight 800 crash in July 1996 and the initial suspicions that a bomb was involved, interest in passenger profiling generally, and CAPPS in particular, increased. Recommendation 3.19 of the Gore Commission recommended that automated passenger profiling be used to complement existing bomb detection technology. Also, section 307 of the Federal Aviation Reauthorization Act of 1996 (P.L. 104-264, 110 Stat. 3253) directed FAA to assist airlines in developing a computer-assisted passenger profiling system in conjunction with other security measures and technologies. Since 1998, CAPPS has been widely employed by the airlines.

Concerns were raised at that time about this passenger profiling system. The American Civil Liberties Union and Arab-American groups, among others, expressed concern that CAPPS could discriminate by using factors such as the passenger's race, religion, or national origin. The Subcommittee held a hearing on this issue on May 14, 1998.

The factors the airlines use are a secret. But airlines insist race, religion and national origin are not factors. Published reports indicate that the factors include frequency of travel to certain destinations, whether the passenger is a member of the airline's frequent flyer program, and whether the ticket was bought with cash

or a credit card. The latter two are factors because it was assumed that terrorists would not participate in a program or use methods of payment that would reveal aspects of their identity.

Previously, passengers who fit the profile might never know that they had been selected. Their baggage might be examined by an explosive detection device or matched with them to ensure that they actually boarded the flight. More recently, however, passengers who are selected by CAPPS may be subject to additional security at the gate before boarding the aircraft.

Due to the concerns that had been raised about the potential for discrimination, DOT and the Gore Commission asked the Justice Department to review the CAPPS profiling system. Justice issued its report on October 1, 1997. It included the following findings -

CAPPS does not include race, religion, or national origin as a screening factor;

- Neither the Constitution or any Federal law prohibits the implementation of the CAPPS system; and
- To a limited degree, CAPPS distinguishes between passengers on the basis of whether or not they are American citizens but that this is justified and constitutional.

Justice did make the following recommendations --

- The FAA should periodically review the screening factors in CAPPS to ensure that they are reasonable predictors of risk;
- Justice should undertake a post-implementation review within one year to ensure that passengers are not singled out on the basis of race, religion, or national origin;
- DOT and FAA should undertake efforts to inform the public about the profiling system;
- Airlines should be prohibited from altering CAPPS without government approval; and
- FAA should require airlines to establish procedures for implementing CAPPS to ensure that it is not done in a discriminatory or insensitive manner.

Concerns about discriminatory profiling persist. However, since September 11th, attention has shifted to the effectiveness of the profiling system currently in use. It is unclear whether the current profiling system selected the terrorists who hijacked the planes on September 11th. Moreover, many people note that the type of person who is often selected for additional screening, Congressmen, elderly women, disabled passengers, and children, are not the sort of person who is most likely to pose a terrorist threat. They suggest that any profiling system should focus on those who are more likely to pose a threat.

It has been reported that Federal aviation authorities will soon begin testing a system designed to pull together every passenger's travel history, living arrangements, and other personal and demographic information. The plan is to establish a computer network linking every reservation system in the U.S. to private and government databases. The computer network would use data-mining and predictive software to profile passengers and look for potential threats.

WITNESSES

PANEL I

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TESTIMONY OF
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BEFORE
THE SUBCOMMITTEE ON AVIATION

COMMITTEE ON TRANSPORTATION & INFRASTRUCTURE

"AVIATION SECURITY AND PASSENGER PROFILING
AT UNITED STATES AIRPORTS"

FEBRUARY 27, 2002

I.
INTRODUCTION

Thank you, Mr. Chairman, it is a honor to appear

before the Subcommittee on Aviation and its distinguished members to discuss the constitutional and policy implications of the use of passenger profiling at the nation's airports. My name is Jonathan Turley and I am a law professor at the George Washington University Law School where I hold the J.B. and Maurice C. Shapiro Chair for Public Interest Law. I know that your time is limited today and, with the consent of the Subcommittee, I would like to submit a longer written statement to augment my oral testimony.

Profiling is a subject that could easily occupy an entire session of Congress, let alone a single congressional hearing. There is no subject that more polarizes our population or pulls within its vortex a greater array of complex constitutional and policy questions. While I bring some relevant experience to this subject,[1] I cannot claim to represent the majority of scholars or even guess at what that consensus might be.[2] In fact, this subject is so heavily laden with deep societal conflicts that it is often difficult to hold a meaningful conversation about the merits and dangers of profiling. This is why today's hearing is so important. It is essential that we move beyond stereotypes and

generalizations concerning profiling and engage in a good-faith dialogue over the possible use of this security device. To put it simply, we need to move beyond our inhibitions in the discussion of race and speak frankly about the value and dangers of passenger profiling during these precarious times.

In the current crisis, we have an enormous asset in a constitutional system that was designed to adapt with changing times and emerging dangers. The United States Constitution is a document grounded in practicality. Doctrines like the separation of powers were conceived in a frank appraisal of the natural tendencies of people in power to expand and abuse authority. Another reflection of that practicality is found in the tests governing the violation of core constitutional rights from the freedom of speech of the First Amendment to the search and seizure protections of the Fourth Amendment to the equal protections of the Fourteenth Amendment. These rights are consistently interpreted as requiring some level of balancing of interests. Whether the conflict is between an individual and the state or between two citizens, the Constitution often requires a consideration of the rivaling interests in a given area of conflict. In the area

of search and seizure such balancing is particularly evident in constitutional tests and analysis. As will be shown, the Supreme Court has often accommodated the interests of the government in areas like borders and airports as well as those circumstances raising issues of exigency or public interest.

It has been said that the United States Constitution is not a suicide pact.[3] While protecting core liberties, it is a document that also allows for the accommodation of transient government needs or exigent circumstances. In this sense, September 11th did not create a new reality for constitutional analysis. Rather, it reflected the fact that the state's interests can ebb and flow with periodic dangers and realities. Nevertheless, there are limitations on such accommodation and, while the Constitution protects the security and survival of the state, it also guards against the arbitrary and abusive use of power in the name of the public interest.

Profiling may be an inevitable response to the dangers evident at airports. Every month, over 40 million people travel by air in this country. It is simply practically impossible to closely scrutinize every

passenger while maintaining a functioning air travel system. Obviously, it is theoretically possible to subject every passenger to an in-depth interview and screening process but the costs of such a system would be prohibitive. As a result, airlines must make choices and select which passengers to subject to closer scrutiny. There are only two basic systems for such scrutiny: random selection and profile selection. Profile selection can itself be divided into two basic forms: computerized passenger prescreening (like the CAPPS system) or observational profiling by security agents. Both forms of profiling are valuable and can be used in concert. However, regardless of its form, profiling is only as accurate and reasonable as the criteria used to screen passengers.

Due to the erroneous inclination of the public to consider “profiling” and “racial profiling” as synonymous, there has been an unwillingness of airlines to implement any formal profiling systems. Instead, the primary identification process remains the random selection process. As an academic, I became aware of this system and its inherent inefficiency while traveling not long after September 11th. Early one morning, I was rushing to Chicago for a speech. I was

aware that I fit an easy profile for a suspicious passenger. I had purchased my ticket not long before the flight; I was traveling with no luggage; and I was visibly nervous as I rushed for a flight to a major U.S. city with some of the "high value targets" identified after the September 11th attacks. In addition, my Italian complexion could easy be construed as Middle Eastern rather than Mediterranean. I was not surprised, therefore, to see security coming over in my direction. However, rather than pull me aside, the security stopped an elderly lady next to me. The elderly lady gradually disassembled as a team of security officers pulled out every one of her many pill bottles, inhaler, and cosmetic items. While I watched this scene unfold, I asked the supervisor why they stopped the old lady and not the younger, single male with no luggage. The security official responded that she would have probably preferred to search me but that they are strictly prohibited from using any profile. The old lady was the choice of a random selection process so they would carry out a search on the least likely individual on the airplane to actually be a terrorist.

Such experiences hardly make one feel safer. Rather, due to our inhibitions, we appear unable to implement

systems that offer the reality and not just the appearance of enhanced security. This is not to say that random selection can never isolate a guilty party. Rather, random selection rolls the dice on security by selecting an insignificantly small number of the 40 million monthly travelers for special scrutiny. At the beginning of any given monthly cycle, the airlines are facing the same odds as a lottery player in a multi-million-dollar game.[4] The airlines have tried to increase these odds with the same strategy as multiple ticket purchasers – increasing the number of randomly selected passengers. This difference, however, does not change the overwhelming odds against "winning." This is not to say that an airline cannot hit the jackpot and land a Mohamed Atta. It is simply statistically unlikely that the terrorist lottery will yield a positive result.

If we want to have an effective screening system at our airports for terrorism, some form of profiling must be used. As will be shown below, I believe that a well-tailored and balanced system could pass constitutional muster. Moreover, such a system could actually reduce ethnic and racial incidents at airports by subjecting stops to greater scrutiny and monitoring. The greatest

danger to citizens from profile stops is not the brief interruption in their travel but what occurs after the stop in the tenor and time of questioning. Abuses, if they occur, will be found in the use of illegitimate criteria or in the disrespectful or abusive treatment of individuals selected for airport stops. I would suggest that answering these insular questions would most serve the individual rights of our citizens as well as the collective interests of air travelers.

II.
PROFILING IS A CONCEPT THAT IS DISTINCT AND INHERENTLY AT ODDS WITH THE ABUSIVE USE OF RACIAL PROFILING.

This hearing would constitute a great leap forward if it only succeeded in establishing an important threshold distinction between profiling as a general concept and racial profiling as a specific (and corrupted) application. Racial profiling is to the science of profiling as forced confessions are to the art of interrogation. Like forced confessions, racial profiling achieves only the appearance of effective police work. Racial profiling often shields or obscures

a racial prejudice and unscientific bias against a particular class or group. It is the antithesis of legitimate profiling in that it elevates stereotypes over statistics in law enforcement. It is important to understand what is wrong with racial profiling to understand what might be right with airport profiling.

Racial profiling is something of a misnomer. A legitimate profile is an aggregation of reliable factors with statistically proven indicators of criminality. Abusive racial profiles use a single or outcome-determinative criterion for isolating suspects. When someone judges individuals entirely and superficially on the basis of race, they are making by definition a racist determination. Dressing up such bias as a scientific calculation is little more than a post-rationalization. This is not to say that race cannot be a factor in some legitimate profiles, but its placement and use in a profile is extremely precarious and delicate work. All of the profiling abuses that have been documented follow a common pattern where race is the only or predominant factor used to select suspects. There are very limited circumstances where race is a relevant criterion and only when it is tied to other criteria of selection. For example, if police are

dealing with an increase in crime in a neighborhood by white or African-American gangs, race may be part of a legitimate profile of possible suspects. Along the Mexican border, race is an obvious criteria in looking for illegal immigrants. In some opium smuggling circumstances, the government may profile on the basis of race if it finds that gangs primarily use Asian couriers due to the presence of family members in source areas (for possible retaliation). Finally, some profiles may be generated by intelligence to indicate a specific threat that includes information on race or nationality.

These are not, however, the type of cases that most concern the majority of Americans. Over the years, we have seen profiling used to isolate African-American males under a general assumption that they are more inclined to criminality. The social and legal costs of this abusive practice have been extraordinarily high. Part of the reason for this practice is the common reference to a statistical difference between races in terms of criminal activity. There is in fact a higher percentage of crime by African-American males in comparison to their percentage of the population.[5] However, this difference does not support the use of

racial profiling for two reasons. First, the higher percentage of African-American males stopped may explain some of the higher percentage of convictions. Racially based stops can be a self-fulfilling prophesy as the greater number of stops naturally yield a great number of arrests and convictions. If whites were stopped with greater frequency, the number of arrests would likely rise with the increased detection and enforcement. Second, even assuming arguendo that race is a statistical indicator of criminality, its use may still be barred as imposing prohibitive social costs that outweigh any social benefits. Racial profiling reinforces stereotypes of criminality; fuels racial divisions; imposes social stigma on individual citizens; creates de facto travel restrictions or barriers; and drains police efforts from alternative and proven method of enforcement.

Some of these concerns are clearly present in airport profiling but not to the same degree and not to the same effect. There are both legal and practical distinctions between racial profiling and airport profiling.[6] The controversial use of racial profiling concerns the elevation of race as the sole or over-riding criteria; to tie a race to a general propensity for

crime. Conversely, airport profiling is tied to specific criminal conduct and a demonstrated threat. There is clearly a greater threat of terrorism coming from certain countries with extreme Islamic and anti-American movements. Moreover, an airport is a limited and somewhat unique location for profiling. In racial profiling, it is the race of the suspect and not his conduct that often triggers a stop. In the most controversial cases, a black driver is stopped on suspicion of "crime" rather than an articulated suspicion of a specific crime. Airport profiling is tied more closely to the locus and the specific dangers of terrorism. Part of the social costs to racial profiling is that every African-American male is always at risk of being stopped for the offense of "driving while black." An airport, however, is a location that is understood to be subject to more stringent security and restrictions. One's expectations are manifestly different when entering a terminal as opposed to a neighborhood. Finally, the specific crime involved in airport profiles presents a greater exigency and risk for society than does a typical drug profile stop on the street. Quite frankly, society can live with a couple of nickel bags of narcotics making it through the law enforcement net. The costs of a failure to detect

criminality at an airport are far more immediate and deadly. Failures at airports security are not measured by nickel bags but body bags – a reality that cannot be ignored in any final analysis.

Given our painful history with racial profiling, it is obviously tempting to argue that we can use profiles with the express prohibition on the inclusion of race or nationality or ethnicity as criteria. However, it is possible to accept that race may, in limited circumstances, be a relevant criteria without endorsing the use of racial profiling in its colloquial sense.[7] This is particularly the case where intelligence or witnesses indicate the race of possible suspects. In the same fashion, profiles that include well-founded factors of nationality or ethnicity cannot be categorically rejected as evidence of prejudice or bias. In the case of terrorism, it is a type of crime that can be focused by world events or regional conflicts on particular nationalities or ethnic groups. Unlike appearance or behavior, nationality and ethnicity are characteristics that are difficult to hide or change. Conversely, because they are immutable characteristics, we have to be cautious that individuals with these characteristics are not

converted into walking profiles subject to endless stops and searches. This is why the combination of criteria and the training of agents for observational profiling is so essential. It is to those issues that I would now like to turn.

III.
PROFILING CAN BE A CONSTITUTIONAL AND APPROPRIATE MEANS TO DETER TERRORISM AT UNITED STATES AIRPORTS.

As stated earlier, I believe that passenger profiling would be constitutional – even with the inclusion of nationality or ethnicity – if crafted to fit existing standards under the Fourth and Fourteenth Amendments. There are four principle lines of cases that are most relevant to the issue of profiling of passengers at airports. First, there is a long line of cases in which profile stops that been specifically reviewed by the Supreme Court and lower courts.[8] The Supreme Court has never found racial profiling, let alone general profiling, to be unconstitutional as a threshold matter. However, it is clear that racial profiling can be a violation of the Fourteenth Amendment's guarantee of equal protection as well as

a violation of the Fourth Amendment's search and seizure protections in certain circumstances. Race alone is not sufficient as a general matter to establish reasonable suspicion for stop.[9] It seems likely, in my view, that a majority of the Court would accept race or nationality as a factor on a profile where the government could show a statistical justification or intelligence basis for the selection.

Second, the Supreme Court has allowed law enforcement to stop individuals for questioning where their conduct or appearance creates a reasonable basis for inquiry. In Terry v. Ohio,[10] the Supreme Court found that an investigatory stop and patdown was constitutionally permissible when supported by "reasonable suspicion," a standard below that of the Fourth Amendment's probable cause standard. This standard is tied to the totality of the circumstances and the use of an officer's reasonable judgment.[11] However, it is clear that officers cannot detain someone longer than reasonably necessary.[12] Accordingly, at airports, Terry stops can be used where a reasonable officer would view an individual as suspicious due to their conduct or appearance. Any

profile stops would be limited in time and character along the lines of a Terry stop.

Third, there is a line of cases recognizing that the government must be given greater discretion and flexibility at airports as the functional equivalents of borders.[13] Not only is the expectation of privacy less at an airport under the Katz v. United States[14] test, but airports are a primary site for profile stops by government agents working with Customs, the DEA, and the INS. If a profile including nationality or ethnicity is to be upheld, it is most likely that it would be upheld at airports where the government's interests are at their apex.

Fourth, and finally, the Court has allowed stops to occur for the most minor violations – even when such reasons are merely a pretext. In Whren v. United States, the Supreme Court ruled that the police can use pretextual stops.[15] While the Court noted that the use of pretextual stops based on race could violate the Fourteenth Amendment, the Court stated that it would not delve into the subjective intent of an officer who can cite a valid pretext for a stop.[16] One interesting

limitation on Whren is the Court's subsequent rejection of the use of pretextual roadblocks in City of Indianapolis v. Edmond.[17] Ironically, profiling seeks to avoid the problem identified in Edmond. Airport security does not want to use a pretext to stop every passenger but to remove an identifiable subgroup of travelers from the much larger population. Pretextual stops are more relevant outside of the airports where simple violations of motor vehicles laws supply easy pretexts for law enforcement.[18] Nevertheless, Whren would indicate that law enforcement can use minor violations as an alternative justification for investigatory stops at airports.

While there is much more that can be gleamed from these cases in terms of guidelines, these cases suggest that a profile on terrorism could be upheld, even with the inclusion of nationality or ethnic factors. Such profiles would have to contain an array of factors beyond nationality or ethnic factors such as conduct, appearance, and independent intelligence factors. The multiple criteria is particularly important for general profiling. Few would seriously contest that greater importance can be given to nationality or ethnicity in a target profile where an individual or group is being

specifically sought by the government. While we may call such an “information circular” a “description” of suspects as opposed to a “profile,” it is often little more than an identification of likely suspect characteristics. If a threat is viewed as imminent, there may be little for the government to use beyond nationality and a general profile of a likely terrorist’s age and gender. Thus, if the government receives intelligence that a terrorist cell in Sudan is about to attack an airplane, it is particularly reasonable for the government to temporarily subject all Sudanese nationals and Sudanese flights to added scrutiny. The greatest concerns arise in a general profile based on statistical analysis as opposed to a targeted profile based on specific intelligence. It is in these general profiles that we need to direct our greatest attention to define the proper use of such criteria and to impose some reliable form of monitoring.

IV.
CONGRESS SHOULD DEVELOP GUIDELINES AND MONITORING SYSTEMS FOR PASSENGER PROFILING AT UNITED STATES AIRPORTS.

It is clear that profiling at airports will occur informally

regardless of whether it is adopted formally. Cases like Terry allow police officers to use their reasonable judgment as to suspicious conduct or appearance. An officer may describe this selection as based on a "hunch" supported by objective criteria, but it is often an informal profile. Ultimately, a profile is the aggregation of the experience of hundreds or thousands of officers into a single list of common criteria. Basic profiles of high-risk travelers (regardless of nationality) are obvious to any booking agent. A passenger traveling without luggage, with a one-way ticket purchased the day of the flight will raise a series of "flags." Such profiles can be used either as part of a computerized system like the computerized passenger prescreening system (CAPPS) or as a secondary observational system by booking and security agents. The key in both computerized and observational systems is obviously the use of true objective criteria. It is obviously easier to scrutinize, control, and monitor a CAPPS system as opposed to stops triggered by visual observation.

The benefit of a formal profiling system is that we can control the criteria and better monitor their use. One of the greatest corruptions of profiling is the use of

"objective" criteria that cover every possible conduct or behavior as well as its inverse. Thus, past controversial profiles have shown such inversive criteria as avoiding eye contact as well as making eye contact.[19] This can create the false appearance of scientific objectivity when the cited criteria merely rationalize a stop based on bias.[20] Accordingly, the United States Customs Service changed its 1999 Personal Search Handbook to eliminate over forty (often conflicting criteria) with six criteria relevant to customs violations.[21]

Terrorism involving airplanes is a relatively narrow category of crime that avoids the past problems associated with generalized and race-based theories of criminality. Even critics of past racial profiling have accepted that some limited nationality or racial factoring is permissible when there is greater specificity as to the crime and threat. Thus, academics have accepted as valid profiles that focus on limited categories of criminality, distinctive patterns of ethnic or racial offenders, specific locations, and patterns of conduct.[22] Many of these criteria mirror successful profiles used in cases like United States v.

Sokolow.[23]

Obviously, many of the most obvious profile criteria do not involve nationality or ethnicity. Richard Reid is an example of the obvious value of a general profile in the isolation of particular travelers. Reid was identified by a profile at the Charles de Gaulle airport. Security officials with ICTS, a subcontractor at the American Airlines counter, identified Reid because of (1) lack of a verifiable address; (2) a one-way ticket; (3) no clear travel plan; (4) no luggage; and (5) use of cash to buy his ticket.[24] This led to a stop that led to Reid missing his first flight – and quite possibly a successful attempt at terrorism. The failure of the French authorities to completely search Reid, including his shoes, was a case in which a profile was successfully used but undermined by poor security procedures.[25] On December 11, 2001, the FAA issued an "information circular" that specifically stressed that shoes should be inspected for possible weapons or devices.[26]

As noted earlier, the value of nationality or ethnicity is that they are characteristics that are more permanent.

While future terrorists are likely to take care to learn from Reid's experience and follow the profile of a tourist rather than a terrorist, nationality or ethnicity are more difficult to disguise. The danger is that these criteria would become the only criteria or outcome-determinative criteria. The greatest danger is that nationality or ethnicity would be the sole criteria used by an agent, who will simply add "nervous in appearance" as the other reported criteria. Moreover, care must be taken to avoid the simple adoption of any criteria that have a greater than average yield. For example, all of the terrorists on September 11th were Muslim and the terrorist threat against the United States is closely connected to Islamic fanaticism. However, use of Muslim faith as a criterion would be problematic on a number of levels. First, there are over 1.6 billion Muslims in the world and only a small number of such individuals are terrorists.[27] With one out of four humans a Muslim, the population group is too high to yield a meaningful statistical value to a profile. Second, the social costs of such a criterion heavily outweigh its value. Questioning individuals on religion creates a chilling effect, particularly with a religious group that is already confronting growing prejudice. Third, there is no easy way on travel

documents to easily isolate faith and only some Muslims wear clothing that indicates their faith. This creates the added danger of misidentification by security attempting to use the criterion. Fourth, this is a criterion that any terrorist could easily hide or deny. As a result, law-abiding Muslims would occupy security officials and the criteria would serve as a distraction for security. This does not mean that an individual who has been stopped on legitimate criteria cannot be legitimately questioned about their religious views as part of a later interrogation. However, such questioning should only occur after an initial stop has revealed additional basis for suspicion.

Congress can help implement a system of monitoring to identify abuses or statistically unsound profiling. [28] This system should include easily available reporting mechanisms at airports for abuses or complaints, mandatory reporting of complaints, expedited review of complaints, active oversight from Congress, and the assignment of supervisory personnel. Perhaps the most important protection is the continual review of criteria used for airport investigatory stops. Given the shifting intelligence on threats, a passenger profile is likely to evolve more

than a drug or customs profile. It is important for the government to be monitored to keep profile criteria updated and relevant to the current threat. Moreover, the greatest danger to citizens comes not in the brief investigatory stop but in their treatment after the stop. Congress is essential in guaranteeing that stops are limited in time and conducted in a respectful and non-threatening fashion by law enforcement. Finally, a bi-annual report on the number and characteristics of passengers stopped should be mandated. Unlike the current system where profiling likely occurs on an informal basis, this reporting would give us our first comprehensive tracking system for such stops. While this report would have to be classified to some extent (including the current profile criteria), much of it could be made public to assure citizens that "flying while Arab" is not a new addition to our national lexicon.

V.
CONCLUSION

It is the continual burden of a free and democratic society that we must balance our needs as individuals with the interests of our nation in times of peril. It is far easier to address such questions when only the

security of the nation is a concern. We, however, chose a more difficult path when we formed this representative democracy. Profiling is and should be a controversial step in the war against terrorism. We should implement such a system with the greatest caution and reluctance. In the best of times, I would oppose profiling as a security device. However, in my view, these are difficult times that require difficult choices. Complaining about the need for added security is like complaining about the weather. The risks at airports are real and present. We must respond to those risks. I believe that we can do so in a measured and constitutional fashion. I admit that I will not likely shoulder the burden of such precautions at airports. We owe it to our fellow citizens who will be inconvenienced to demonstrate that these stops are based on articulated and well-founded criteria. Our commitment to their civil rights will be measured by the resources that we commit to the monitoring and investigation of any abuses in this system.

There is obviously much on this subject that I have not addressed in the limited time and space available. I hope, however, that this testimony will give the Subcommittee a useful outline of the issues to help

grapple with this difficult question. To that end, I am available to address any later questions that may arise on this subject.

I would be happy to answer any questions that the Subcommittee might have at this time.

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[1] For over a decade, I have both taught, written, and litigated in the area of constitutional law, including the specialty of constitutional criminal law which is at the heart of the subject of today's hearing. In addition to a brief stint at the National Security Agency (NSA), I have also written and litigated in the area of national security law. I have previously testified on the legal and policy issues relating to post-September 11th security measures. See United States House of Representatives, Committee on Government Reform, Subcommittee on Government Management, Information, and Technology, "Oversight Hearing on National Identification Cards," September 16, 2002 (testimony of Professor Jonathan Turley). I have no current consulting or employment relationship with any federal agency. Furthermore, I have no consultative or

employment relationship with any company associated with air travel.

[2] I am on record as supporting the use of profiling at airports, a position on which the academic community is deeply divided. Jonathan Turley, Use Profiling Judiciously, The Los Angeles Times, January 4, 2002, at A13.

[3] Terminiello v. Chicago, 337 U.S. 1 (1949) (Jackson, J., dissenting) ("If the court does not temper its doctrinaire logic with a little practical wisdom, it will convert the Constitutional Bill of Rights into a suicide pact.").

[4] For example, California currently has a lottery worth $62 million in which the odds are 1-41 million. Ray Delgado & Kell St. John, Record Jackpot Estimates Sales at 20,000 per Day, San Francisco Chronicle, February 15, 2002, at A2.

[5] See Randall Kennedy, Suspect Policy, New Republic, Sept. 13, 1999, at 32 ("Statistics abundantly confirm that African-Americans – and particularly young black men – commit a dramatically disproportionate share of street crime in the United States. This is a sociological fact, not a figment of the media's (or the police's) racist imagination.").

[6] This is a distinction that is understood by the vast majority of African-Americans polled on the use of profiling at airports. A recent Gallup poll showed that 71 percent of African-Americans polled supported ethnic profiling to combat terrorism. Liane Hansen, African-American Communities Supportive of US War on Terrorism, National Public Radio, October 14, 2001.

[7] Conversely, our inhibition to include race can lead to unjustified and dangerous over-compensation. Thus, leading newspapers like The Washington Post have been criticized for publishing descriptions of dangerous criminals that omit their race out of misplaced concerns of racial stereotyping. For example, The Washington Post was criticized for failing to publish such a description of the man who killed 8-year-old Kevin Shifflett, when other newspapers ran with a full description including race. Compare Patricia Davis & Fredrick Kunkle, 8-Year-Old Boy Fatally Stabbed in Alexandria; Unidentified Attacker Also Injures 2 Adults, The Washington Post, April 20, 2000, at A01 (omitting description) with Ellen Sorokin & John Drake, Man Kills 8-Year-Old Alexandria Boy in Knife Attack, The Washington Times, April 20, 2000 (identifying attacker as “black,

20-25 years old, 5 feet 9 inches tall and with medium build . . . wearing a light brown sweater, dark blue T-shirt and dark pants). This description was available to the Post in a police description as city-wide search for the suspect. There is no legitimate reason to omit race from descriptions of suspects being sought by the police. Particularly when combined with other physical features, these descriptions significantly reduce the possible pool of suspects for both citizens and police. Race is a descriptive factor that cannot be changed or easily disguised by a suspect, unlike facial hair or dress. While it is understandable why race is a taboo in our society, our inhibition to include race in public descriptions that specifically isolate a single perpetrator or suspect is an example of misplaced sensitivities.

[8] See, e.g., United States v. Sokolow, 490 U.S. 1 (1989) (upholding use of a profile stop); United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976); United States v. Collins, 422 U.S. 873; 886 (1975); but see Reid v. Georgia, 448 U.S. 438 (1980) (rejecting profile stop at airport because only one criteria involved defendant's actual conduct); see also United States v. Coleman, 450 F.Supp. 433, 439 N.7 (E.D. Mich. 1978) ("While ethnic background and, similarly, race are not

features which can alone justify an investigative stop, they are one factor which may be taken into account, together with other pertinent circumstances." Some profiles are specific crime based, general descriptions that result in stops based in part on race. See, e.g., Brown v. City of Oneonta, 221 F.3d 329, 337-38 (2d Cir. 1999) (involving a profile of a "young black man with a cut on his hand.").

[9] United States v. Brignoni-Ponce, 422 U.S. 873, 886 (1975) (rejecting the use of the apparent Mexican descent of a car's occupants as a basis for either "a reasonable belief that they were aliens, [or] a reasonable belief that the car concealed other aliens who were illegally in the country.").

[10] 392 U.S. 1 (1968).

[11] Ohio v. Robinette, 519 U.S. 33, 39 (1996).

[12] Florida v. Bostick, 501 U.S. 429, 433 (1991).

[13] See, e.g., Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (recognizing the right to search all cars and trucks at national borders).

[14] 389 U.S. 347 (1967).

[15] 517 U.S. 806 (1996).

[16] Id. at 813 (noting constitutional problems if a case indicates "selective enforcement of the law based

on considerations such as race.”).

[17] 531 U.S. 32 (2000).

[18] It is also relevant to the Attorney General John Ashcroft’s announced policy to arrest potential suspects for “spitting on the street,” as the Justice Department did with its war against organized crime under Robert Kennedy.

[19] See, e.g., David Cole, Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship, 87 Geo. L.J. 1059, 1077-78 n. 109 (1999).

[20] The legal profession has had a long-standing difficulty with such false systems. The greatest example is the rejection of the once dominant “canons of construction” that guided courts during the so-called formalist period. See generally Jonathan Turley, Transnational Discrimination and the Economics of Extraterritorial Regulation, 70 Boston University Law Review 339, 392 (1990). It was ultimately shown that for every canon that said “if x do y” there was another canon that said “if x do the opposite of y.” Thus, the opinions themselves appeared neutral but the bias was in the selection of the canon preceding the opinion.

[21] Some of these criteria are obviously relevant

to terrorist suspects in their behavior. "The categories are: (1) behavioral analysis, which means looking for physiological signs of nervousness such as cold sweats, flushed face, and eye contact avoidance; (2) observational techniques, which focus on physical discrepancies in appearance, such as an unnatural gait; (3) inconsistencies identified in the interview or documentation; (4) intelligence developed by another officer; (5) signals from K-9 units; and (6) evidence gathered incident to a seizure or arrest." Jerome H. Skolnick and Abigail Caplovitz, Guns, Drugs, and Profiling: Ways to Target Guns and Minimize Racial Profiling, 43 Ariz. L. Rev. 413, 433 (2001).

[22] Id. at 420 (noting that "such empirically based profiles can legitimately include race and ethnicity. If factual support for such inclusion exists, listing race or ethnicity, along with other identifying factors, is and should be lawful.").

[23] 490 U.S. 1 (1989). In Sokolow, the criteria included (1) cash payment for the ticket; (2) conflicts in the name on the ticket and the name for the telephone reference number; (3) did not check luggage; and (4) nervous appearance as well as more drug-related criteria like arrival as a source city.

[24] Pierre Sparaco, France, U.S. Probe CDG

Passenger Screening, Aviation Week & Space Technology, January 7, 2002, at 37; Terrorist With Shoe Bomb Exposes Shortcomings in Aviation Security, 15 Air Safety Week, December 31, 2001.

[25] The failure to inspect Reid's shoes is particularly odd given the long-standing knowledge that shoes are often used to hid contraband and narcotics in the airline industry. Terrorist With Shoe Bomb Exposes Shortcomings in Aviation Security, 15 Air Safety Week, December 31, 2001 ("Shoes have been used routinely for smuggling high-value drugs . . . through airport security . . . [but] the knowledge gained by law enforcement officials in the war on drugs does not appear to have transferred into the campaign against air terrorism.").

[26] Id.

[27] Bernard K. Freemon, Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence, 11 Harv. Hum. Rts. J. 1, 64 n.5 (1998) (citing growth rates among the Muslim world population).

[28] Customs uses a program called COMPEX. This system of "compliance examination" requires officials to randomly examine non-targeted passengers "to determine what percentage of contraband-carrying passengers are passing through undetected" in the

system. Skolnick & Caplovitz, supra, at 434. This is used to compare the results with profile selected groups with a targeted goal of a success rate ten times higher in the profile selected groups than the random test groups. Id. Obviously, given the small number of terrorists, such sampling is not very feasible. Instead, a more active monitoring and training program would probably be needed.

Remarks of Rafi Ron
CEO New Age Technology, Ltd.
Aviation Subcommittee
Committee on Transportation and Infrastructure
February 27, 2002

Mr. Chairman and members of the Subcommittee on Aviation.

For the record I am Rafi Ron and up until October 1st 2001 and for the last 5 years, I was chief in charge of security in the Israeli Airport Authority (I.A.A.). Within this role, I was in charge of all aspects of Israeli airport and aviation security including (but not only), security assessments and risk analysis, security planning and development, commanding all security operational units, identifying, negotiating, purchasing, and implementing new technologies etc. Within this role, I was in charge of more then 2000 security personal who were working in the Ben-Gurion airport.

Currently, I am CEO of New Age Aviation Security, and I am directly in charge of the professional side of the company's performance. I am also a member of the A.C.I.'s (Airport Council International), World Standing Security Committee, and a member of the G.A.S.A.G. (Global Aviation Security Action Group initiated by IATA).

I want to thank the committee for inviting me to talk with you about aviation security and profiling.

In 1968 an EL-AL aircraft was hijacked by Palestinian terrorist to Algeria. As a result the state of Israel decided that protecting

Israeli aviation is a national security matter of high priority and established the "air marshal" program. It became obvious that there is a need to develop a ground security operation in order to minimize the risk on board the aircraft.

The operational analysis was based on the assumption that in order for an attack to take place, two conditions must be met:

1. There has to be a person with a hostile intention.
2. A weapon has to be used.

The natural tendency was to choose the discovery of the weapon as the preventive method. Through the attempt to develop an effective method for this purpose, it became clear that while it is possible, it must involve some very thorough checks, some at forensic level. The reason for the great difficulties is the fact that weapons and especially explosive charges take almost every possible shape, color or smell and they can be produced from a great variety of materials. Simple manual search is not effective enough. These checks consume a long time (about one hour for a single passenger with one checked bag), they are very intrusive and considered by most passengers as a very substantial hassle. It became clear that it will be impossible to provide this type of procedure to all passengers and therefore a need to develop a method that will allow an intelligent decision as to who is more eligible for this thorough search.

The answer to this need came in the development of a systematic, real time, investigation of the passenger profile. This well designed procedure allows the security officer to make a

decision, based on identifying the level of risk, as to the level of checks to be performed before the passenger is allowed to board the aircraft.

This real time investigation can be as short as 90 seconds or last as long as 20 minutes. It involves the checking of documents (I.D. , flight tickets etc.) and questions that relate to the passengers journey and background.

This profiling method has been used very successfully for the last 32 years by the state of Israel. It led to the discovery of an explosive device in an attempted terrorist attack on EL-AL flight from London to Tel-Aviv in 1986, using a naïve Irish girl by the name Ann Marry Murphy. It was through questioning that the EL-AL security officer realized that the pregnant young woman was carrying a bag she received from her Palestinian, father to-be, boyfriend. The thorough check of the bag exposed a 1.5kg of Cemtex and a sophisticated altimeter initiation device disguised as an electronic calculator.

The lack of further attacks gives credence to the assumption that this method is a strong deterring factor, since it is difficult to assume that Palestinian terrorism lost its interest in Israel's aviation.

There has been criticism against the use of this method on the ground of racial discrimination. Most if not all of this criticism in unfounded. The fact that there are many Palestinian "selectees" in Israel's aviation security procedures merely reflects the fact that most of the terrorists acting against it are

Palestinian. It is also a fact that there are more "selectees" of other nationalities rather than Palestinians.

I would even argue that without a professional procedure the space if taken by intuition of the security person and in many cases will involve some level of prejudice personal views.

After the 9/11 tragedy the public discussion focused on the low performance level of the screeners as if the attack could have been avoided by better screening! To my best judgment this is not the case and focusing the discussion in this direction leads to future exposure to the same type attacks.

Even the great effort to develop quickly a 100% hold baggage screening standard cannot prevent the 9/11 type attack. I do not suggest that these technological measures are not important, on the contrary, their importance is paramount – but they are not enough! The missing element is the human factor and without relating to it we leave the room for future attacks.

It should also be argued that without the ability to take an intelligent decision on where to invest our effort we end wasting our attention on the "low risk" passengers and not being able to invest enough in the "high risk" passengers.

The situation is particularly worrying because the technology used in security check-points (x-ray screening and metal detection) is not enough to stop even the Richard Reid type attack and I would not suggest that we rely only on a 1-10 random ETD (explosive trace detection) check.

Ideas like "Trusted passenger program" that allows people to register in advance, by submitting personal information voluntarily in the manner they do when applying for a credit card combined with the use of biometric technology for ID verification will make the use of pattern recognition (professional profiling) very feasible and very effective. The advantage of this program is not the exemption of any passenger from the bag screening, but by adding a human factor element we create the ability to invest more effort in the "high risk" passengers.

Finally it can be said that the civil rights issue can be controlled and the creation of an operational method for pattern recognition is feasible. Without it we will not be relating effectively to the threat as it materialized in the latest Al-qaida attacks.

Thank you and I would be pleased to respond to your questions.

Remarks of Thomas J. Kinton, Jr.
Aviation Subcommittee
Committee on Transportation and Infrastructure
February 26, 2002

Mr. Chairman and members of the Subcommittee on Aviation.

For the record my name is Thomas J. Kinton, Jr., Aviation Director of Boston's Logan International Airport, and acting Executive Director and CEO of the Massachusetts Port Authority, owner and operator of Logan Airport.

As one of the first airports in the country to endorse and actively campaign for the federalization of airport security following the September 11 terrorist attacks, I want to commend the members of this committee for your work in crafting and passing the Transportation and Aviation Security Act last November.

Passage of this important new law signaled a major step forward in this country's commitment to the safety and security of the flying public.

The new act elevated airport security to a national priority, created uniform national standards of performance and accountability and gave airport operators and the public alike the confidence knowing that highly trained, professional personnel will be operating airport security checkpoints.

Delivering on the promise of this important new law will be a major undertaking. The steps we are taking to neutralize, at last,

the threat of terrorists planting bombs inside checked luggage, are decades overdue. At the same time, the challenge we face to individually inspect more than a billion bags that fly each year is daunting. Yet, it is a test that must be met.

So is the challenge, in less than a year, to train and deploy an airport security force larger than the FBI, DEA, and Border Patrol combined. Yet, until this historically weak link in our airport security system is reinforced, by replacing existing screeners with designated federal agents, we will continue to suffer breakdowns in security that force passengers to be deplaned from loaded aircraft and entire concourses to be evacuated for re-screening.

These exasperating incidents test public confidence in our airport security system, tax the patience of a flying public that has shown commendable patience over the past five months, and cost the air travel industry and our economy millions of dollars in delays and missed flights.

Because of what happened at Logan Airport just five months ago we feel a special urgency to be on the cutting edge of whatever new techniques or technologies are being developed to make aviation more secure than it has ever been before.

Whether we like it or not, Logan Airport is in the national spotlight of our nationwide effort to rebuild public confidence in our airports and in air travel. We're the airport where two planes were hijacked, so consciously or not, Logan Airport is the yardstick by which the country measures its progress on making

airport security airtight.

Logan has responded to this special responsibility by taking a leadership role on airport security issues, and making a commitment to go above and beyond the various security directives issued since September 11.

That is why Logan Airport was particularly proud to be selected by the Transportation Security Administration as one of 15 airports across the nation enlisted to help in the federal effort to establish security procedures and protocols for all 439 commercial airports in this country.

At Logan, we're improving security with technology. Logan is piloting a first-in-the-nation facial recognition program that creates a direct link between Logan's security checkpoints and federal counter-terrorism databases.

We're also the first airport in the country to put a database in the hands of airport security personnel walking the beat. In less than a minute, Logan security officers using a BlackBerry wireless device can access the National Crime Information Center for wants, warrants and FBI watch lists without ever letting a potential suspect get out of their sight.

And to intercept potential terrorists who might try to fly on a fake passport or other bogus identification, Logan is also testing "BorderGuard" document authentication technology.

Logan is also making needed structural changes. We are nearly

complete with the first phase of a three phase project to install about 200 security cameras throughout every airport concourse and airfield access point, which will be monitored simultaneously from a central security office.

Technology is an important tool. But even more important are the people who use that tool.

For Logan's frontline staff, we've taken steps to instill a culture of security awareness by giving counter-terrorism training to hundreds of people who deal face-to-face with Logan's customers every day.

We're holding people accountable by increasing fines for violations of Logan's security regulations. And when a company responsible for some of Logan's security checkpoints showed they weren't up to today's more rigorous security standards, we had them fired and found someone who was.

We are happy to share our experience with other airports and are eager to be a testing ground for pilot projects so that other people can share their good ideas with us.

Even before September 11, the Massachusetts Port Authority was engaged in an authority-wide audit of our security procedures and facilities. The attacks did not so much alter this agenda as accelerate it.

To help us better understand and prepare for the new world we woke up to on the morning of September 11, we turned to

nationally and internationally respected experts on counter-terrorism.

Rafi Ron has been working with Massport to improve security at Logan since October. He is the former head of security for El Al Airlines and Ben Gurion Airport. His impressive credentials as a security specialist in one of the most dangerous regions of the world is particularly valuable to us at Logan as we prepare to counteract the new threats of today's more dangerous world.

Airports in America can learn from the experience of airports in those parts of the world that have been on the frontline in the war on terrorism much longer than we have. By bringing Rafi Ron to Logan Airport we have been able to learn about the strict security that is standard operating procedure in Europe and Israel, while learning how these security measures can be adopted and incorporated into the operations of large, complex American airports, like Logan International Airport, with their unique demands and constraints.

It is now my pleasure to introduce to the committee, Rafi Ron.

Thank you.

WASHINGTON NATIONAL OFFICE
Laura W. Murphy
Director

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STATEMENT

OF

KATIE CORRIGAN

LEGISLATIVE COUNSEL

AMERICAN CIVIL LIBERTIES UNION

WASHINGTON NATIONAL OFFICE

ON

AIR PASSENGER PROFILING

BEFORE

AVIATION SUBCOMMITTEE

OF THE

HOUSE OF REPRESENTATIVES COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

FEBRUARY 27, 2002

WASHINGTON NATIONAL OFFICE
Laura W. Murphy
Director

122 Maryland Avenue, NE Washington, D.C. 20002 (202) 544-1681 Fax (202) 546-0738

My name is Katie Corrigan and I am the legislative counsel on privacy at the American Civil Liberties Union (ACLU). The ACLU is a nationwide, non-partisan organization with nearly 300,000 members dedicated to protecting the individual liberties and freedoms guaranteed in the Constitution and laws of the United States. I appreciate the opportunity to testify about aviation security profiling before the Aviation Subcommittee of the House of Representatives Committee on Transportation on behalf of the ACLU. Rachel King will join me for the question and answer period. She is also an ACLU legislative counsel and has expertise on racial profiling.

In the aftermath of September 11, Congress has acted quickly to address air security concerns. The ACLU urges Members of Congress to use a three-prong analysis before implementing additional security measures.

First, any new security proposals must be genuinely effective, rather than creating a false sense of security. Second, security measures should be implemented in a non-discriminatory manner. Individuals should not be subjected to intrusive searches or questioning based on their perceived or actual race, ethnic origin, or religion, or based on proxies for such characteristics. Finally, if a security measure is determined to be genuinely effective, the government should work to ensure that its implementation minimizes its cost to fundamental freedoms, including the rights to due process, privacy and equality.

Based on these principles, the ACLU supported many provisions in the aviation security legislation including limits on the number of carry on bags, matching all baggage with passengers, increased training for airport security personnel, strict control of secured areas of airports, and fortification of cockpit doors.

Like all Americans, the ACLU supports efforts to ensure our security from terrorist threat. We do not believe, however, that profiling is an advance in aviation security. Historically, profiling has been

employed as a cost saving measure when security resources were scarce. As a result, passengers may have had a false sense of security because profiling is not an effective security measure, is potentially invasive of privacy, and is likely to be discriminatory. The ACLU remains convinced that we need not sacrifice our civil liberties to protect safety. We believe our country can be both safe and free.

The Elements of Airline Passenger Profiling Systems

Most recently, profiling was instituted as a security measure in the days following the crash of TWA Flight 800. The White House Commission on Aviation Safety and Security recommended the Federal Aviation Administration (FAA) proceed with its plans to implement a form of passenger profiling. Northwest Airlines first developed the Computer-Assisted Passenger Screening System (CAPS) under a grant from the FAA.

The CAPS system separates passengers into two groups: Passengers who "fit the profile" become "selectees" and are subjected to heightened security measures. To determine who is subject to heightened security, the computer evaluates approximately 40 pieces of data that the airlines collect from passengers. Most of the criteria for the profile are secret. According to information in the public record, however, this data includes a person's address, whether the person purchased a ticket in cash, whether the ticket was purchased in advance or shortly before departure, with whom they will travel, whether they will rent a car, when they will depart, the origin and destination of the flight, the destination of the passenger and whether the flight is one-way or return.

The data also includes information in the airlines' frequent flyer database as to whether the airline has communicated with the passenger at a known address. Different bits of data in different combinations somehow suggest a heightened security risk, designating the passenger a "selectee."

A limited number of passengers selected on a random basis are added to the pool of selectees who fit the profile to ensure that selectees are not stigmatized or subjected to unreasonable searches.

Since September 11, there have been numerous profiling proposals discussed in the press, on the Hill, and in the Administration.

Although it is difficult to know exactly what the Administration will propose as the "next-generation" of profiling, information in the public record has provided some guidance on where the Administration is headed. John Magaw, Under-Secretary of the newly instituted Transportation Security Administration (TSA) at the Department of Transportation (DOT) testified that the TSA is working on an enhanced profiling system that would rely on a "very,very robust" set of tools to sharpen the profiling system.[1]

At a minimum, the criteria used as the basis for the passenger profile would go well beyond the 40 or so variables that the CAPS system currently relies on.

In addition, there have been several proposals to subject passengers to background checks before they board an airplane. The Air Transport Association, the industry group for airline carriers is promoting a "National Traveler's ID."[2] The card would allow individuals the convenience of bypassing security screening lines at airports if they submit to a background check. The program would rely on a "constantly

refreshed" database that would include law enforcement data, immigration and U.S. Customs information, treasury and financial data and "any other databases the government requires." (The trusted passenger card would also be a de facto national ID. See ACLU testimony on national identification systems before the House Subcommittee on Government Efficiency at http://www.aclu.org/congress/l111601a.html.)

On February 1, 2002, the Washington Post reported that the DOT is funding private research on network techniques that would build on current profiling techniques and amplify them using complex software to analyze large amounts of personal data about every passenger that boards a plane. There is not much known about these research projects beyond the press reports. However, as reported, the system would analyze passengers' travel history, buying patterns, past home addresses, and other information gathered from government and private industry databases.

Profiling Is an Ineffective Security Measure

Profiling is an ineffective security measure. A profile is not rooted in specific facts or evidence that a particular individual is a terrorist. Instead, passenger profiling has been used pursuant to a cost-benefit analysis that certain security devices are too expensive to be used on each and every passenger.

First, profiling systems will always be one step behind terrorists. It is far too easy for a terrorist who "fits the profile" to plant a bomb on someone who does not fit the profile, or to hire such a person to plant the bomb. Probability systems are based on past experience. And, as we know, past experience does not necessarily tell us anything about new and innovative means to bypass security measures. The profile is changed only after the weapon or explosive is discovered, or worse, detonated. The technology currently under development would also not predict individuals' behavior. Again, terrorists will always be one step ahead.

Second, from a security perspective, profiles are under inclusive. A profile alone does not establish articulable suspicion. A terrorist may not fit the profile and would be given only cursory attention, or no attention at all.

Before September 11, the CAPS system was only used to profile passengers who checked luggage. Selected passengers had their checked luggage either screened by bomb detection equipment certified by FAA or subjected to bag matching to ensure that the luggage of a selectee would be removed from the flight if a selectee did not board.

Pursuant to the new air security legislation, however, every passenger's checked luggage will be screened either through Explosive Detection Systems (EDS), luggage matching procedures, or some other screening mechanism.[3] By the end of the year, the DOT is required to have EDS machines screen each and every piece of checked luggage.

The trusted passenger program also illustrates the problem of relying on computer background checks and profiling to determine who should undergo security screening measures. Pursuant to the trusted passenger program, passengers would submit to a background check that would profile their information and allow them to avoid security lines at airports (a "get out security free" card). Earlier this month, Under Secretary John Magaw was asked about the trusted passenger card during a Senate Commerce Committee hearing on air security. Magaw expressed concern that from a security perspective

he would be hesitant to allow any passenger to avoid passenger and baggage screening requirements. "[M]y whole problem is that this may be … not as good as it looks to be. It may be convenient, but in terms of security, I don't really see it helping us, because I would not be willing to … allow the baggage to go unchecked or have your hand carry unchecked. So I don't really see the benefit of it in terms of security."[4]

Congress has made it clear the cost of implementing universal baggage screening, luggage matching, and comprehensive screening measures is far outweighed by the human and economic costs of allowing even one passenger on board an airplane with an explosive or weapon.

Profiling Criteria Could Result in Illegal Discrimination

Race-based Profiles: The most offensive profiles are those that are based on characteristics a person cannot change, or should not be forced by the government to change, and which have no causal relationship to terrorist activity: race, religion, national origin, gender, sexual orientation, or political opinion. Profiles based on these characteristics are ineffective at preventing terrorists from boarding airplanes.

Protected characteristics such as race should never be part of a profile used to determine whom (or whose luggage) will be subjected to heightened security measures in an airport. It is similar to the use of race to decide which cars to stop in a search for drugs. Such discrimination cannot be excused merely by citing financial difficulty or mere convenience. Nor will such discrimination enhance safety. Professional terrorists will employ measures to defeat whatever profile is in use.

Even profiles that do not explicitly include race as an element can often have the racially discriminatory effect of disproportionately selecting people identifiable by race. Because most criteria for the computerized passenger profiling system are secret it is difficult to determine whether the profile will have disparate impact on particular racial groups.

In its review of the CAPS system, the Department of Justice's Civil Rights Division stated in an October 1, 1997 report concluded that CAPS did not use race, religion, national origin, or ethnicity as a screening factor. However, the DOJ report also suggests that the computerized profile may have a disparate impact on some passengers identifiable by those criteria. Such disparate was not, in the DOJ's view, "unjustified," but the DOJ noted that such inequities should be closely monitored because constitutional problems could arise in implementation of the profiling system. The DOJ report included numerous recommendations for oversight and reporting requirements that would ensure the profiling system remained constitutionally sound. As far as we know, none of these recommendations have been followed to date.

Monitoring Allegations of Discrimination. For the past five years, the ACLU has urged the FAA to establish an independent entity that would monitor abuse in aviation security such as discriminatory searches. The Civil Liberties Advisory Panel to the White House Commission made a similar recommendation.[5] No such panel has been established to date. While the DOJ did do a study, the study was not independent. The DOJ helped create the profiling system it was later asked to evaluate. Moreover, the DOJ report did not involve actual testing of the system on passengers.

In order to root out discriminatory effects of profiling, it is imperative that discriminatory searches be collected and analyzed. Thus far, the DOT's efforts in this area have been inadequate. In 1997, the DOT vowed it would put at the gates information passengers needed to file complaints. This still has not been done. Few passengers know the mechanics of how to file a complaint, thus making it impossible to determine the impact on passengers.

The federal government, not the private carriers, now has the primary responsible for air security screening. It is incumbent on the government to ensure that federal constitution's promise of equal protection is not being overrun by ineffective and discriminatory security measures.

Litigation Involving Discriminatory Aviation Profiling. In 1991, ACLU sued Pan Am World Airways for subjecting people of Middle Eastern descent to heightened security measures based on their race and national origin during the Gulf War. Pan Am denied the factual and legal assertions of the case and the case was settled when Pan Am went bankrupt.

Last month, the ACLU of Illinois filed a lawsuit on behalf of Samar Kaukab, a Muslim woman who was strip-searched at O'Hare Airport. The complaint alleges violations of the First, Fourth, and Fourteenth amendments of the Constitution and state tort law. Kaukab passed through metal detectors without setting them off, and there was no indication she was carrying any banned materials on her person or her carry-on bags. Following a conversation with the National Guardsman, a male security employee demanded that Ms. Kaukab remove her hijab. Ms. Kaukab explained that, for religious reasons, she could not remove her hijab in public. After a private room was finally found, she was subjected to a highly intrusive search that included opening her sweater to expose a camisole and she was forced to unzip her pants.

Need for Congressional Action. We urge passage of H.R. 2074 the "End Racial Profiling Act" a bi-partisan bill that will, among other things, define racial profiling and make it illegal.

Additional legislation besides H.R. 2074 may be necessary to address the particular types of profiling that is taking place at airports. For example, many people have been subjected to racially discriminatory treatment since September 11th. The organization Council of American Islamic Relations (CAIR) has been collecting complaints on its website and has received nearly 200 complaints of race based airline profiling. See attached document provided by CAIR.

Many Arab Americans have been thrown off airplanes even after they submitted to intrusive security procedures and were cleared by security. In the month following the September 11th attack, the Arab American Institute received 11 such complaints. Since that time, there have been dozens more.

Three victims, Vahid Tony Zohrehdvandi, Mohammed Ali and Arshad Cowdhury, testified before Congress in a January 24 forum sponsored by Representative Conyers entitled "National Security and the Constitution." What happened to Vahid Tony Zohrehdvandi illustrates the problems that many Arab Americans are having when they try to travel by air. Mr. Zohrehdvandi is a naturalized citizen who emigrated from Iran. He is working on a Ph.D. in mechanical engineering. He works as a software development consultant and has clients such as Boeing and Lockheed-Martin. Because he works on military contracts, he has a high security clearance. Additionally, Mr. Zohredvandi works part time for American-Airlines and has an FAA approved identification card.

Mr. Zohrehvandi was flying back from Seattle on September 21 on an American Airlines flight. Even though Mr. Zohrehdvandi did not alert the magnetometer, he was asked to submit to being scanned by the hand want and asked to submit to a pat down search. He willingly agreed to both searches. After being cleared by security he settled himself into his seat and was reading the newspaper when an American Airlines employee asked him to grab his belongings and accompany him off the plan. Mr. Zohrehdvandi asked why he was being asked to leave and the agent refused to answer him. He then asked if he would miss his flight and was told that he would. As he left the plane, other passengers stared at him and he felt humiliated and embarrassed.

The agent for American Airlines told Mr. Zohrehvandi that the pilot had requested that he and another man be removed from the flight because the pilot said that his appearance made him uncomfortable. Mr. Zohrehdvandi asked what about his appearance made the pilot uncomfortable and no further information was given. In the meantime, three armed, uniformed police officers arrived and questioned Mr. Zohrehdvandi for over an hour. The officer asked him to present his passport and Mr. Zohrehdvandi said that as an American citizen he did not travel with his passport on domestic flights. The officer told him that he might want to consider carrying his passport from now on. Finally after an hour of questioning the airline and law enforcement cleared him of any suspicion. He was eventually booked on another flight but the several hour delay greatly inconvenienced him.

Mr. Chowdury is an American born citizen whose parents emigrated from Bangladesh. Mr. Chowdury graduated from Wesleyan University and was working as an investment banker and had several friends killed in the Twin Towers attack. He was asked to leave the plane on a return trip from San Francisco because the pilot said his name matched that of someone on a “watch list.” After being delayed for several hours, Mr. Chowdury was allowed to board a different flight. Mr. Chowdury was inclined not to complain about the incident until it happened to him again about a month later when he was traveling home to see his family at Thanksgiving. Once again, he was told that his name matched someone on a watch list. Chowdury is a very common name in Bangladesh, as common as Smith is in the United States. When Mr. Chowdury asked how he could get himself off the watch list he was not given any response. Now, Mr. Chowdury’s entire family is afraid to fly fearing that they will be subjected to discriminatory treatment because of their name.

In these two cases, American citizens were subjected to heightened scrutiny based on their race and national origin and were prevented from flying after willingly complying with extra security measures and being cleared by security. What happened to these men and many others was not rational airline security measures, it was blatant racial discrimination. The federal government must intervene to prevent this type of discriminatory treatment.

Last fall, the ACLU urged Congress to include several protections in the air security legislation to protect against discrimination and overly intrusive airport searches. The final legislation included a "Transportation Oversight Board" to review and ratify air security plans and regulations, share intelligence information, and make recommendations on air security. A Scientific Advisory Panel was also established to review new security technologies. But there was no protection for civil liberties. Legislation should establish an independent entity to receive and investigate complaints of discriminatory or other inappropriate security screening and privacy violations. This entity should also track inappropriate, overly intrusive or discriminatory screening practices so abuses can be identified and problems can be addressed through retraining or the elimination of a particular device. It could also order DOT to conduct a study to determine whether the profiling system put in place has a disparate impact on

passengers based on their race or national origin.

In addition, Congress should enact legislation requiring airport and air carrier security plans to include a complete bar to using actual or perceived race, religion, national origin, gender, sexual orientation or political opinion – and proxies for such characteristics – as an element of a profile or other scheme used to identify passengers (or which passengers' luggage) are to be subjected to heightened security measures.

Just last month, the DOT issued guidelines for flight crews who face threats onboard the aircraft.[6] The guidelines themselves are not available to the public, but the DOT press release outlined several highlights, including recommendations that any passenger disturbance should be considered suspicious; the flight crew should work as a team; and, in the case of possible or actual hijaking, the pilots should land the plane as soon as possible. There is no mention of nondiscrimination policies or diversity training included in the press release. Congress should require the guidelines to include clear policies on racial and ethnic profiling.

Finally, Congress should direct the DOT to track and report passenger complaints of inappropriate, discriminatory, or overly intrusive security screening measures – as it does for on-time performance – so that passengers and the DOT know where security abuses are taking place and the Transportation Security Administration can retrain problem agents.

Profiling Systems Violate Individuals' Privacy Rights

Passengers' personal information is the engine that feeds a computerized profiling system.

CAPS draws on about 40 pieces of information to develop its profile. Earlier this month, however, the Security Administration testified it is currently developing a more sophisticated profiling technique.[7]

Most dramatically, the DOT is funding private research on artificial intelligence techniques that would rate the risk of each passenger that boards a plane. According to the press reports, DOT has contracted with HNC Software and several other companies to develop what might be called "super-profiles." HNC Software is reportedly working with Axciom, one of the world's largest data marketing companies. Axciom sells information about consumer demographics, home ownership characteristics, purchase behavior, and lifestyle data.[8] A trusted passenger card would draw on more information than the current CAPS system to conduct a background check before entering the airport.

Both of these systems would be ineffective as a security measure and impose a huge cost to individual privacy. The determination of who actually poses a threat would still be rooted in the limited and ineffective stereotype that serves as the basis for profiling systems in the first place. And, a central principle of information privacy is that information collected for one purpose should not be used for another purpose. Passengers book a flight or enroll in a frequent flyer program because they want to travel and occasionally travel free. They do not expect their information to be shared with a massive profiling database.

Most Americans are already familiar with profiling techniques through junk mail and telemarketing calls. Telemarketing and direct mail companies have some of the most sophisticated profiling techniques.

Direct marketing companies collect names, addresses, phone numbers and other consumer information from lots of different lists and come up with a best guess of what type of person is most likely to buy a particular magazine or consumer product.

Common experience shows that once an individual gets on a direct mailing list it is very difficult to get off.

Imagine the result of getting on a list that is used to establish a passenger profile. Law enforcement databases are often incomplete and inaccurate. Use of this data could result in repeated and unwarranted selection of particular passengers. One slip of the keystroke could accidentally record frequent flyer miles for a trip that you never booked. Incorrect information could be used against you each and every time you enter an airport.

Consumers may never know why they consistently get selected through a profiling system. The data used in passenger profiling systems is kept secret for security reasons.

It is merely annoying to be on the wrong direct marketing list. It could be humiliating, time consuming, or worse if an individual is selected before each and every business trip or family vacation to go through a separate screening process. Passengers would be at the whim of a computer's decision, without any clear recourse. How would one get off a list or clear the record? It is difficult enough to fix a credit report. In addition, database inaccuracies also breach the security goal.

All of this personal information must be protected against disclosures that have nothing to do with profiling and security systems. Data should not be used for other purposes such as marketing and the DOT itself should limit its use and disclosure of the information. In addition, if an individual is selected through a profiling system at random or because the individual fits the profile, the fact of selection should be disposed of as soon as possible.

We would support law enforcement's sharing of the names of suspected terrorists with air security personnel, but indiscriminate information sharing runs directly counter to the principles supporting the Privacy Act and also raises concerns about equality and limitations on individuals' right to travel. Government databases contain a significant amount of highly sensitive personal information including income tax statements, employment records and even medical information. Congress should place meaningful limits on information sharing for air security purposes by requiring a nexus between the information shared from these databases and the purpose of identifying passengers who are suspected terrorists. Otherwise, air security personnel could access all kinds of personal information contained in Federal databases that have nothing to do with air security at all.

Alternative Solutions

The ACLU supports many provisions in the aviation security legislation including limits on the number of carry on bags, increased training for airport security personnel, strict control of secured areas of airports, and fortification of cockpit doors. The ACLU also supports 100% luggage matching, including a remedy to the fact that luggage matching is not implemented for passengers with connecting flights. The ACLU has never challenged the use of X-Ray machines to scan carry-on luggage in the airports, and the courts have upheld the practice.

Conclusion

Congress should not support systems that would undermine our privacy, threaten equality, and challenge our understanding of freedom. The ACLU strongly believes that our country must be safe, but security measures must be proven to be effective and need not come at the cost of our fundamental liberties.

Profiling would be ineffective at preventing terrorism and subject to abuse and to error that would come at the cost of our civil liberties. Although we oppose the use of profiling systems to begin with, the Security Administration is likely to continue some form of a CAPS system.

At a minimum, the Subcommittee should:

n Include a complete bar to profiles based on race, religion, national origin, gender, sexual orientation or political opinion – and proxies for such characteristics – as an element in any profile or other scheme used to identify which passengers (or which passengers luggage) are to be subjected to heightened security measures.

n Require the DOT to commission an adequate, independent study of the discriminatory effects of the passenger profiling system as implemented.

n Establish an independent entity to receive and investigate complaints of discriminatory or other inappropriate security screening that would supplement, not supplant, existing court remedies.

n Urge passage of H.R. 2074 the "End Racial Profiling Act" and any additional legislation necessary to address the racial discrimination currently happening in our nation's airports.

n Direct DOT to track and report passenger complaints of inappropriate, overly intrusive security screening measures so that the DOT and passengers know which airports commit security-related abuses and the DOT can retrain problem agents.

n Bar carriers from sharing personal information without the passengers knowing and informed and uncoerced consent and limit disclosure of information for security purposes. Maintain protections for the privacy of personal information.

n Mandate that a passenger Bill of Rights be posted at ticket counters to inform passengers of their rights such as (i) what triggers intrusive security measures, such as pat down and strip searches, and how to avoid such searches; (ii) the consequences, if any, of exercising these rights; (iii) who to contact with complaints of security-related abuses.

n Searches arising from the use of a profiling system should be no more intrusive than search procedures that could be applied to all passengers. For example, the courts have consistently held that a magnetometer examination is a search for Fourth Amendment purposes. Body scanners that project an image a person’s naked body onto a screen are far more intrusive.

- Prohibit the use of trusted passenger programs.

Thank you for the opportunity to testify today.

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[1] Unofficial transcript of Senate Commerce, Science and Transportation Committee on Aviation Security Issues, John Magaw, Under Secretary of Transportation for Security, February 5, 2002.

[2] Press Release, Air Transport Association (Nov. 11, 2001)(release can be found at www.air-transport.org/public/news/display2.asp?nid=4710).

[3] Statement of John Magaw, Under Secretary of Transportation for Security before the House Aviation Subcommittee on Transportation and Infrastructure, January 23, 2002.

[4] Unofficial transcript of Senate Commerce, Science and Transportation Committee on Aviation Security Issues, John Magaw, Under Secretary of Transportation for Security, February 5, 2002. Answer in response to Senator Hutchison's question regarding the trusted passenger program.

[5] White House Commission on Aviation Security and Safety, Final Report to President Clinton submitted by Vice President Al Gore, Chairman, February 12, 1997.

[6] Department of Transportation Press Release, dated January 18, 2002.

[7] Unofficial transcript of Senate Commerce, Science and Transportation Committee on Aviation Security Issues, John Magaw, Under Secretary of Transportation for Security, February 5, 2002. Answer in response to Senator Hutchison's question regarding the trusted passenger program.

[8] See Acxiom website: http://www.acxiom.com/DisplayMain/0,1494,USA~en~936~978~0~1,00.html (last visited February 26, 2002).