U.S. Department of Homeland Security

GUIDANCE REGARDING THE USE OF RACE, ETHNICITY, GENDER, NATIONAL ORIGIN, LANGUAGE, RELIGION, SEXUAL ORIENTATION, OR GENDER IDENTITY

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INTRODUCTION AND EXECUTIVE SUMMARY

The Department of Justice’s 2014 Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Language, Religion, Sexual Orientation, or Gender Identity established a broad prohibition on the improper use by law enforcement agencies of such personal characteristics. However, it specifically exempted from its application Federal non-law enforcement personnel, interdiction activities in the vicinity of the border and protective, inspection, or screening activities. The Department of Homeland Security (DHS) intends with this Guidance to close that gap by both broadening and reaffirming the Federal government’s deep commitment to ensuring that DHS conduct its activities in an unbiased manner.

Biased practices, as the 2014 Guidance recognize, are deeply hurtful, promote mistrust in government, and perpetuate negative and harmful stereotypes that are polarizing. Moreover, biased practices are ineffective. Indeed, terrorism has no "typical" face, race, nationality, ethnicity, sexual orientation, gender or gender identity. Biased enforcement can cause illegal behavior to go undetected and resources to be squandered pursuing conduct that is ultimately benign. Worse, biased practices reinforce stereotypes of the United States that can be used by terrorists as recruiting propaganda.

These same considerations apply equally to DHS’s immigration mission. The only defining characteristic of individuals in the country without recognized legal status or documents is just that – the legal status of being in the country without the requisite documentation. Targeting certain groups for deportation on the basis of personal characteristics is fundamentally unjust and wrong, at odds with the DHS’s enforcement priorities, and the founding principles of this country. The Department’s Priority Enforcement Program (PEP) is intended to ensure its enforcement and removal policies prioritize threats to national security, public safety, and border security. The Department wishes to ensure this mission is conducted free of insidious profiling.

The DHS has come to recognize that, regrettably, PEP has led to the profiling of certain communities – particularly Asian Americans, Southeast Asians, South Asians, Pacific Islanders and other communities of color, especially Arab, Middle Eastern, Latinx, and Black communities. For example, a 2012 study found 15% of South Asians reported they were subjected to religious or racial profiling by ICE. South Asians and Muslims in particular are often profiled as “terrorists.” Lesbian, Gay, Bi-Sexual, Transgender and
Questioning (LGBTQ) individuals have also been subjected to heightened scrutiny because they do not fit pre-conceived gender norms.

As President Obama has stated, “We are and always will be a nation of immigrants ... What makes us Americans is our shared commitment to an ideal – that all of us are created equal, and all of us have the chance to make of our lives what we will.” Thus, as the 2014 Guidance recognizes, unbiased enforcement of all laws is central to the integrity, legitimacy, and efficacy of all Federal law enforcement activities. The highest standards can—and should—be met across all such activities. Doing so will not hinder—and, indeed, will bolster—the performance of the DHS’s mission.

This new Guidance applies to DHS personnel in the discharge of their duties, including those engaged in the Department’s immigration, customs, national security and intelligence missions. This Guidance defines the circumstances in which the Department’s employees may take into account a person’s race, ethnicity, gender, national origin, language, religion, sexual orientation, or gender identity. This Guidance also applies to state and local law enforcement officers while participating in DHS task forces. This Guidance also outlines the DHS’s policy regarding the use and appropriate treatment of evidence that was obtained in contravention of this Guidance.

**DISCUSSION ON USE OF INDIVIDUAL CHARACTERISTICS**

The Constitution protects individuals against the invidious use of irrelevant individual characteristics. *See Whren v. United States*, 517 U.S. 806, 813 (1996). Such characteristics should never be the sole basis for a decision to monitor, investigate, stop, detain, question, or search an individual. Similarly, such characteristics must not be used as the sole basis for placing an individual into detention or removal proceedings. This Guidance sets out requirements beyond the Constitutional minimums that shall apply to the use of race, ethnicity, gender, national origin, language, religion, sexual orientation, and gender identity by DHS employees. As discussed below, the Guidance follows many of the same principles as the 2014 Guidance, but applies those principles to a broader range of governmental activity. This Guidance applies to all DHS employees at all times, including in matters of national security, and including when they are operating in partnership with non-Federal law enforcement agencies.

The core principle of this Guidance is as follows:

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1 As used in this Guidance, “national origin” refers to an individual’s, or his or her ancestor’s, country of birth or origin, or an individual’s possession of the physical, cultural or linguistic characteristics commonly associated with a particular country. It does not refer to an individual’s “nationality” (i.e., country of citizenship or country of which the person is deemed a national), which may be relevant to the administration and enforcement of certain statutes, regulations, and executive orders.
DHS employees may not use race, ethnicity, gender, national origin, language, religion, sexual orientation, or gender identity as the sole basis for monitoring, investigating, stopping, detaining, questioning, or searching an individual, or placing an individual into detention or removal proceedings (a Relevant Action).

The 2014 Guidance rejects the idea that overall discrepancies in certain crime rates among certain groups could justify using a listed characteristic as a factor in general enforcement activities. Similar arguments have been made in other contexts – for example, that members of certain ethnicities or national origins are more likely to be undocumented immigrants or to present a national security threat. Profiling on the basis of a listed characteristic is unjust and contrary to the core values of equality, fairness and justice upon which this country was built. Even if some statistical evidence of differential rates of commission of certain offenses might exist, the application of such generalized theories amounts to stereotyping. It would unfairly condemn a group without regard to the actual facts. It is unjust, offensive, polarizing, and ineffective.

For these reasons, it is prohibited, when taking a Relevant Action, to rely upon generalized stereotypes involving the listed characteristics set forth in this Guidance. However, DHS employees may rely on information about a listed characteristic, but only if each of the following factors is also present:

- The information must be relevant to the activity being undertaken in support of DHS’s mission;
- The information must be trustworthy;
- The information concerning identifying listed characteristics must be specific to particular suspects or incidents that would warrant taking a relevant action; and
- There is clear reason for the Relevant Action that does not rely on identity markers of race, ethnicity, gender, national origin, language, religion, sexual orientation, or gender identity

As outlined in the 2014 Guidance, because law enforcement and intelligence actions are necessarily context-specific, in applying each of these factors, DHS employees may properly account for relevant facts and circumstances, such as any temporal exigency and the nature of any potential harm to be averted. However, in all cases, the employee must reasonably believe that the Relevant Action to be undertaken is merited under the totality of the circumstances.

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2 As discussed further in the principles below, a specific characteristic together with an unsupported allegation remains an insufficient basis for pursuing a Relevant Action. One must not subvert the Guidance by using the pretext of an unsubstantiated allegation as the basis for taking a Relevant Action.
The following policy statements more fully explain these principles, and reflect the same core ideas embodied within the 2014 Guidance while applying them to a broader range of governmental activities.

1. **In taking a Relevant Action, DHS Employees May Never Rely Solely on Generalized Stereotypes, But May Rely Only on Specific Characteristic-Based Information**

This standard categorically bars the use of generalized assumptions based on listed characteristics while taking a Relevant Action.

- **Example:** At a border control crossing, an Immigration and Customs Enforcement (ICE) officer cannot properly choose to target individuals of a particular national origin as suspects, based on a generalized assumption that those individuals are more likely to be terrorists.

- **Example:** A Transportation Security Administration (TSA) officer thinks that a passenger in traditionally female clothing has masculine features, becomes suspicious, and decides to subject the passenger to a pat-down search, even though he does not observe any behavior that would suggest additional scrutiny of the passenger is warranted. Regardless of the passenger’s actual gender identity, the search was improper.

- **Example:** In an effort to crack down on undocumented immigration, U.S. Citizenship and Immigration Services (USCIS) officers target a neighborhood predominantly occupied by people of a particular race and national origin. The choice of neighborhood was based only on the general assumption that members of that particular race and national origin are more likely to be in the country without documentation. This effort would be improper because it is based on generalized stereotypes.

- **Example:** ICE officers receive information from a credible source that a local church is being used to run a human trafficking ring. The church caters predominantly to members of a particular religion, race, and national origin. So long as they are not motivated by racial animus, ICE officers can properly decide to investigate and monitor members of the church about whom they have other trustworthy information to justify a Relevant Action. They may not investigate and monitor members of the religion, race, or national origin who are not affiliated with the church, nor may they investigate and monitor members of the church where there is no other information to justify a Relevant Action.

- **Example:** A TSA officer observes a woman wearing a religious garment appear to hide an unknown object under her garment. So long as they are not motivated by racial animus, and because the woman’s behavior appears suspicious, the TSA officer may subject the woman to further investigation. It would not be appropriate for the TSA officer to further investigate the woman strictly on the basis that her religious garment could be used to conceal a prohibited item.
However, because the decision was based on an observed behavior, the Relevant Action was appropriate.

Where DHS employees are investigating a matter and have received specific information that the suspect possesses a certain listed characteristic (e.g., direct observations by the relevant witnesses), the employees may reasonably use that information, even if it is the only descriptive information available. In such an instance, it is the witness making the classification, and officers may use reliable incident-specific identifying information to apprehend criminal suspects. As the 2014 Guidance recognizes, caution must be used in the rare instance in which a suspect’s possession of a listed characteristic is the only available information. Although the use of that information may not be unconstitutional, broad targeting of discrete groups always raises serious fairness concerns.

- **Example:** A farmer sees a group of individuals crossing the border in the early hours of the morning. His description includes the race, gender, and suspected age of the individuals, together with other identifying information, such as the fact the individuals were dirty from having traveled through muddy fields and were carrying duffle bags. USCIS officers begin to search the immediate vicinity for individuals matching that description. Although the ensuing investigation affects individuals of a particular race and gender, that investigation is not undertaken with a discriminatory purpose, and is further limited to individuals matching the other identifying characteristics. In this instance, the use of race and gender as factors in the investigation, coupled as with other trustworthy information, is permissible. *Morgan v. Woessner*, 997 F.2d 1244, 1254 (9th Cir. 1993) (finding no reasonable basis for suspicion where tip “made all black men suspect”).

2. **The Information Must be Relevant to the Locality or Time Frame**

Any information that DHS employees rely upon in taking a Relevant Action concerning a listed characteristic must be locally or temporally relevant.

- **Example:** Five years ago, ICE issued an intelligence report that indicated that a large number of undocumented immigrants of a particular national origin were working illegally as day laborers on farms in Southern California. An agent operating in North Dakota reads this intelligence report. In the absence of information establishing that this intelligence is also applicable in North Dakota or at the present time, the agent may not use national origin as a factor in choosing to monitor, investigate, stop, detain, question, search or place into detention or removal proceedings individuals of that particular national origin.

3. **The Information Must be Trustworthy**

Where a DHS employee receives information regarding an individual person possessing a listed characteristic that, if true, would warrant a Relevant Action, but the information is unreliable or is too generalized and unspecific, reliance on that characteristic is prohibited.
Example: A DHS officer receives an email from “bob@ihateimmigrants.org” that a church frequented predominantly by individuals of a particular ethnicity and religious belief is “nothing but a bunch of terrorists the government should throw in jail.” Without more, the officer may not specifically target for investigation members of that ethnicity or religious belief. The information is neither sufficiently reliable nor sufficiently specific.

In determining whether information is trustworthy, the employee should consider the totality of the circumstances, such as the reliability of the source, the specificity of the information, and the context in which it is being used.

4. Characteristic-Based Information Must Always be Specific to Particular Suspects or Incidents that Would Warrant Taking a Relevant Action

These standards contemplate the appropriate use of both “suspect-specific” and “incident-specific” information. As noted above, where eyewitness accounts of conduct that would warrant taking a Relevant Action include the race, ethnicity, gender, national origin, language, religion, sexual orientation, or gender identity of an individual, that information may be used. DHS employees may also use reliable, locally or temporally relevant information linking persons possessing a listed characteristic to a particular incident. In certain cases, the circumstances will point strongly to an individual possessing a specific listed characteristic, even though law enforcement officers lack an eyewitness account.

Example: DHS discovers a religious group has smuggled immigrants into the country illegally. In the course of the investigation DHS finds evidence that another branch of the group is operating in a neighboring state. DHS knows that members of the group dress in a particular way. Because DHS officers have reliable, locally or temporally relevant information linking a group with a distinctive character to the illegal activity, it could properly decide to focus on persons dressed in the manner of the group members, when there is additional trustworthy information that would justify a Relevant Action such as a high frequency of border crossings.

5. Reasonably Merited Under the Totality of the Circumstances

Finally, when a DHS employee relies on a listed characteristic in undertaking a Relevant Action, that employee must have a reasonable belief that the action is merited under the totality of the circumstances. This standard ensures that, under the circumstances, the employee is acting in good faith when he or she relies in part on a listed characteristic to take action.

Example: A TSA officer receives a reliable tip that an individual intends to smuggle a small knife on a flight but the tip does not provide any more information. No other details as to the likely perpetrator are provided. The TSA officer believes that men of a particular ethnicity are likely to be terrorists and to
have a certain look. He subjects men of that ethnicity with long beards to physical body searches but does not subject men with long beards of other ethnicities to the same searches. These searches would violate this Guidance. An officer’s stereotypical beliefs never provide a reasonable basis to undertake a Relevant Action.

As with the 2014 Guidance, note that these standards allow the use of reliable identifying information about future violations. Where officers receive a credible tip from a reliable informant regarding a planned crime or attack that has not yet occurred, the officers may use this information under the same restrictions applying to information obtained regarding a past incident.

ADDITIONAL REQUIREMENTS

In order to ensure its implementation, this Guidance finally extends the training, data collection, and accountability requirements set forth in the 2014 Guidance to those additional areas of DHS that are encompassed by this Guidance.

It is the DHS’s intent that all employees follow this Guidance. However, it is nevertheless important for this Guidance to address situations in which it has not been followed.

1. Reporting Procedure

This Guidance supplements the accountability requirements, by requiring a formal process whereby allegations of profiling based on race, ethnicity, national origin, language, color, religion, can be reported, investigated, and resolved, either by reporting that the complaint was unsubstantiated or by taking appropriate action. Complaints that are substantiated should be addressed by training the relevant employees, or in extreme cases, dismissal. The DHS Ombudsperson is a newly created department-level employee with the authority to hear complaints relating to any purported violation of this Guidance by a DHS employee within any agency of the DHS. The Ombudsperson is appointed by, and reports directly to, the Secretary of DHS.

In the first instance, complaints should be made to the relevant DHS agency with which the employee alleged to have engaged in profiling is affiliated. The agency will then respond in writing to the complainant within 30 calendar days. If the complaint is not resolved to the satisfaction of the complaining individual, the complaining individual can report that the complaint was unsubstantiated or by taking appropriate action. Complaints that are unsubstantiated should be addressed by training the relevant employees, or in extreme cases, dismissal. The DHS Ombudsperson is a newly created department-level employee with the authority to hear complaints relating to any purported violation of this Guidance by a DHS employee within any agency of the DHS. The Ombudsperson is appointed by, and reports directly to, the Secretary of DHS.

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3 The Department shall maintain a dedicated website for the reporting of complaints. TSA officers shall provide individuals that are subjected to additional security screening (such as a pat down, search of the individual’s baggage, or additional questioning) with a pamphlet containing the details of the relevant website address through which complaints may be reported. Complaints may also be reported in writing to the mailing address of the Ombudsperson.
appeal the agency’s decision to the DHS Ombudsperson. The Ombudsperson is required to respond in writing within 30 calendar days of the appeal. In the event of an appeal, the Ombudsperson’s response shall indicate whether there has been a violation of this Guidance and the reasons for its findings. In the event a violation of this Guidance has been found, the response shall also identify the disciplinary action it deems appropriate and will require in the circumstances. The DHS will issue under separate cover additional rules regarding the procedural process.

The Ombudsperson will issue a report to the Secretary of the Department on an annual basis which provides an overview of the Ombudsperson’s work during the previous year. The report shall include: (i) the total number of complaints received, (ii) the manner in which the complaint was made (i.e., through the Department’s website or by mail), (iii) for each of the following characteristics, the number of complaints alleging profiling on the basis of that characteristic: race, ethnicity, gender, national origin, language, religion, sexual orientation, and gender; (iv) the total number of complaints that lead to disciplinary action further broken out by the nature of the disciplinary action (i.e., additional training, suspension, termination); and (v) specific recommendations on how the Department can best continue to ensure compliance with this Guidance.

2. Accountability and Disciplinary Action

Complaints that are substantiated should be addressed by training the relevant employees, temporary suspension, demotion of the employee, and in extreme cases, dismissal. Such disciplinary action is an appropriate response to a violation of this Guidance that comes to light through the complaint process, and/or in response to compliance failures identified through other means (e.g., news reports or internal monitoring).

3. Use of Evidence

Evidence that an individual has violated the laws of the United States which has been obtained in violation of this Guidance may not be used to prosecute a violation of law. This includes violations of immigration laws. To permit the use of evidence obtained in violation of this Guidance would be to undermine the Guidance itself. This is an application of the exclusionary rule established in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) and Wong Sun v. United States (371 U.S. 471 (1963).

- **Example:** An ICE officer pulls over an individual and begins to search his car. The officer targeted the individual because of his national origin and ethnicity; the individual had not done anything suspicious to warrant scrutiny and the officer was not acting on a tip specific to that individual. A review of the officer’s record indicates that a majority of the individuals he stopped over a 3-year period are of the same national origin, even though members of that national origin are only a small minority of the community in which the officer operates. During the search, the officer discovers that the individual is engaged in illegal narcotics trafficking and that the individual is in the country illegally. The officer cannot
seek to place the individual into removal proceedings because illegal profiling led to the discovery of wrongdoing by the individual.

There are three exceptions to this rule: (1) if the evidence is discovered from a source independent of the illegal activity; (2) the discovery of the evidence was inevitable; (3) the evidence is sufficiently attenuated from the illegal activity.