TESTIMONY

of

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on

S. 989, the "End Racial Profiling Act of 2001"

before the

Senate Subcommittee on the Constitution, Federalism and Property Rights

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Good afternoon, Mr. Chairman and distinguished members of the Senate Subcommittee on the Constitution, Federalism and Property Rights. My name is Steve Young. I am a twenty-five year veteran of the Marion, Ohio City Police Department. I am the National Vice President of the Fraternal Order of Police. The F.O.P. is the nation's largest law enforcement labor organization, representing more than 297,000 rank-and-file law enforcement officers in every region of the country. I am here this morning to discuss our strong opposition to S. 989, the "End Racial Profiling Act," introduced by Senators Feingold, Clinton and Corzine.

I want to begin by saying very clearly that racism is wrong. It is wrong to think a person a criminal because of the color of his or her skin. But it is equally wrong to think a person a racist because of the color of his or her uniform. This bill is a "solution" bill, but it unfortunately identifies the "problem" as racist police officers. The so-called practice of "racial profiling," hyped by activists, the media and others with political agendas, is one of the greatest sources of stress between law enforcement and the minority community in our nation today. But the solution cannot, as this bill does, presuppose that a man or woman in a police officer's uniform is inclined to be racially biased. This is just not so.

The so-called practice of "racial profiling" is, in fact, only part of the larger issue. That larger issue is a mistaken perception on the part of some that the ugliness of racism is part of the culture of law enforcement. I am here today not only to challenge this perception, but refute it entirely.

We can and must restore the bonds of trust between law enforcement and minorities; to do so requires substantial effort to find real solutions. It requires that we resist our inclination to engage in meaningless "feel good" measures that fail to address the substance of our problem. It requires that we resist using hyperbole and rhetorical excess to place blame. This legislation does both of these things and we strongly oppose it. Open and honest communication builds trust—snappy sound bites and bills with the premise that law enforcement officers are racist do not.

I do not believe that S. 989, the "End Racial Profiling Act" will help to repair the bonds of trust and mutual respect between law enforcement and minority communities. Quite the opposite—I believe it will widen them because it is written with the presumption that racist tactics are common tools of our nation's police departments. This is wrong and is a great disservice to the brave men and women who put themselves in harm's way every day and night to keep our streets safe.

Let me explain by addressing some of the bill's specifics.

First of all, we believe that the legislation unnecessarily defines and bans "racial profiling." "Racial profiling" is not a legitimate police practice employed by any law enforcement agency in the United States. The United States Supreme Court has already made it very clear that "the Constitution prohibits selective enforcement of the law based on considerations such as race," and that "the constitutional basis for objecting to intentionally discriminatory application of the laws is the Equal Protection Clause." *Whren v. United* States, 517 U.S. 806, 813 (1996). Further, as one Court of Appeals has explained, "citizens are entitled to equal protection of the laws at all times. If law enforcement adopts a policy, employs a practice, or in a given situation, takes steps to initiate an investigation of a citizen based solely upon that citizen's race, without more, then a

violation of the Equal Protection Clause has occurred." *United States v. Avery*, 137 F.3d 343, 355 (6th Circuit 1997).

The United States Constitution itself prohibits "racial profiling," making Federal legislation defining or prohibiting such activity unnecessary. I am sure that there is no one on this Subcommittee or in the United States Senate who would disagree that our Constitution prohibits the practice of "racial profiling."

Further, the F.O.P. contends that the legislation's definition of "racial profiling" is far too broad. The bill prohibits the use of race "to any degree" in selecting individuals to be subject to even the most routine investigatory action, excepting only those situations in which race is used "in combination with other identifying factors when the law enforcement agent is seeking to apprehend a specific suspect whose race, ethnicity or national origin is part of the description of the suspect."

This means we might as well disband the F.B.I.'s Behavioral Science Unit, whose work includes conducting high-impact research and presenting a variety of cutting edge courses on topics such as Applied Criminal Psychology, Clinical Forensic Psychology, Crime Analysis, Death Investigation, and Gangs and Gang Behavior. The unit's personnel are primarily Supervisory Special Agents and experienced veteran police officers with advanced degrees in the behavioral science disciplines who focus on developing new and innovative investigative approaches and techniques to the solution of crime by studying the offender and his/her behavior and motivation. Sometimes, their profile of a suspect contains racial information, because race can and does have an impact on our psychology. In some cases, it may be the only physical description law enforcement has to go on. The profile provided by this unit in its work on the Unabomber case, for example, suggested that the suspect was a white male. Generally speaking, serial killers are much more likely to be white males than any other race or gender.

Under this legislation, we would be unable to use information of this kind absent an eyewitness or other description of a specific suspect's race or ethnicity. This bill is very specific on this point: law enforcement officers can never use race as a factor—even if it would help them to pursue an investigation, identify a suspect, prevent a crime or lead to an arrest. The proposed legislation would therefore ban a whole range of activities beyond the already unconstitutional, purely race-based activity. The legislation would also apply to Customs and immigration-related enforcement activities, as well as criminal law enforcement efforts.

What does this mean to the officer on the beat? That no minority will be stopped, searched or questioned no matter how suspicious the activity without a specific eyewitness account? Measures like this can only lead to situations like we have now in Cincinnati. Eighty-five (85) people have been wounded or killed in seventy-three (73) separate shooting incidents since the riots in April. Last year during the same time frame, there were nine (9) shootings and eleven (11) victims. None of the seventy-three (73) shootings since April have received media attention like the death of Timothy Thomas. Or even that of Ricky Moore, who ambushed and attempted to kill Officer Thomas Haas. Why? Do we as a nation not care about black-on-black violence? The Over-the-Rhine community does, and that includes the police officers who live and work there. Hamilton County Prosecutor Mike Allen said of the neighborhood, "It's like the killing

fields, it's like the Wild West down here. There is still the same lawlessness that went on during the riots. And the criminals know that the police are now reluctant to take action."

Lieutenant Ray Ruberg of the Cincinnati Police Department said, "Our discretion has been limited... The racial profiling forms policy also went into effect in May, and a lot of officers now feel they have to articulate for every stop and that, in turn, will limit stops."

Keith Fangman, the president of the local Fraternal Order of Police, said, "The city has never seen this level of violence. This is an epidemic of crime."

The numbers bear all three of these observations out. Last year there were nine (9) shootings between April and July—this year there were seventy-three (73). Arrests have dropped fifty percent (50%) since April and traffic stops have dropped by sixty percent (60%).

Every cop on the beat in Cincinnati knows that if something goes wrong, even the slightest mistake when made in that split second, their jobs, lives and families could be at risk. Good policing, pro-active policing that deters and prevents crime, cannot occur in these conditions.

This bill would elevate that problem to a national level. Criminals in our communities will know that the police have their hands tied and can no longer be effective.

This same pattern is being repeated throughout the nation. When the mayor of Minneapolis accused his police force of "racial profiling," traffic stops dropped sixty-three percent (63%).

"Solutions" are being presented by politicians to a dubious problem that they cannot define. The result is a deleterious effect on public safety and the maligning of our country's police officers.

I also want to question this legislation's proposal to use statistical data against law enforcement officers and agencies in court. This is a terrible precedent to set. This bill assumes that "racial profiling" has occurred solely on the basis of a statistical disparity. Section 102(c) of the bill provides that demonstrating that law enforcement activities disparately impact racial or ethnic minorities constitutes *prima facie* evidence of illegal activity. The effect of this presumption is not expressly spelled out in the legislation, but it is very clear to law enforcement. The resulting litigation burden on law enforcement agencies will be dramatic—after all, once a "disparate impact" is demonstrated, it will be up to the law enforcement agency to somehow prove itself innocent of engaging in the unlawful use of race in its procedures and practices.

The legislation thus presumes illegal activity solely from evidence of a statistical disparity, notwithstanding the bill's finding that "[t]he vast majority of law enforcement agents nationwide discharge their duties professionally, without bias, and protect the safety of their communities." If the "vast majority" of police officers are conducting themselves professionally and without bias, why does a statistical disparity change that?

There is no study or other hard data that can withstand even cursory scrutiny which can substantiate claims that police systematically practice selective enforcement against minorities. None. Even the finding of former New Jersey Attorney General Peter Verniero that found fifty-

three percent (53%) of consent searches—searches that the driver consents to—between 1994-98 were minorities is meaningless. It is meaningless because Attorney General Verniero did not include racial information on searches that were denied. He mixes stops, searches and arrests from different time periods. But the most important reason that this statistic is invalid is because there is nothing to compare it to--why is it "too many?" Statistics from other government sources in New Jersey demonstrate that minorities are vastly overrepresented in the drug trade. Over sixty percent (60%) of drug and weapons arrests in New Jersey are black, even though they make up less than fourteen percent (14%) of the population. Given this, State police search rates are proportionate.

Statistically, minorities have a greater chance of being crime victims because crimes occur more frequently in areas with a large minority population. Good policing means going after criminals and patrolling areas where crimes are committed. This is good police work—not racism.

Consider the case of the Arlington County Virginia Police Department, which responded to demands from the black community to step up enforcement against drug dealers in minority neighborhoods. The police instituted aggressive motor-vehicle checks, revived the use of "jump out" squads and cracked down on quality-of-life offenses in an effort to make dealers uncomfortable in the neighborhood. By the end of last summer, it was clear the new enforcement strategy had worked, earning the police deserved praise from the community as a whole. But the new policing strategy, which was devised in response to the disproportionate victimization of minorities by minorities, generated a lot of data showing "disproportionate" minority arrests. If this bill were adopted, any of the minority criminals arrested and prosecuted could bring legal action against the County of Arlington, the department or the arresting officer. The criminal would be able to point to the "disparate impact" on the minority community and have evidence—*prima facie* evidence, mind you—in support of any action brought pursuant to Title I of S. 989.

To use statistical data without an adequately sophisticated benchmark for analysis is bad policy. The law cannot consider individual enforcement incidents as racially motivated by using flawed data and reckless analyses establishing a "disparity."

I also want to say a word about the police practice of criminal profiling. This is a legitimate and effective law enforcement tool which I believe is being unfairly maligned in the media and here on Capitol Hill because it is now associated with race. Race can be a factor in a criminal profile, but it is never the only factor, nor is it the most significant factor. It is simply one of many.

No one ought to be stopped solely on the basis of their race; this practice is wrong and does not serve the law enforcement mission. But to contend that the successful practice of profiling—*which does **not** consider race exclusively*—be abandoned when it has proved to be a successful tool to prevent crime and catch criminals is not the answer. If this practice is misused or misunderstood, then it must be corrected. Racism is ***never*** a legitimate law enforcement tool.

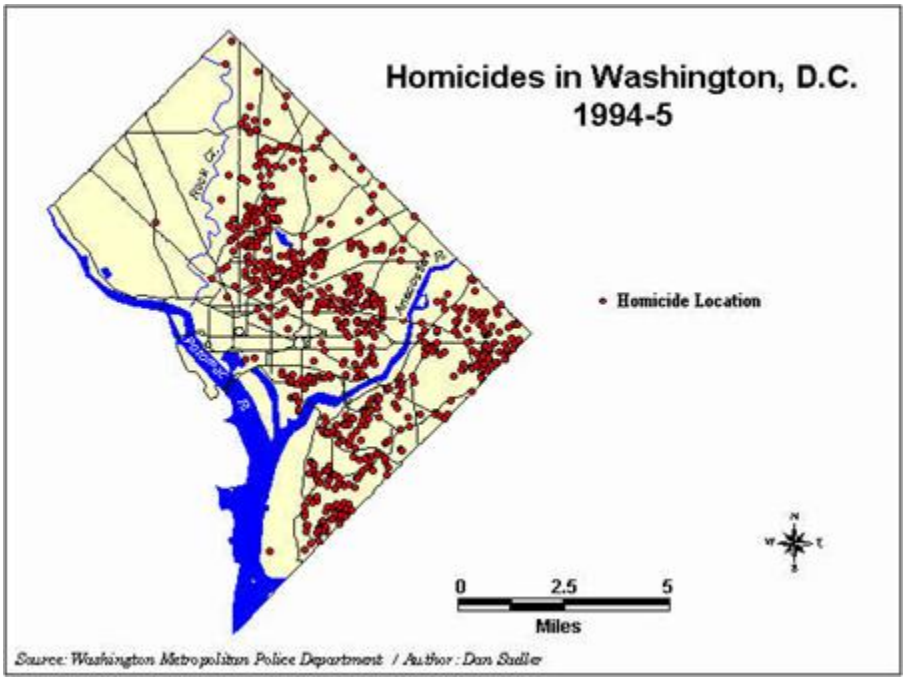
When any employer is considering applicants, they have an idea of not only the skills and abilities that the job requires, but also what kind of person would make the best fit—a "profile," if you will. Character matters, which is why law enforcement managers conduct—or ought to

conduct—extensive background checks to ensure that the person who will carry the badge is of the highest caliber.

I ask the Subcommittee to also consider the practice of crime-mapping, which, for all intents and purposes can also be referred to as geographic profiling. This, too, is proving to be an extremely useful crime-fighting and crime-prevention tool. It has evolved far beyond push pins on a wall map to become sophisticated computer models that allow law enforcement to "predict" crimes and establish more effective patrols to enhance public safety.

Crime mapping data can and does use such demographic factors such as population density, race and poverty levels. I have attached to my testimony a simplified "crime map" of homicides committed in Washington, D.C. from 1994-95. In the time frame examined, seven hundred and sixty-five (765) homicides were committed—twenty (20) of which were west of the 16th Street "line" and only one (1) of which was committed west of Rock Creek.

Crime is human activity and therefore has spatial relationships and characteristics that can be geographically plotted. The same profiling is also useful in crime prevention and crime fighting when applied to crime victims. Racial data is important here, too. The crime map provided shows the overwhelming preponderance of homicides in Washington, D.C. in 1994-95 were committed in predominately black areas. Is this racial profiling?



Nationally, according to the Bureau of Justice Statistics, there were 5.1 homicide victims per 100,000 non-Hispanic white males in 1995—the rate for blacks that same year was 57.6, more than 10 times the white rate. Most violent crime is intraracial—more than 80 percent of homicides where we know the race of the killer are either white-on-white or black-on-black crimes. Given this data, how can we adopt a measure that would prevent its use in solving homicides if we cannot consider the race of the suspect unless there is an eyewitness description?

What is also offensive to me as an American is that the legislation focuses on protecting racial and ethnic minorities, rather than protecting all individuals from discrimination on the basis of race and ethnicity. Unlike all other Federal antidiscrimination statutes, which generally protect all individuals from discrimination on the basis of race, portions of this legislation are geared to protecting only racial and ethnic minorities. For example, the "disparate impact" provisions found in section 102(c) of the bill are available only to racial and ethnic minorities. Any legislation that specifically targets only members of certain races, while excluding members of other races, presents very real equal protection problems.

Again, to use Washington, D.C. as an example, the unfairness of the bill is plainly demonstrated. According to the most recent census, 30.8% of this city's population is white and sixty percent (60%) is black. If this bill were to become law, if thirty-two percent (32%) of all persons arrested in Washington were white, this "disparity" would not be evidence under Title I of the bill. However, if sixty-one percent (61%) of all persons arrested were black, this would be a "disparate impact" and could be used in any legal action taken against the Metropolitan Police Department. How does this help ease racial tensions in this city or across the country?

The bill also misstates current law by reading the U.S. Supreme Court's decision in *Whren v. United States* (1996) to hold that "the racially discriminatory motive of a police officer in making an otherwise valid traffic stop does not warrant the suppression of evidence." To the contrary, according to the unanimous decision in *Whren*, "the Constitution prohibits selective enforcement of the law based on considerations such as race," and that "the constitutional basis for objecting to intentionally discriminatory application of the laws is the Equal Protection Clause." 517 U.S. at 813.

The legislation also states that "[r]acial profiling is not adequately addressed through suppression motions in criminal cases," implying that suppression motions are currently the sole legal remedy available against the so-called practice of "racial profiling." However, numerous remedies do exist under current law to redress constitutional equal protections violations, including actions for money damages as well as prospective relief under 42 U.S.C. Section 1983, 42 U.S.C. Section 2000(d) et. seq., and 42 U.S.C. Section 14141.

The legislation also imposes a number of mandates on State and local governments in violation of the principles of Federalism. The bill mandates that all State and local governments collect data, pursuant to Federally established standards, to determine whether "racial profiling" is taking place as a condition of receiving Federal monies—even if there is no evidence or complaint that a particular agency has engaged in such activity. Noncompliance with this mandate is punishable by the withholding of Federal funds. These provisions may even violate the constitutional limits of the ability of Congress to regulate State and local governments as a condition of Federal funding. On a number of occasions, the Supreme Court has expressed a narrow view with respect to Federal power to regulate State and local governments pursuant to Section 5 of the Fourteenth Amendment, absent substantial evidence that constitutional rights are being violated.

Mandatory data collection is also not sound policy from a public safety perspective, because it would require law enforcement officers to engage in the collection of sociological data. When

you add to the list of things that police officers have to do, you are necessarily subtracting from the law enforcement mission. Police officers are supposed to prevent crime and catch crooks, not collect data for Federal studies.

How can we achieve a color-blind society if policies at the Federal level require the detailed recording of race when it comes to something as common as a traffic stop? Should the passenger's race be recorded? Why not? Some traffic stops do result in the arrest of the passenger. What about the officer's race? Should that be recorded so that officers can be assigned to beats based on their ethnic background? And what if the officer is unable to determine the driver's race? Will police officers now be required to ask for "Driver's license, registration and proof of ethnicity, please?"

I submit to this Subcommittee that we do have a problem in our nation today—the lack of trust and respect for our police officers. Police officers also have a problem in that they have lost the trust, respect and cooperation of the minority community. This is tragic because it is minorities in our country that are most hurt by crime and violence. This bill, however, is not the solution. It will make matters worse, not better.

Let me give you another example of a bad idea. Prior to the media's misuse of the term "racial profiling," Jack Levin of Northeastern University suggested a way to end racially-charged confrontations between police and minority communities. He said, "White police officers should never knowingly confront black suspects" (USA Today, 28 October 1996). This suggestion is ludicrous. Its very premise is that individuals of different racial and ethnic backgrounds are simply unable to interact with one another without violence.

I reject that premise, Mr. Chairman. All of us should. And I submit that the premise of S. 989 is similarly flawed.

Racial tensions here in Washington, D.C. are not atypical of any other urban area. The Washington D.C. Metropolitan Police Department is sixty-seven percent (67%) black in a city where the black population is only sixty percent (60%). Does this mean that sixty-seven percent (67%) of the Metropolitan police officers should never confront white, Hispanic or Asian suspects? How does this make our streets safer? How is this good police work?

Legislation like S. 989 emphasizes racial differences. It will, in fact, make police officers much more aware of race when our objective should be to de-emphasize the race of the suspect. Consider this scenario: A police officer stops four drivers, all of whom are black. How is that officer to respond to allegations by the fifth driver—who may be white, Asian or Latino—that they were only stopped to inoculate the officer against charges of racism. Can a case be made that the officer's decision is racially motivated? This is the exact opposite of our intent.

This bill will actually increase the unfounded allegations of racism when drivers and officers are of a different race. Racial tensions will increase, not decrease, if this bill's measures are given the force of law. Supreme Court Justice Antonin Scalia eloquently reminded us, "To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race

privilege and race hatred. In the eyes of government, we are just one race here. It is American." Instead of officers looking at someone as a human being, this bill would require them to make racial and cultural distinctions between the communities they serve because they know their choices will be scrutinized from that perspective by political leaders, police managers, and the Federal government.

A police officer who makes a stop or an arrest—no matter what that officer's racial background—must balance the constitutional rights of the suspect with their duty to guard the public safety and preserve the peace. No one, however, seems to consider that the officer is as much a citizen entitled to his or her rights as any suspect from any allegation. Unlike most professions, many rank-and-file police officers are not, particularly in employment and disciplinary matters, guaranteed their constitutional due process protections in this country. Too often, their rights are discounted. The United States Congress has actively considered legislation similar to S. 989 for the past six years. The last time that legislation protecting the due process rights of police officers was ten years ago in 1991.

I do not know if, let alone how, we as a nation can solve the problems of racism. But I do know what will and will not work in the profession of law enforcement. There is a mistaken perception that the ugliness of racism is part of the culture of law enforcement. It is incumbent on all of us to correct that perception. This bill was written with this mistaken perception in mind—and it reinforces it. This legislation is not good public safety policy and will not result in good policing. It will not help to rebuild the trust between law enforcement and the minority community. For these reasons, the Fraternal Order of Police strongly opposes the bill and I urge this Subcommittee to reject it.

Mr. Chairman, I want to thank you for the opportunity to appear before the Subcommittee today.