April 13, 2012

BY U.S. MAIL AND FACSIMILE

U.S. Senator Dick Durbin
711 Hart Senate Building
Washington, DC 20510
Fax: 202/228-0400

Re: Written testimony about racial profiling in Illinois

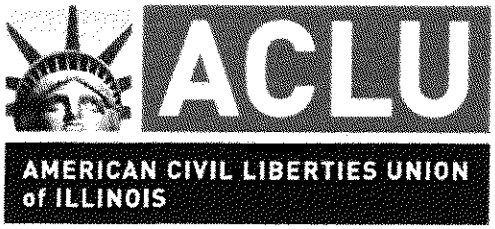
Dear Senator Durbin:

I write on behalf of the ACLU of Illinois, and its more than 20,000 members and supporters throughout the state, to provide the attached written testimony regarding racial profiling in Illinois. If I can be of any further assistance, please do not hesitate to call me at (312) 201-9740, extension 316, or to email me at hgrossman@aclu-il.org.

Sincerely,

Harvey Grossman
Legal Director
ACLU of Illinois

cc: Joseph Zogby (Joseph_Zogby@Judiciary-dem.senate.gov)



Written Statement of Harvey Grossman
Legal Director of the ACLU of Illinois
Regarding Racial Profiling in Illinois

Submitted to the U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Human Rights

Hearing on "Ending Racial Profiling in America"
April 17, 2012

The ACLU of Illinois joins the written statement of the ACLU submitted to this Subcommittee for this Hearing. Among other things, the ACLU of Illinois joins the ACLU in supporting the passage of the End Racial Profiling Act, and the strengthening of U.S. Department of Justice guidance regarding the use of race by federal law enforcement agencies. The ACLU of Illinois writes separately to address racial profiling issues in the State of Illinois.

In the national struggle against racial profiling, Illinois has been both part of the solution and part of the problem. To its credit, Illinois has one of our nation's best systems for collecting and analyzing statistical data about traffic stops, as a means to deter and detect racial profiling – a critical accountability system championed by then-State Senator Barack Obama. Unfortunately, many police agencies in Illinois have adopted policies and practices that cause a racial disparate impact, perhaps best exemplified by the so-called "consent searches" performed by the Illinois State Police ("ISP").

1. The Illinois Study Act

The Illinois Traffic Stop Statistical Study Act of 2003 ("the Study Act") requires all police officers in Illinois to document all of their traffic stops, including motorist race and what happened. It also requires all police agencies in Illinois to report their stops data to the Illinois Department of Transportation ("IDOT"). It then requires IDOT to publish an annual report about this data, with assistance from university scholars. *See* 625 ILCS 5/11-212. *See also* www.dot.state.il.us/trafficstop/results.html (presenting seven years of Study Act data).

Among other factors, passage of the Study Act was advanced by the then-recent experience in the City of Highland Park. In 2000, the ACLU of Illinois and that city entered a consent decree requiring it to gather and analyze data about police stops and searches, to resolve racial profiling allegations by some of that city's residents. *See Ledford v. City of Highland Park*, No. 00-cv-

4212 (N.D. Ill.). Highland Park found that measuring this aspect of officer performance assisted in efficient department management, and that the increased transparency advanced community trust and cooperation, without in any way diminishing public safety. In particular, Highland Park's actual experience helped to dispel the myth that data collection was too burdensome for patrol officers.

The Study Act has twice been expanded to capture additional kinds of data. In 2006, in response to Study Act data regarding racial disparity in consent searches, it was expanded to require disclosure of whether a consent search yielded contraband, and whether a motorist declined consent to search. *See* Public Act 94-997. In 2011, in response to Study Act data regarding racial disparity in canine sniffs, it was expanded to document whether a dog sniff occurred, whether a dog alerted, whether a dog alert caused a search by an officer, and whether contraband was discovered. *See* Public Act 97-0469.

In addition to the ACLU of Illinois, passage and expansion of the Study Act has been supported by the Illinois Coalition for Immigrant and Refugee Rights, the Mexican American Legal Defense and Education Fund, the National Association for the Advancement of Colored People (Illinois Conference), Rainbow/PUSH, and many other civil rights groups.

Collection of data under the Study Act has refuted many erroneous claims. For example, opponents of the Study Act argued that it would cause police officers to disengage from the public. In fact, the number of ISP traffic stops grew by 15% from 2004 (the first year of data) to 2010 (the most recent year of data). Likewise, some commentators argued that the racial disparity in consent searches was caused by minorities granting consent more frequently than whites – until new Study Act data showed that minorities and whites grant consent at nearly the same high rates.

The Illinois Study Act is arguably the best statute of its kind in the nation. It applies to every state and local police agency, and every traffic stop. It mandates collection of rich and relevant data. It requires annual analysis by a statewide agency, and disclosure to the general public of that analysis and the underlying raw statistical data. Every year, it spurs a salutary public discussion about police practices, in the news media and among policy makers and other stakeholders. Federal legislation might be modeled on the Illinois statute championed by our current President.

Unfortunately, the Illinois Study Act is now scheduled to sunset in July 2015. The ACLU of Illinois continues to urge the Illinois General Assembly to make the Study Act permanent.

One gap in the Illinois Study Act is sidewalk detentions by police officers of pedestrians: the Act only applies to traffic stops. In 2006, the Chicago Police Department ("CPD") to some degree acted to address that gap: it required officers to document all of the reasons supporting their sidewalk detentions; it required supervisors to review whether these reasons justified the detention; and it required maintenance of this information for years. *See* CPD Special Order 03-09, Revisions of July 10 and December 29, 2006. This policy was a response to an ACLU of Illinois lawsuit on behalf of Olympic Gold Medal speed skater Shani Davis, who was subjected to an improper CPD sidewalk detention. *See Davis v. City of Chicago*, No. 03-cv-2094 (N.D.

Ill.). Unfortunately, the CPD subsequently withdrew these important accountability measures. *See* CPD Special Order S04-13-09 (issued and effective Feb. 23, 2012). Yet data collection to ensure integrity and fairness in police enforcement activity is as important in the context of sidewalk detentions, as in the context of the traffic stops covered by the Study Act.

2. ISP consent searches

A consent search occurs when a police officer does not have individualized suspicion or other legal cause to require a search, yet nevertheless requests that a civilian give permission for a search. Consent searches during routine traffic stops raise at least three serious civil rights and civil liberties concerns.

First, in many cases, the motorist's supposed "consent" to search is not truly voluntary. Consent is often granted on an isolated roadside in a one-on-one encounter with an armed law enforcement official. This setting is inherently coercive. Many civilians believe they must grant consent. Other civilians fear the consequences of refusing to grant consent, such as the issuance of extra traffic citations, or the delay caused by further interrogation or bringing a drug-sniffing dog to the scene. Thus, the Study Act data show that ISP troopers obtain consent to search from the overwhelming majority of motorists: 94% to 99%, depending upon the year and the motorist's race.

Second, once consent is granted, the result is an intrusive and publicly humiliating search of one's car and/or person. *See Terry v. Ohio*, 392 U.S. 1, 24-25 (1968) (describing a pat-down frisk of one's body as a "severe" intrusion, and as "annoying, frightening, and perhaps humiliating"); *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (describing such frisks as "intrusive" and "embarrassing").

Third, because the decision whether to request consent to search is typically based on the subjective "hunch" of individual police officers, consent searches are inherently susceptible to bias, conscious or otherwise. From a management perspective, consent searches are particularly troublesome. Since they are subjective, they are not subject to meaningful supervisory review.

Indeed, the Study Act data show that ISP consent searches have a persistent and dramatic racial disparate impact against Hispanic and African American motorists. On the one hand, minority motorists are far more likely than white motorists to be subjected to ISP consent searches. Specifically, in the seven years from 2004 through 2010, Hispanic motorists were 2.7 to 4.0 times more likely to be consents searched, and African American motorists were 1.8 to 3.2 times more likely. On the other hand, white motorists subjected to ISP consent searches are far more likely than Hispanic and African American motorists to be found with contraband. For example, in 2010, white motorists were 89% more likely than Hispanic motorists to have contraband, and 26% more likely than African American motorists. According to a leading treatise, such racial disparity in hit rates implies that "a lower standard of proof was applied to searches of minorities than to searches of Caucasians." *See* Police Executive Research Forum, *By the numbers: A guide to analyzing race data from vehicle stops* (2004) at p. 274.

The solution is a ban on consent searches during routine traffic stops. This police practice is coercive, invades the privacy of motorists of all races, and has a racial disparate impact.

In 2008 and 2009, the ACLU of Illinois and a coalition of civil rights groups asked the past and current Illinois Governors to end ISP consent searches. No action was taken by either Governor.

In 2011, the ACLU of Illinois filed a complaint with the Civil Rights Division of the U.S. Department of Justice ("DOJ"), and requested an investigation of ISP consent searches. *See* Letters of June 7 and July 13, 2011, from Harvey Grossman to Thomas Perez. In response to that complaint, the Illinois Governor stated that the ISP would examine its consent search practices. No results from that examination have been announced. Also, the DOJ has not yet responded to the ACLU of Illinois' complaint.

3. Other racial profiling problems in Illinois

Sadly, racial profiling in Illinois is not limited to the ISP, as shown by numerous examinations of Study Act data. For example, a media study showed that numerous suburban police departments were stopping Hispanic motorists at significantly disproportionate rates compared to the driving-age population. That study also found racial disparities in consent searches. *See* Fernando Diaz, *Driving while Latino*, Chi. Reporter, March 2, 2009.

Similarly, a newspaper expose showed that alerts by police drug-sniffing dogs in suburban Illinois are usually wrong, and that the hit rates for car searches resulting from the use of dogs are nearly twice as high for white motorists than for Hispanics. *See* Dan Hinkel, *Drug-sniffing dogs in traffic stops often wrong*, Chi. Trib., Jan. 6, 2011; Harvey Grossman, *Problems with dog sniffs*, Chi. Trib., Feb. 3, 2011. Concerns about this racial disparity prompted an expansion of the kinds of dog sniff data collected under the Study Act, and also a requirement that all state and local police drug-sniffing dogs in Illinois must be trained by programs certified by a state board. *See* Public Act 97-0469.

The danger of racial profiling in Chicago is increased by the current CPD policy on police spying, which allows investigations of First Amendment activity based on a mere "proper law enforcement purpose," even when there is no indication whatsoever of wrongdoing. *See* CPD General Order G02-02-01 at Part II(A)(2). The recent loosening of the CPD's spying rules may have been inspired in part by the loosening of the FBI's domestic spying rules by Attorneys General Ashcroft and Mukasey. In years past, the infamous CPD "red squad" infiltrated and disrupted unpopular religious groups. In more recent years, the FBI and the NYPD, among other police agencies, have improperly spied on Muslim and Arab groups and individuals. It may only be a matter of time until the current nebulous CPD policy likewise contributes to similar religious and ethnic profiling.

4. The reform board that never met

In 2006, an Illinois statute created the Racial Profiling Prevention and Data Oversight Board, with a mission to examine Study Act data, and to make appropriate recommendations. *See* 20 ILCS 2715. Unfortunately, the Governor has never made the necessary appointments, so the

board has never met. This board would be a valuable means to advance the statewide dialogue about how to detect and deter racial profiling.

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Thank you for giving the ACLU of Illinois the opportunity in this setting to address racial profiling in Illinois.