U.S. Senate Judiciary Committee
Subcommittee on the Constitution
Hearing on "Laptop Searches and Other Violations of Privacy Faced by Americans Returning from Overseas Travel"
Wednesday, June 25, 2008

Responses by Farhana Khera, President & Executive Director, Muslim Advocates To Written Questions Submitted by Senator Feingold

1. **Some people might listen to your testimony and say, if a customs agent asked me intrusive questions about my religious and political beliefs, I would just refuse to answer, and then I would report the person who asked the question. Is it that simple? What sorts of real or perceived barriers exist for a Muslim American who wants to resist or protest this mistreatment?**

A number of real or perceived barriers exist for Muslim Americans who may want to resist or protest being asked about their religious or political beliefs by Customs and Border Patrol (CBP) agents. First, it does not appear optional that an American can refuse to answer questions about constitutionally protected beliefs and activities. All travelers need permission of the CBP agent in order to proceed beyond the screening area – and CBP agents frequently carry guns or other weapons that reinforce that message. In certain instances, CBP agents have actively intimidated travelers selected for scrutiny. (*See* Story #3, Written Testimony Submitted by Farhana Khera.) In addition, we are not aware of any guidance constraining a CBP agent from asking questions about religious or political beliefs or activities. Given the CBP's assertion of broad authority, we are concerned that refusing to answer questions can result in further delay for the traveler and/or more extensive searches, as well as being entered into a CBP database and flagged for intensive scrutiny the next time he or she re-enters the U.S.

Second, many Americans are not aware of their rights and the scope of permissible questioning. In response, Muslim Advocates has conducted "know your rights" sessions in the Muslim American community and recently produced an educational video for community members to inform them about their rights at the border and the scope of permissible questioning. (This video is available on our website and in DVD.) The video specifically addresses the issue of impermissible questioning about religious or political beliefs and lawful associations.

Third, Muslim Advocates encourages travelers to record the name and badge number of CBP agents and supervisors and to file complaints if they have not been treated fairly. But Muslim Advocates has found that many Muslim Americans are reluctant to file complaints because they fear retaliation and even greater scrutiny by law enforcement.

Finally, even if travelers file complaints, Muslim Advocates is concerned about the failure to have these complaints meaningfully resolved. Nearly every traveler

summarized in the written testimony submitted by Muslim Advocates for the record of the hearing had filed a complaint with the U.S. Department of Homeland Security (DHS), but not a single one of these complaints has led to a resolution and improvement in the traveler's experience.

2. The written statement that DHS provided the night before the hearing states as follows: "[A]n individual's frequent travel to countries associated with significant terrorist activity, narcotics smuggling, or sexual exploitation of minors, may give our officers reason to question that person's reasons for travel. When officers are satisfied that the person has valid reasons for the frequent travel, and there are no other areas of concern or potential violations, the person may be cleared to enter the United States." Does this address your concerns as to whether customs agents are targeting travelers based on their race, ethnicity, religion, or national origin?

No. The Department's statement does not address our concerns and is insufficient to allow Congress and the public to fully assess how travel patterns are being used in selecting individuals to subject to more intensive questioning or searches. Based on what we do know, information about a traveler's travel patterns does not appear to be used fairly or effectively.

Specifically, the Department states that when "there are no other areas of concern or potential violations," the traveler may be cleared to enter the U.S. What are these "other areas of concern"? What are the "potential violations"? What guidance does DHS and CBP provide line agents in determining "other areas of concern"? Based on the Department's statement, there appears to be enormous discretion and subjectivity by CBP in selecting whom to screen more closely. We therefore urge Congress to request information from DHS and CBP about how information regarding travel patterns is being used.

In addition, Congress should inquire about the guidance and training CBP has given its agents, including the levels of guidance and training provided to agents when intelligence directives have been issued by DHS or senior CBP officials. Adequate training curricula and materials are necessary to ensure that CBP agents understand and implement policies and procedures correctly and fairly.

Furthermore, based on the complaints received by Muslim Advocates, the government appears to have a very broad definition of "countries associated with significant terrorist activity, narcotics smuggling, or sexual exploitation of minors." Witnesses have reported encountering scrutiny when traveling from places as diverse as Japan (story #1), Canada (stories #1, #3, #8); Turkey (story #1); and even a trip to Jordan sponsored by the U.S. Department of State (story # 9). DHS claims CBP applies a reasonable suspicion standard when evaluating potential threats, but such assurances do not answer why a law-

abiding corporate lawyer with a Georgetown law degree was singled out and interrogated about subjects including her views of presidential candidates (story # 2).

Based on complaints received, Muslim Advocates is concerned that travel patterns could be a proxy for religion or ethnicity in selecting travelers to subject to additional scrutiny. This would be wrong and improper, although not necessarily a violation of DHS guidelines implementing the U.S. Department of Justice (DOJ) Guidance banning racial profiling since the DOJ Guidance and DHS guidelines created an exception for compelling governmental interests (e.g., national security) that swallows the rule banning profiling. That is why federal legislation clearly banning racial, ethnic and religious profiling is needed.

Finally, Muslim Advocates also urges Congress to require CBP to collect data about individuals who are selected for more extensive questioning and searches and the basis for doing so. Rigorous data collection and reporting will help both the agency and Congress monitor the activities of CBP at the border and ensure that discriminatory targeting of travelers based on their faith, ethnic or racial background is not taking place.

3. As you noted in your testimony, DHS policy is to "prohibit the consideration of race or ethnicity in our daily law enforcement activities in all but the most exceptional instances, as defined in the DOJ Guidance. DHS personnel may use race or ethnicity only when a compelling governmental interest is present."

a. In your view, what "compelling governmental interest" would justify DHS personnel relying on race or ethnicity in deciding whom to subject to intrusive border searches?

CBP agents have an important responsibility to protect our borders but they also have a responsibility to wield that power fairly and effectively. Absent a suspect-specific description, reliance on race or ethnicity should not be permissible in deciding whom to subject to intrusive border searches. Americans are guaranteed equal treatment and equal protection under the laws by the federal government – that includes federal officials at the border. Congress should enact legislation requiring CBP to focus on real threats and ensuring reporting and accountability to Congress.

b. Do you believe that DHS's laptop search policy is consistent with the DOJ Guidance?

Based on what DHS has publicly disclosed about its laptop search policy, it does not satisfy concerns about whether CBP may be engaging in inappropriate targeting of travelers based on race, ethnicity or religion. First, the DOJ Guidance is inadequate because it explicitly exempts any investigations predicated on national security aims (including most border searches & interrogations). Moreover, the Guidance fails to address *religious* profiling, as distinct from racial and ethnic profiling. As discussed in

the written testimony and in responses to questions 2 and 3.a. above, federal legislation banning racial, ethnic and religious profiling and requiring data collection and reporting by CBP is very much needed.