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Despite Anti-Profiling Rules, the FBI Uses Race and Religion When Deciding Who to Target

Cora Currier

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One of the Obama administration's high-profile criminal justice reform efforts was a new policy that purported to ban racial profiling in federal law enforcement. But internal policy guidelines The Intercept has obtained show that the FBI has left its racial profiling practices virtually unchanged, and that the bureau still claims considerable latitude to use race, ethnicity, nationality, and religion in deciding which people and communities to investigate.

The issue of profiling by federal law enforcement and immigration authorities has taken on new urgency with the inauguration of Donald Trump, who as a candidate called Mexican immigrants rapists and criminals and was slow to denounce white supremacist supporters. Among his first moves in office has been an executive order banning immigration from a list of majority-Muslim countries.

The FBI updated its policy on racial profiling as recently as March 3, 2016, in a section of its main governing manual, known as the Domestic Investigations and Operations Guide. (The Intercept is publishing the 2011 edition of the DIOG in its entirety, along with the updated section on profiling.) The guidelines make clear that when an FBI agent is deciding whether or how to investigate someone, he or she can consider factors like race, nationality, or ethnicity so long as these factors are clearly relevant and coincide with other reasons for suspicion. And

when the FBI selects communities on which to gather intelligence — in order to generate what the bureau calls “domain awareness” — it also allows itself to take such factors into consideration.

The only policy change on profiling added in the five-year gap between the manuals — and in the wake of former Attorney General Eric Holder’s anti-profiling initiative — is that the new version reflects an expanded definition of profiling, which covers not just race and ethnicity but also gender identification, national origin, religion, and sexual orientation.

Civil liberties groups, which have long objected to the FBI’s practice of surveilling ethnic communities and seeding them with informants, say that the guidelines leave the door open to alarming forms of monitoring.

“The fact that the DIOG hasn’t changed is exactly what we had feared,” said Ferhana Khera, president of the group Muslim Advocates. “While we appreciate that Attorney General Holder expanded the categories to include religion, national origin, and sexual orientation, we were concerned that he did not go far enough in making those revisions, and that it still gave a green light to the FBI to engage in activities that would target our communities.”

The flexible guidelines on racial profiling show that the FBI’s formal procedures reflect the blunt talk of its leadership. In late 2014, when the Department of Justice announced the new rules, Holder, who had spoken about his own experiences being stopped by the police as a young black man, heralded them as an important step to ensure “sound, fair, and strong policing practices.”

Yet the very next day, FBI Director James Comey insisted that the new guidance would have no impact on his agency’s counterterrorism investigations or on its ability to look for informants and map Muslim communities and businesses in the United States.

“No, nothing. It doesn’t require any change to our policies or procedures,” he said in a press briefing.

Behind the scenes, the FBI had reportedly pushed back against any rules from Holder that would ban consideration of race, ethnicity, and religion in counterterrorism investigations. Federal law enforcement has long been barred from scrutinizing someone solely on the basis of race or ethnicity, unless chasing down a particular suspect of a crime. But rules in effect under the administration of George W. Bush included a blanket exception for national security and border investigations.

Holder’s guidelines retain significant loopholes. For example, they explicitly permit cultivating sources of a particular ethnicity when investigating a terrorist organization made up of members of that ethnic group. They also allow mapping a city and looking at “population demographics, including concentrations of ethnic demographics,” if that information is collected “pursuant to an authorized intelligence or investigative purpose.” Moreover, the guidelines apply only to federal law enforcement, not to local and state police, and not to federal agents near the borders.

The FBI argues that agents need such latitude in order to recruit informants who might have insight into terrorist networks. For example, the bureau has suggested, agents might look within Somali communities in the United States for people who might have information about the Shabab militant group.

“When there is a threat from outside the country, it makes sense to know who inside the country might be able to help law enforcement,” Comey argued in 2014. “It is about knowing the neighborhoods: What’s it like, where’s the industry, where are the businesses, are there particular groups of folks who live in a particular area?”

In recent years, the American Civil Liberties Union obtained documents showing FBI field offices investigating ethnic communities based on broad generalities. For example, a 2009 document from San Francisco justified mapping that city’s Chinese neighborhoods because “within this community there has been organized crime for generations.” In Michigan, the FBI looked at the “large Middle Eastern and Muslim population” as “prime territory for attempted radicalization.”

Civil liberties groups, and Muslim groups in particular, oppose this logic, noting that the overwhelming majority of Muslim Americans have nothing to do with terror networks.

“Imagine the FBI deciding to collect data on where all Italian-Americans live, the churches that they worship in, and their charitable giving activities, because they’re concerned about the mob,” said Khera. “Rather than focusing on where there’s evidence of particular criminal activity, they collect data in one broad brush on an entire ethnic group.”

The mapping policy has also come under criticism from those who see it as a representation of the FBI’s mutation after the 9/11 attacks into an intelligence agency with broad investigative powers aimed at counterterrorism rather than at solving specific crimes.

Faiza Patel, co-director of the Liberty and National Security Program at the Brennan Center for Justice, said that she worried about the FBI combining mapping with “the vast reams of public information that are now available about everybody (including, for example, social media posts and travel records obtained through license plate readers) to create detailed portraits of each of us and of entire communities.”

An FBI spokesperson said the guidelines under which the FBI operates “are very clear that the FBI cannot predicate investigative activity solely on the exercise of First Amendment rights, including freedom of religion, or on race or ethnicity.”

The FBI’s profiling loopholes raise questions about the extent to which other federal law enforcement agencies will amend their practices — especially under a Trump administration that has pledged to take a hard line on immigration and counterterrorism. The Department of Homeland Security, U.S. Customs and Border Protection, and the Transportation Security Administration have all been expected to put out new policies, which are “badly overdue,” said Chris Rickerd, policy counsel for the ACLU.

The Department of Homeland Security, which oversees CBP and TSA, does have its own policy against racial profiling, but it has a broad loophole for national security. CBP's current guidance states that "the use of nationality as a screening, enforcement, or investigative criterion is appropriate for the vast majority of CBP functions and operations." A CBP spokesperson told The Intercept this fall that the agency follows Holder's 2014 rules but did not elaborate on whether or how it will update its own guidance.

A spokesperson for DHS told The Intercept last month that the department "has reviewed the Attorney General's guidelines on racial, ethnic, religious and other profiling by federal law enforcement and is in the process of developing our own department-wide standards."

Activist groups have documented the targeting of Latino drivers for traffic stops and other examples of Border Patrol activity that extends well beyond actual border crossings. Last year, The Intercept reported on FBI cooperation with CBP to create lists of passengers arriving from "countries of interest" who might make good informants.

The TSA has also been singled out for allegedly profiling minority passengers for extra screening. In April, a Minnesota TSA manager said that he was told by his supervisor to look for Somali-Americans.

"Absent a specific, reliable suspect description, no law enforcement agency should engage in profiling based on protected characteristics because such profiling is ineffective and offensive," Rickerd said. "We call on CBP and TSA to make clear that discriminatory enforcement plays no role in their operations, as well as to implement public data collection and training reforms to be vigilant against profiling."