

FEB 06 2014



U.S. Customs and
Border Protection

Commissioner

MEMORANDUM FOR: SEE DISTRIBUTION

FROM:

Thomas S. Winkowski
Acting Commissioner

A handwritten signature in black ink, appearing to read "T. Winkowski".

SUBJECT: Nondiscriminatory Law Enforcement and Screening Activities

The Department of Homeland Security (DHS) and U.S. Customs and Border Protection (CBP) are committed to nondiscriminatory law enforcement and screening activities. This is reinforced by the April 26, 2013, DHS policy memorandum issued by former Secretary Napolitano, which highlights the Department's commitment to nondiscriminatory law enforcement and screening activities.

The Secretary noted that the current policy, like the predecessor policy issued by former Secretary Tom Ridge on June 1, 2004, is based on the premise that, "In all we do to secure America, our strategies and our actions must be consistent with the individual rights and civil liberties protected by the Constitution and the rule of law." The current policy restates DHS's adoption of the Department of Justice's (DOJ) "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies," issued in June 2003.

CBP has adopted the April 26, 2013, DHS policy, along with 2003 DOJ Guidance. The DHS policy prohibits the consideration of race or ethnicity in the agency's daily law enforcement and screening activities in all but the most exceptional circumstances. CBP personnel may use race or ethnicity only when a compelling government interest is present, and only in a way narrowly tailored to meet that compelling interest. National security is *per se* a compelling interest, but use of race and ethnicity must nonetheless be narrowly tailored to the particular national security concern involved in a proposed use. Of course, race- or ethnicity-based information that is specific to particular suspects or incidents or ongoing criminal activities, schemes, or enterprises may be considered.

We note that this prohibition relates to the consideration of *race* or *ethnicity*, which is distinguished from the consideration of *nationality*. Using nationality for antiterrorism, customs, or immigration activities in which nationality is expressly relevant to the administration or enforcement of a statute, regulation, or executive order to, for example, trigger screening, inspection, or investigative steps is entirely appropriate and needs no further justification. Therefore, the use of nationality as a screening, enforcement, or investigative criterion is appropriate for the vast majority of CBP functions and operations.

The Secretary has directed each component to include the April 26, 2013, DHS policy in all manuals, policies, directives, and guidelines regarding any activity in which the use of race, ethnicity, or nationality may arise as a security screening, enforcement, or investigative criterion;

to implement agency-specific policy and procedures for implementing the policy; and to ensure that all law enforcement personnel, including supervisors and managers, are trained to the standards set forth in the DOJ Guidance and the DHS Policy and are held accountable for meeting those standards. CBP fully supports DHS's efforts to remain vigilant not only in the protection of the country but in the prohibition against unlawful racial profiling in enforcement, investigation, screening, and inspection. The Office of the Commissioner, Privacy and Diversity Office, will work with the appropriate CBP Offices to fully implement this policy.

As an initial step to assure that CBP personnel are aware of their obligations under the policy, attached you will find an anti-profiling policy muster module to read at musters and/or staff meetings with all frontline employees by no later than **Friday, March 7, 2014**. Please confirm implementation via electronic mail message to PDOTasking.

In addition to the attached muster module, attached for distribution is the full text of the DHS/CBP Policy and DOJ's 2003 "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies."

Distribution:

- All Assistant Commissioners
- Chief, Office of Border Patrol
- Chief Counsel
- Executive Director, Office of Policy and Planning
- Executive Director, Joint Operations Directorate
- Principal Executive, Office of Strategic Integration
- Director, Office of Trade Relations
- Director, Office of the Executive Secretariat
- Director, State Local and Tribal
- Chief of Staff
- Deputy Chief of Staff

Attachments

Muster Module: Commitment to Nondiscriminatory Law Enforcement and Screening Activities

Instructions: This information must be read and discussed at regular musters no later than **Friday, March 7, 2014**. If multiple shifts are in place, the information must be read at each muster for each different work schedule. Hard copies of the muster should be posted in all muster areas, break rooms, and common areas.

Length: 5 minutes

Topic: Commitment to Nondiscriminatory Law Enforcement and Screening Activities

Office: Office of the Commissioner, Office of Privacy and Diversity

Message: It is the policy of U.S. Customs and Border Protection (CBP) to adhere to the Department of Homeland Security's (DHS) official policy against the use of racial profiling in its screening and enforcement activities. On April 26, 2013, DHS issued a revised policy, which CBP has adopted and which is the subject of this muster.

Attachments: The Department of Homeland Security's Commitment to Nondiscriminatory Law Enforcement and Screening Activities (April 26, 2013)

The Department of Justice's "Guidance Regarding the Use of Race by Federal Law Enforcement Agencies" (June 2003)

- Background
 - "Racial profiling" is the invidious use of race or ethnicity as a criterion in conducting stops, searches, and other law enforcement, investigative, or screening activities. It is premised 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 another race or ethnicity.
 - Definitions:
 - Ethnicity means ancestry, language, culture, or other similar social characteristics.
 - Country of birth means the political entity where the individual was born, without regard to whether the person is a citizen or resident of the country.
- DHS and CBP policy prohibits the consideration of race or ethnicity in daily law enforcement and screening activities in all but the most exceptional instances.
 - Race - or ethnicity - based information may be considered if it is specific to particular suspects, incidents, or ongoing criminal activities.

- In most situations, information pertaining to race, ethnicity, or country of birth should be combined with other relevant characteristics, if practicable, in order to focus the inquiry.
 - Approaches that respond to actual travel itineraries or combine race, ethnicity, or country of birth with other limiting characteristics (e.g., age, sex, travel history, known affiliations) are preferable to those that draw distinctions on the basis of ethnicity or country of birth alone.
- When conducting screening, enforcement, and investigative functions, you should rely on your training for making sensible identifications of relevant characteristics and should not rely on general assumptions about ethnic groups.
- Using **nationality for antiterrorism**, customs, or immigration activities in which nationality is expressly relevant to the administration or enforcement of a statute, regulation, or executive order (to, for example, trigger screening, inspection, or investigative steps) is appropriate and needs no further justification. Therefore, the use of nationality as a screening, enforcement, or investigative criterion is appropriate for the vast majority of CBP functions and operations.