

# Justice Department Releases New Guidance on Discriminatory Profiling

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Recently, several high-profile incidents involving the use of police force against unarmed African Americans have prompted a nationwide debate about the nature and extent of racial profiling. In the midst of this debate, the Department of Justice (DOJ) announced last month that it was issuing [new guidance](#) to prevent discriminatory profiling by federal law enforcement agencies. Designed to ensure that federal law enforcement efforts are conducted in an unbiased manner, the new guidance makes a series of changes to racial profiling [guidance](#) issued in 2003.

Racial profiling, a practice in which law enforcement officers target individuals for detention based on their race or ethnicity in the belief that certain minority groups are more likely to engage in unlawful behavior, was banned by DOJ in 2003. The 2003 guidance, however, preserved certain exceptions for the use of race and ethnicity to combat potential terrorist threats. Like the 2003 policy announcement, the updated guidance prohibits the use of generalized stereotypes based on these factors and allows officers to consider such factors in traditional law enforcement activities only under certain circumstances. However, the new guidance expands upon the 2003 guidance in two notable ways.

First, the new guidance widens the scope of prohibited profiling activities by barring federal law enforcement agencies from considering not only race and ethnicity, but also gender, national origin, religion, sexual orientation, or gender identity. Second, the 2014 guidance limits the number of federal law enforcement activities that are exempt from the profiling ban.

Specifically, the 2003 guidance contained a broad exemption for law enforcement activities related to national security or border integrity. In contrast, the 2014 guidance eliminates this broad exception in favor of a more limited approach that exempts “interdiction activities in the vicinity of the border” and “protective, inspection, or screening activities.” Except under these limited circumstances, federal law enforcement agencies, as well as state or local law enforcement participating in federal task forces, are directed to avoid making law enforcement decisions based on race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity except when such factors are part of a specific suspect description or when there is “trustworthy information, relevant to the locality or time frame, that links persons possessing a particular listed characteristic to an identified criminal incident, scheme, or organization, a threat to national or homeland security, a violation of Federal immigration law, or an authorized intelligence activity.”

It is important to note that, even in the absence of DOJ’s guidance on unlawful profiling, certain forms of profiling may already be prohibited under federal statutory or constitutional law. For example, a [variety of federal](#) and state statutes provide potential relief to individuals who claim that their rights are violated by race-based law enforcement practices and policies. Likewise, several courts have considered the constitutional ramifications of the practice as an “unreasonable search and seizure” under the [Fourth Amendment](#) and, more recently, as a denial of the [Fourteenth Amendment’s](#) equal protection guarantee. For more on these statutory and constitutional prohibitions, see our racial profiling report [here](#).

Ultimately, although the revised guidance is broader in scope than the 2003 prohibition against racial profiling, its impact may be limited by several factors. First, it applies only to federal law enforcement efforts, whereas the bulk of national law enforcement remains a state and local matter. Second, the guidance is largely advisory, since it imposes no penalties. Finally, its limited exceptions may invite broad circumvention. In light of these factors, Congress may [consider enacting legislation](#) that would further curtail the use of discriminatory profiling practices in law enforcement.

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