

Revised 104C

ADOPTED WITH REVISIONS

RECOMMENDATION

1 RESOLVED, That the American Bar Association urges federal, state, local and territorial
2 governments to enact effective legislation, policies, and procedures to ban law
3 enforcement's use of racial or ethnic characteristics not justified by specific and
4 articulable facts suggesting that an individual may be engaged in criminal behavior,
5 hereinafter termed "racial and ethnic profiling." Racial and ethnic profiling does not
6 include the use of racial or ethnic characteristics as part of a physical description of a
7 particular person observed by police or other witnesses to be a participant in a crime or
8 other violation of law.

9
10 FURTHER RESOLVED, That the American Bar Association urges ~~the adoption of that~~
11 such legislation, policies, and procedures ~~to ban racial or ethnic profiling which~~, except
12 when impractical due to the small size or other characteristics of a law enforcement
13 agency, should require:

- 14
15 1. That law enforcement agencies have written policies, training, and
16 supervision necessary to effectively implement the ban and funding necessary for
17 these purposes;
- 18
19 2. Data collection, on all police stops and searches, whether of drivers and their
20 vehicles or pedestrians.
- 21
22 3. Where feasible, independent analysis of data collected, and publication of both
23 the data and the analysis; and
- 24
25 4. Funding for police agencies to be made contingent on compliance with these
26 requirements.

(Deletions struck-through; Additions underlined)

REPORT

I. Overview

On June 17, 2003, the U.S. Department of Justice issued a policy statement on police racial profiling. It stated: “Racial profiling rests on the erroneous assumption that any particular individual of one race or ethnicity is more likely to engage in misconduct than any particular individual of other races or ethnicities.” The statement also noted: “Racial profiling sends the dehumanizing message to our citizens that they are judged by the color of their skin and harms the criminal justice system by eviscerating the trust that is necessary if law enforcement is to effectively protect our communities.” U.S. Department of Justice, “Fact Sheet: Racial Profiling (June 17, 2003), page 1. See www.usdoj.gov.

This resolution updates and strengthens ABA Policy on Police Racial and Ethnic Profiling. It provides a definition of the invidious use of race or ethnicity as a criteria in conducting stops, searches, or other law enforcement investigative procedures either solely or as one factor among others. Police profiling based on “ethnic characteristics” is included to recognize that police profiling is not limited to skin color or other immutable physical characteristics. Police profiling based on a person’s accent, such as a white person speaking with an Hispanic accent, or dressed in a particular manner, such as a member of a sect or religious tradition, similarly results in perceptions by individuals and groups that the law does not operate fairly, judging each man or woman on the basis of his or her conduct. In both situations the targeted individuals and groups believe that justice depends on race or ethnic identity, and, therefore, our institutions of justice cannot and should not be trusted.

The resolution recognizes that in very specific and infrequent circumstances racial or ethnic characteristics along with other information may be permissible if “justified by specific and articulable facts suggesting that an individual may be engaged in criminal behavior”. An example is law enforcement investigation of gangs that may have a racial or ethnic makeup. For example, a study of street gangs in Los Angeles from 1940-2000 reported that the Bloods and the Crips, the most well-known gangs of Los Angeles, were predominantly African American. In addition, there were approximately 600 Hispanic gangs in Los Angeles County with a growing Asian gang population numbering approximately 20,000 members. See Alex Alonso, “Black Street Gangs in Los Angeles: A History,” page 1, at www.streetgangs.com.

The resolution also recognizes that racial profiling does *not* include the use of racial or ethnic characteristics as part of a physical description of a particular person observed by police or other witnesses in connection with a crime event or incident or other violation of the law.

In order to take effective action against racial or ethnic profiling, legislation, policies, and procedures to ban racial or ethnic profiling should require: (1) meaningful written policies, training and supervision of police officers and funding needed for these purposes; (2) data collection, as described in the ABA’s 1999 resolution on racial profiling, as further discussed in

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this Report; (3) if feasible, independent analysis of data collection, and publication of both the data and the analysis; and (4) funding contingent on compliance with these requirements. Because there are approximately 17,000 police agencies in the United States, including agencies with less than five police officers, including part-time officers, the resolution provides an exception “when impractical due to the small size or other characteristics of a law enforcement agency”.

It is important that data collected undergo independent analysis and publication to provide transparency and encourage confidence and trust in law enforcement agencies. If police agencies can show the public and the media that the police are operating impartially and objectively and only when race is a critical fact in an investigation, there will be more citizen cooperation with police agencies. This should help counter the attitude that cooperating with the police is “snitching”. Obtaining citizen cooperation, especially in some African-American and Latino communities, has been of concern especially with criminal drug law enforcement and even with homicide cases.

Funding to effectively implement the resolution may be difficult in some jurisdictions. Implementing the resolution, however, will in the long run save state and local governments from civil rights suits and expensive settlements. Also, increased citizen trust and cooperation should result in more cases closed with less expenditure of investigatory resources. In addition, when proper police procedures are followed, plea bargains are more likely to result, saving scarce judicial and law enforcement resources.

II. Need for Updating and Strengthening of ABA Policy

Several previous ABA resolutions and policies have addressed profiling and related issues. The time has come to update the ABA’s positions.

The 1999 ABA resolution focuses solely on data collection by all federal, state, local and territorial law enforcement agencies that engage in traffic stops. Also, it urged passage of legislation requiring DOJ and state attorneys general to undertake a study, based on this data, to determine whether, how and the degree to which race-based profiling or other methods that disproportionately target or affect persons of color are used by law enforcement authorities in conducting traffic stops and searches and, if so, to identify the most efficient and effective method of ending all such practices.

Also, in August, 2004, the ABA adopted a policy statement that recommended that the federal government and states establish criminal justice racial and ethnic task forces to design and conduct studies to determine the extent of racial and ethnic disparity in the criminal justice system. Also, it required law enforcement agencies to develop and implement policies and procedures to combat racial and ethnic profiling, including education and training, data

collection and analysis and other "best practices" that have been implemented throughout the country through voluntary programs and legislation.

The ABA policy needs updating and strengthening. The 1999 resolution focuses on data collection related to traffic stops. It is a narrowly focused, very limited response. The problem of police racial profiling continues to be a serious one in many police jurisdictions. It undermines the fairness, legitimacy and respect for the criminal justice system, especially in affected minority communities. Given the seriousness and pervasiveness of the problem as shown in various studies and more recent information from several states on how to strengthen public policy to more effectively respond to police racial profiling, there is a need and opportunity to update and strengthen the ABA official policy.

There is a need for an approach that is more comprehensive and specific than the ABA recommendations. The Committee proposal requires police departments to have a written policy banning racial profiling and focuses not only on training all line personnel but to institute operational supervision to ensure compliance with the policies and training. The data collection requirement does substantially overlap with the earlier ABA resolutions. Unlike the ABA resolutions, the Committee proposal recommends not only analysis of the data, but publication of the data as well. Also, the Committee's recommendation would provide funds available to implement the policies, especially for training of officers.

Finally, the Committee's proposal provides a penalty in the event of non-compliance, including loss of implementation and training funds and additional budgeted funds sufficient to induce compliance. In the case of federal legislation, a funding contingency is the only power that the federal government has to mandate conduct of state and local agencies such as police departments. Congress may make any and all federal funds available to state or local agencies contingent on compliance with conditions in federal law. It has done this before, with laws addressing state matters such as speed limits and the thresholds for judging whether a driver has operated a vehicle under the influence of drugs. Similarly, state and local law enforcement agencies typically are creatures of state law and, therefore, subject to state law mandates.

III. Current ABA Policy on Police Racial Profiling

In August 1999, the ABA approved the following resolution:

RESOLVED, That the American Bar Association supports passage of federal, state, local and territorial legislation requiring the systematic collection of and annual reporting to the United States Department of Justice and the appropriate state or territorial attorneys general the following data, by all federal, state, local and territorial law enforcement agencies that engage in traffic stops:

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- (1) the race and ethnicity but not the identity of each Person stopped by law enforcement officials;
- (2) the alleged traffic infraction that led to the stop;
- (3) whether a search was instituted as a result of the stop;
- (4) whether the vehicle, personal effects, driver, passenger and/or passengers were searched;
- (5) the legal basis for the search;
- (6) whether contraband was discovered in the course of the search;
- (7) the nature of any contraband found; and
- (8) whether an arrest was made or citation or warning issued as a result of either the stop or the search.

FURTHER RESOLVED, That the American Bar Association supports The passage of federal, state, local and territorial legislation that requires the Department of Justice as well as state and territorial attorneys general, to undertake a study using the data collected and reported pursuant to the legislation described above and such other information as may be gathered by or reported to them, to determine whether, how and the degree to which race-based profiling or other methods that disproportionately target or affect persons of color are being employed by federal, state, local and territorial law enforcement authorities in conducting traffic stops and searches, and, to the extent such practices are being employed, to identify the most efficient and effective method of ending all such practices.

In August 2004, the ABA approved the following:

RESOLVED, That the American Bar Association urges states, territories and the federal government to strive to eliminate actual and perceived racial and ethnic bias in the criminal justice system by enacting measures that would:

- (1) Establish Criminal Justice Racial and Ethnic Task Forces to:
 - (a) include individuals and entities who play important roles in the criminal justice process, and invite community participation from interested groups such as advisory neighborhood commissions and local civil rights organizations; and
 - (b) design and conduct studies to determine the extent of racial and ethnic disparity in the various stages of criminal investigation, prosecution, disposition and sentencing; make periodic public reports on the results of their studies; and make specific recommendations intended to eliminate racial and ethnic discrimination and unjustified racial and ethnic disparities.

(2) Require law enforcement agencies to develop and implement policies and procedures to combat racial and ethnic profiling, including education and training, data collection and analysis and other "best practices" that have been implemented throughout the country through voluntary programs and legislation.

(3) Require legislatures to conduct racial and ethnic disparity impact analyses to evaluate the potential disparate effects on racial and ethnic groups of existing statutes and proposed legislation; review the data gathered and recommendations made by Criminal Justice Racial and Ethnic Task Forces; and propose legislative alternatives intended to eliminate predicted racial and ethnic disparity at each stage of the criminal justice process.

Also, in August 2003, the ABA approved the following - see especially #5 of the "further resolved" clause:

RESOLVED, That the American Bar Association encourages state, local and territorial bar associations, judges, prosecutors, defenders and police to instill public confidence in the fairness of the justice system by making concerted efforts to assure that the justice system provides fair and equal treatment for all youth.

FURTHER RESOLVED, That the American Bar Association urges state, local and territorial bar associations, judges, prosecutors, defenders and police to address disparate treatment of racial and ethnic minority youth in the justice system as a serious problem by adhering to the following principles:

1. State, local, and territorial bar associations should provide education and training on addressing the disparate treatment of youth and ensure that courts maintain the goal of reducing disparate treatment.
2. Judges should obtain training on the disparate treatment of youth, promote the use of objective risk assessments, ensure meaningful access to objective risk assessments, guard against overcharging, ensure meaningful access to counsel, and maintain a jurisdictional goal of reducing disparate treatment.
3. Prosecutors should obtain training on the disparate treatment of youth, ensure their decisions are based on objective criteria, seek alternatives to formal prosecution, and take a leadership role in

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ensuring reduction in the disparate treatment of youth.

4. Defenders should obtain training on the disparate treatment of youth, advocate for improved data collection and use of objective risk assessments, ensure that their clients receive culturally appropriate services, advocate for community based alternatives to detention, and maintain in (sic) active role in reducing disparate treatment.

5. Police should obtain training on the disparate treatment of youth, keep detailed data regarding their contact and geographic patrolling of youth, be familiar with diversion and community-based programming, work with court personnel to develop community resources, and take a leading role in reducing the disparate treatment of youth.

IV. Explaining the Recommendations

A. The Issue of Racial or Ethnic Profiling

Since the middle to late 1990s, considerable public discussion has surrounded the practice of racial or ethnic profiling. Racial or ethnic profiling consists of law enforcement's use of racial or ethnic appearance as one factor among others¹ in determining whether a particular individual warrants police attention, such as a detention or search.² Using race or ethnicity this way burdens entire minority groups with unwanted and unjustified intrusive police attention, simply on the basis that police believe that those who share a single physical characteristic, dark skin - black or brown -or other distinguishing characteristic, such as speaking with an accent or peculiar or unique manner of dressing, have a greater likelihood of involvement in some particular kind of criminal activity. This practice leads to great resentment and feelings of antipathy toward police by the majority of persons in these racial and ethnic groups, who behave lawfully, and has, therefore, become a major point of friction between police and those they serve. Black and brown Americans believe that law enforcement targets them for stops, frisks,

¹ This definition utilizes the phrase "one factor among others" purposely, because racial profiling is not limited to situations where law enforcement judgments are based "solely" on race, as other definitions, including those in some statutes, sometimes are. Such definitions are far too narrow. For all practical purposes, they define the problem out of existence, because there is no police (or human) action one could envision which could be said to be based "solely" on any one factor; rather, multiple causes for the actions of people are the rule. Other definitions of racial profiling, such as the one used by the General Accounting Office, show awareness of the same idea: "[u]sing race as a key factor in deciding whether to make a traffic stop." General Accounting Office, Racial Profiling: Limited Data Available on Motorist Stops. GAO/GGD-00-41. Washington, DC: March 2000.

² As defined here, racial profiling does not include the use of racial or ethnic characteristics as part of a physical description of a particular person observed by police or other witnesses. Thus the description of a suspect which includes his or her probable race or ethnicity as reported by someone who has seen the suspect violates no principle against racial profiling.

and searches on racially and ethnically discriminatory grounds. Some law enforcement officials and others argue that, at least in certain situations, racial profiling constitutes a sound and effective law enforcement strategy for attacking crime, which, they say, emerges from minority populations at disproportionate rates.

While African Americans and Latinos have complained about these practices for years, only in the past decade have these discussions come into the full public arena, with the majority population and the media finally taking notice in the late 1990s. This happened because, for the first time, data became available that substantiated minority Americans' claims that police had used racial or ethnic targeting to decide who to stop and detain and search on the highways, roads, and sidewalks of the U.S. For example, in Maryland, more than seventy percent of all drivers stopped by state troopers along heavily-traveled Interstate 95 were African American, even though only seventeen percent of the drivers on the highway were black.³ In New Jersey, after years of highly contentious litigation by minority defendants and bitter denials of any wrongdoing, the state's Attorney General admitted in 1999 what the statistics gathered and analyzed by experts since the early 1990s had shown consistently: state police used a variety of practices to target African American drivers. Racial profiling, the Attorney General's report said, was "real -- not imagined."⁴

In New York City, reports concerning stops and frisks of pedestrians by the New York Police Department's officers over a fifteen month period showed that African Americans and Latinos were considerably more likely to experience stops and frisks than whites – even though searches of both African Americans and Latinos were less likely to yield arrests than were the searches of whites.⁵ This last finding – encapsulated by the idea of "hit rates," the rate at which law enforcement personnel actually found contraband or made an arrest after a racially-targeted detention – proved particularly eye opening. Proponents of racial profiling have claimed that, given racially disproportionate patterns of offending, using race to enforce the law constituted a sensible strategy.⁶ Studies that included hit rates showed that, at the very least, there were significant reasons to doubt this claim. When police used profiling, they found less contraband and made fewer arrests on a percentage basis among the targeted minority groups than they did among whites.⁷

All of this, and many more studies showing similar results, led to a rare societal consensus by 1999: more than eighty percent of all Americans of all races and ethnic groups,

³ Report of Dr. John Lamberth (plaintiff's expert), *Wilkins v. Maryland State Police, et al.*, Civil No. MJG-93-468 (D. Md. 1996)

⁴ Peter Verniero and Paul Zoubek, *Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling*, 29 April 1999, at 4.

⁵ Elliot Spitzer, Attorney General of the State of New York, *The New York City Police Department's "Stop and Frisk" Practices: A Report to the People of the State of New York*, 1 December 1999, p. 111, 115, tbl. IB.2.

⁶ See, e.g., Marshall Frank, *Racial Profiling: Better Safe Than Sorry*, Miami Herald, 19 October 1999.

⁷ The central claim of the proponents of racial and ethnic profiling – that it constitutes effective police work – was refuted in David A. Harris, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (The New Press, 2002), Chapter 4, *The Hard Numbers: Why Racial Profiling Doesn't Add Up*.

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disapproved of racial profiling by police.⁸ This led to enactment of some state statutes that took steps against racial profiling, and to self-examination and internal regulation by some police departments. In the years since 1999, the number of states with laws against racial profiling has grown considerably, and a considerable number of police departments have also mounted anti-profiling efforts. The state laws vary considerably in effect, strength, and duration, with some no longer in effect.⁹

It is profoundly incorrect to believe, however, that the problem of the use of race and ethnicity to target individuals as a part of domestic law enforcement has disappeared: it most assuredly has not.¹⁰ And we ignore the issue at great peril both to our law enforcement agencies, and to our system of justice.

In his address to a joint session of Congress on February 27, 2001, President George W. Bush declared that “racial profiling is wrong and we will end it in America.” He directed the Attorney General to implement this policy.

In June, 2003, the Department of Justice issued a Policy Guidance¹³ regarding racial profiling by Federal law enforcement agencies which states: “Racial profiling in law enforcement is not merely wrong, but also ineffective. Race-based assumptions in law enforcement perpetuate negative racial stereotypes that are harmful to our rich and diverse democracy, and materially impair our efforts to maintain a fair and just society.” (A copy of the federal “Guidance” is appended hereto.) The document orders federal agencies not to use race or ethnicity, alone or in conjunction with other factors, as an indicator of suspicion in routine law enforcement activities.

The U.S. Department of Justice “Guidance” regulates only federal agencies, which are much less likely than state or local police departments to be involved in routine law enforcement; it makes no effort of any kind to address the behavior of state or local officers. Federal legislative proposals, introduced into each session of Congress since 1997, have never passed.

Legislative action at both the federal and state level is needed to move toward achieving twin objectives: (1) law enforcement free from the taint of racial and ethnic discrimination; and, (2) and more effective action against criminals.

⁸ Frank Newport, *Racial Profiling Seen as Widespread, Particularly Among Young Black Men*, Gallup Poll, 9 December 1999.

⁹ The Racial Profiling Data Collection Resource Center at Northeastern University in Boston features the most comprehensive current national survey of jurisdictions with anti-profiling laws. See <http://www.racialprofilinganalysis.neu.edu/background/jurisdictions.php>, accessed November 12, 2007.

¹⁰ For just one recent example, *see, e.g.*, Dennis Wagner, *Racial Trends Found in DPS Traffic Stops*, Arizona Republic, 7 November 2007 (highlighting “new evidence of possible racial-profiling [sic] by the Arizona Department of Public Safety,” showing that Highway Patrol officers were “more than twice as likely to search vehicles driven by Hispanics and Blacks than those operated by Anglos during 2006.”).

B. Why the American Bar Association Should Act

The American Bar Association rightly claims leadership as one of the pre-eminent American organizations concerned with the rule of law as a bedrock principle of American society. Any action by government that tends to undermine the law's legitimacy in our society, or that applies the law or the state's police power in ways that smack of racial or ethnic discrimination, deserve the Association's strongest condemnation. Any efforts to reverse this kind of action deserve the Association's most unequivocal support.

Racial profiling could serve as the prototypical example of a law enforcement practice that can undermine the legitimacy of rule of law in our society, as well as the foundations of all of our institutions built around the rule of law – not just police, in other words, but every institution of the legal system. When a substantial group of citizens believe that police enforce the law not even handedly but differentially, according to skin color, other immutable physical characteristics, accent, or unique manner of dress, they perceive that the law does not operate fairly, judging each man or woman on the basis of his or her conduct. Rather, they believe that justice depends on race or ethnic identity, and therefore that our institutions of justice cannot and should not be trusted implicitly, as they must if they are to serve the high purposes for which the founders of our Nation designed them. These beliefs may be based on hard data; they may be only perceptions, based upon personal experiences or reports of the experiences of others. Either way, all of society pays an incalculable price: the foundations of our law are undermined, and trust in them is lost.

Beyond the damage to the core idea of the rule of law, the Association should support these Recommendations for pragmatic reasons. Law enforcement action based, even in part, on racial or ethnic characteristics is less effective than law enforcement that focuses on the actual law-breaking or dangerous behavior with which law enforcement is and should be concerned.¹¹ Making racial or ethnic appearance a factor – even just one factor among others – takes the eyes of law enforcement off of what is really important – behavior – and instead focuses attention on appearance. Appearance does not predict behavior well, is easily changed or disguised in many situations, and often overwhelms far more important behavioral cues. Thus banning racial profiling will result not just in shoring up respect for the rule of law, but in more effective enforcement of the law.

C. Components of Acceptable Legislation Against the use of Racial Profiling

In order to have effective action against the use of racial profiling, any legislation at either the federal, state, local or territorial level should include the following elements in actions by police or security personnel in the course of their domestic law enforcement duties.

¹¹ See David A. Harris, *supra* note 7.

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- 1) **Ban Racial or Ethnic Profiling** – Legislation must ban the use of racial or ethnic profiling, as the term is defined in the Resolution. Any definition must specify that the use of racial or ethnic characteristics need not be the sole basis for law enforcement action; rather, it can be one factor among others.
- 2) **Policies, Training, and Supervision** -- Legislation must require police departments to have a written policy banning the use of racial profiling, as defined above; to train all line personnel on the policy and its proper enforcement and related requirements; and to institute operational supervision to ensure compliance with the policies and training, so that the ban can become effective. Legislation should also make funds available to law enforcement agencies to implement these policies, especially for training of officers.
- 3) **Data Collection** – In line with the terms of the 1999 Resolution on data collection, legislation should mandate the collection of appropriate data on all police stops and searches, whether of drivers and their vehicles or pedestrians. Each such stop would require a report, which would collect the following data, at a minimum: date, time, place, and duration of the stop; identity and perceived race or ethnicity¹² of suspect; officer’s legal justification for the stop, including the nature of any observed traffic offense; whether a citation or warning of any kind was issued, and whether an arrest was made; whether a search was conducted, and the legal basis for the search; whether the search uncovered any contraband; if contraband was recovered, its nature and quantity.
- 4) **Independent Analysis and Publication of Data** – Legislation should -require, if feasible, that data undergo analysis, by an entity independent of the collecting agency. The best alternative would be to recruit an independent research partner, such as a university, think tank, or suitable government department, to perform the analysis, as well as to help design the collection effort and the tools involved. After analysis, all data and the analysis should be available to the public. This kind of transparency encourages confidence in the process and a greater degree of accountability.
- 5) **Funding Contingent on Compliance** – Legislation must mandate that agencies or jurisdictions not complying with the law’s requirements will lose any opportunity to receive designated funding from the relevant government. In the case of federal legislation, this funding contingency is in fact the only power that the federal government has to mandate conduct of state and local agencies such as police

¹² It is appropriate to record only the racial or ethnic identity as perceived by the officer. Racial profiling is based on the racial or ethnic identity of the person under observation as perceived by the officer, because that is the basis for the stop when the officer engages in racial or ethnic targeting. The actual race or ethnicity of the driver is therefore irrelevant; the officer knows only what he or she perceives the persons identity to be, not what it actually is. This obviates the need for officer to ask the subject of the stop what his or her racial or ethnic identity is, eliminating a potentially difficult moment. It is simply unnecessary.

departments. While the Congress could, for example, order that the federal Bureau of Immigration and Customs Enforcement comply with a federal anti-profiling law, it cannot command that state or local agencies do so without violating the Constitution.¹³ Congress may, however, make any an all federal funds available to state or local agencies contingent on compliance with conditions in federal law. It has, of course done this before, with laws addressing state matters such as speed limits and the thresholds for judging whether a driver has operated a vehicle under the influence of drugs. No comparable issue exists for state laws; state and local law enforcement agencies would typically be creatures of state law and therefore subject to state law mandates.

No Sunset – Legislation should not expire automatically after any set period. It must make clear that the practice of racial profiling is now and forever outside the permissible boundaries of law enforcement tactics, and that the monitoring that the legislation puts in place, through data collection and supervision, will not go away in any set time. If, at some future point, the Congress or the state legislative body- agrees that law enforcement no longer requires these measures, the legislation may of course be repealed, just as with any law.

The “No Sunset” element was not, however, included in the Resolution because of concern that requiring permanent data collection and analysis might impose costs in some jurisdictions that are viewed as prohibitive. Perhaps, a provision could be added that upon certification by the Attorney General based upon a review of data for a designated period, such as a minimum of three years, a jurisdiction may no longer be required to collect data for each law enforcement officer stop. By not formally including this requirement, it is left up to the jurisdiction as to whether to have a sunset provision for the requirement.

Respectfully submitted,

Stephen J. Saltzburg
Chair, Criminal Justice Section
August 2008

¹³ See, e.g., *U.S.v. Lopez*, 514 U.S. 549 (1995) (declaring a federal firearms law mandating action by local law enforcement unconstitutional).

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GENERAL INFORMATION FORM

Submitting Entity: American Bar Association Section of Criminal Justice

Submitted By: Stephen Saltzburg, Chair, Section of Criminal Justice

1. Summary of Recommendation(s).
That the American Bar Association urges federal, state, local and territorial governments to enact effective legislation, policies, and procedures to ban racial or ethnic profiling by law enforcement agencies and police officers engaging in domestic law enforcement.
2. Approval by Submitting Entity.
The recommendation was approved by the Criminal Justice Section Council at its April 5, 2008 meeting.
3. Has this or a similar recommendation been submitted to the House or Board previously?
Yes.
4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

Several previous ABA resolutions and policies have addressed profiling and related issued.

The 1999 ABA resolution focuses solely on data collection by all federal, state, local and territorial law enforcement agencies that engage in traffic stops. Also, it urged passage of legislation requiring DOJ and state attorney's general to undertake a study, based on this data, to determine whether, how and the degree to which race-based profiling or other methods that disproportionately target or affect persons of color are used by law enforcement authorities in conducting traffic stops and searches and, if so, to identify the most efficient and effective method of ending all such practices.

Also, in August, 2004, the ABA adopted a policy statement that recommended that the federal government and states establish criminal justice racial and ethnic task forces to design and conduct studies to determine the extent of racial and ethnic disparity in the criminal justice system.

5. What urgency exists which requires action at this meeting of the House?

(1) There is a need for a comprehensive and integrated approach in dealing with the issues of police racial and ethnic profiling. Previous Resolutions have been limited in scope. (2) With the increasing immigration issues in America and the fight against terrorism, there is a need for increased emphasis on “ethnic profiling” as well as “racial profiling”. (3) With a new Administration on the horizon, the ABA should now focus on these issues to influence how a new Administration will deal with these issues over the next four years as a matter of law enforcement activities and the administration of justice.

6. Status of Legislation. (If applicable.)
N.A.

7. Cost to the Association. (Both direct and indirect costs.)
The recommendation’s adoption would not result in direct cost to the Association.

8. Disclosure of Interest. (If applicable.)
No known conflict of interest exists.

9. Referrals.
Concurrently with the submission of this report to the ABA Policy Administration Office for calendaring on the August 2008 House of Delegates agenda it is being circulated to the following:

Section, Divisions, Forums
All Section and Divisions

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EXECUTIVE SUMMARY**A. Summary of Recommendation.**

That the American Bar Association urges federal, state, local and territorial governments to enact effective legislation, policies, and procedures to ban racial or ethnic profiling by law enforcement agencies and police officers engaging in domestic law enforcement.

B. Issue Recommendation Addresses.

This resolution updates and strengthens ABA Policy on Police Racial and Ethnic Profiling. It provides a definition of the invidious use of race or ethnicity as a criteria in conducting stops, searches, or other law enforcement investigative procedures either solely or as one factor among others.

C. How Proposed Policy Will Address the Issue.

There is a need for an approach that is more comprehensive and specific than the ABA recommendations. The Committee proposal requires police departments to have a written policy banning racial profiling and focuses not only on training all line personnel but to institute operational supervision to ensure compliance with the policies and training. The data collection requirement does substantially overlap with the earlier ABA resolutions. Unlike the ABA resolutions, the Committee proposal recommends not only analysis of the data, but publication of the data as well. Also, the Committee's recommendation would provide funds available to implement the policies, especially for training of officers.

D. Minority Views or Opposition.

No opposition to this recommendation is known to exist at this time.