Platform for PREJUDICE
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How the Nationwide Suspicious Activity Reporting Initiative Invites Racial Profiling, Erodes Civil Liberties, and Undermines Security

By Thomas R. Cincotta

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Political Research Associates
Political Research Associates (PRA) is a progressive think tank devoted to supporting movements that build a more just and inclusive democratic society. We expose movements, institutions, and ideologies that undermine human rights. PRA seeks to advance progressive thinking and action by providing research-based information, analysis, and referrals.

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Advance Praise for  
*Platform for Prejudice*

“If the past decades have taught us anything about police intelligence, it is that an emphasis on information gathering, rather than better analysis techniques, opens the door to constitutional abuses without any measurable security benefit. *Platform for Prejudice* wisely applies that crucial insight, providing a clear-eyed assessment of how and why the Suspicious Activities Reporting Initiative poses significant risks while failing to make us safer.”

–David Cunningham, Sociology professor at Brandeis University and author of *There’s Something Happening Here: The New Left, The Klan, and FBI Counterintelligence*

“Thomas Cincotta and Political Research Associates have put together a report that both documents the history of the SAR program and plows new ground, uncovering abuses that demand the attention of policymakers. PRA shines a light on an expanding domestic surveillance apparatus that threatens the liberty of all Americans.”

–Mike German, former FBI agent, currently Policy Counsel on National Security, Immigration and Privacy for the ACLU in Washington, D.C.

“PRA’s report on the government’s SAR program is a deeply researched, thorough piece – must reading for anyone who cares about the balance between civil liberties and security. This is one issue that will re-shape the American experience as we know it and yet most of us are uninformed. This report can help you begin to learn about the issue.”

–M. Bilal Kaleem, Executive Director of Muslim American Society of Boston, the largest Muslim organization in New England

“In a world where immigrants are already suspect, Cincotta’s report unmasks a new government initiative with the sole function of further criminalizing immigrants and communities of color. This stirring report illuminates a system that formalizes collaborations between law enforcement bodies at every level, thus immersing us all in the shadowy depths of a police state. As the Obama administration prepares to implement the initiative nationally, Cincotta offers sharp critique and deep fact-finding to expose this program for what it is — a mechanism that inevitably fosters wide-spread racial profiling and perilously ineffective public safety policies.”

–Manisha Vaze, Organizer at Families for Freedom (FFF), a New York-based multi-ethnic defense network by and for immigrants facing and fighting deportation
Foreword

Emergencies are engines of institutional invention in ways that escape the ambit of democracy. Consider the governmental response to the terrorist attacks of September 11, 2001. Many counter-terrorism programs, to be sure, eerily echoed civil rights and civil liberties abuses of the past. The National Security Agency’s Terrorist Surveillance Project, for example, reminded many of broad surveillance programs aimed at political dissidents, civil rights groups, and many other Americans during the Cold War era. But other programs seemed ominous innovations. The “extraordinary rendition” and “black sites” policies, for example, turned existing U.S. relationships with foreign governments to unexpected and ominous ends. Out of the heat and panic of 9/11 came a set of new intergovernmental relations that substantially violate international human rights standards. What was innovative in these programs was less the violations that they enabled and more the novel institutional forms they took.

*Platform for Prejudice* is a judicious and cogent accounting of another set of institutional innovations catalyzed by the 9/11 attacks that may have substantial consequences for constitutional civil liberties. Somewhat paradoxically, while post-9/11 transformations of international relationships have received much media and academic attention, the more subtle changes wrought to our Constitution’s fundamental federal-state structure in the name of national security have gone largely unremarked. Political Research Associates’ work on and analysis of novel collaborations between federal, state, and local governments thus fills an important gap.

One way of situating the subject of this report is in relation to ongoing debates about federal-state interaction about immigration policy. Under Section 287(g) of the Immigration and Naturalization Act, the Department of Homeland Security has entered into increasing number of agreements with local law enforcement empowering the latter to enforce the federal immigration laws pursuant to memorandums of understanding. The result has been, among other things, a sharp uptick of concern with discriminatory policing.

The parallel development to §287(g)s in national security policy is the focus of this report. It outlines the development in the wake of the 2004 Intelligence Reform and Terrorism Prevention Act of both a set of federal-state intelligence sharing protocols and also a new set of federal-state institutions. In the cause of facilitating information sharing, the 2004 Act set in motion the development of a complex, sprawling, and largely unregulated weaving together of local and state police forces on the one hand with federal law enforcement and intelligence agencies on the other. To my knowledge, *Platform for Prejudice* is the first comprehensive descriptive accounting of these new systems and the threats they pose. The report contains a meticulous description of this new form of federal-state cooperation, as well as a helpful case study of a particular collaboration in Los Angeles.

As the report demonstrates, these post 9/11 innovations raise concerns central to the values promoted by our federal Constitution. While *Platform for Prejudice* pays particular attention to downstream effects on individual constitutional rights, the new policies and institutions...
Platform for Prejudice

described here should raise flags for those concerned with what the Supreme Court has called “Our Federalism”: the splitting of sovereignty between national and state governments as a way to create natural rivals for power who would check each other’s encroachments on the people’s rights. Federalism has been a slogan for many different values in its day. But the fact remains that it was a structural protection originally embedded in the Constitution as a means to secure liberty by diffusing government power.

The collaborations detailed in this report fuse the atom of sovereignty in ways that would have been especially troubling to a Founding generation concerned with a distant leviathan exercising unaccountable powers. Platform for Prejudice, in short, is no mere appeal to the civil liberties choir. The questions it raises should be of concern to all Americans who value some fidelity to founding constitutional values.

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March 15, 2010
Acknowledgements

The idea of mapping the domestic security infrastructure from a civil liberties perspective was first proposed by Abby Scher and Tarso Luis Ramos, to whom I am indebted for bringing me on to oversee the investigation and study a matter of critical importance for human rights, as well as the integrity of the democratic and egalitarian ideals upon which this country was founded. Thank you for your guidance, trust, and leadership. I am grateful to Chip Berlet for sharing his historical insights, sharp wit, and production know-how. Many thanks are due the staff and interns at PRA for bringing this report to fruition: Maria Planansky, James Huettig, Pam Chamberlain, and Kapya Kaoma read, commented upon, edited, and criticized multiple drafts of the report and provided both political insight and moral support. Shakeel Syed, the energetic and devoted executive director of the Islamic Shura Council (Southern California), and Nancy Murray, the education and outreach director for the ACLU of Massachusetts, gave invaluable feedback. Thanks also to Debbie Hird, our patient and capable graphic designer, and Becca Wilson for editing.

Investigation for this report was carried out by experienced field journalists who painstakingly pursued documents and interviews with key figures in local agencies. I thank Mary Fischer who wrote and compiled material for our Los Angeles case study on the Joint Regional Intelligence Center; Lisa Ruth, who interviewed officials with Florida’s state fusion center and the Broward County Sheriff’s Office; Andrea Simakis, who interviewed officials with the Boston Regional Intelligence Center and Massachusetts Bay Transportation Authority intelligence unit.

We are extremely appreciative of advisors and organizational allies who contributed insights and support for the project. We stand in solidarity with you. Carol Rose, John Reinstein, and Laura Rotolo of the American Civil Liberties Union of Massachusetts gave us time, extensive input, and access to critical documents from the state fusion center. Those documents are now publicly available at www.stopspying.us/wiki, a new central repository for documents related to domestic surveillance to which multiple organizations have begun to contribute. We are inspired by the ACLU’s effort to establish public accountability for fusion centers with
proposed legislation pending in the Massachusetts state legislature, Senate Bill 931 and hope this will be the first of many other such initiatives.

Many thanks to the front-line organizations who struggle to ensure the safety and dignity of their communities and warmly supported this project with their insights, background information, and leads: Bilal Kaleem and Hossam Al-Jabri of the Muslim American Society for Freedom (Boston Chapter); Affad Sheikh and Ameena Qazi of the Council on American-Islamic Relations (Southern California); Hamid Khan and Tamia Pervez of the South Asian Network; Manisha Vaze of Families for Freedom; and Steve Rohde of the Interfaith Committee for Justice and Peace in California. Guidance was also provided by many devoted civil liberties advocates and authors: Eileen Clancy of iWitness Video; Heidi Boghosian, Jim Lafferty, and Urzula Mazny-Latos of the National Lawyers Guild; Sue Udry of the Defending Dissent Foundation; Chip Pitts and Shahid Buttar of the Bill of Rights Defense Committee; Brigitt Keller of the National Police Accountability Project; sociology professor and COINTELPRO expert David Cunningham; and Mike German, policy counsel for the ACLU. I thank Ross Gelbspan for sharing his experiences researching intelligence agency abuses. I am grateful to all of the members of our national advisory committee and others who have helped along the way.

Finally, I am deeply grateful to my wife, Kari, for picking me up after long hours of research and writing, my mother Janet for emotional support, and my sister Deborah for hosting me on trips to California.

It is easy to feel disempowered when reckoning with the growth of mass surveillance in our country. I sincerely believe that our freedom is too precious to sacrifice on the basis of unfulfilled claims about safety and security. As security cameras, undercover informants, and digital data warehouses proliferate, it is important that Americans assert democratic control over intelligence institutions that have a proven record of going too far. The Suspicious Activities Reporting Initiative is a good place to start restoring oversight and respect for Constitutional principles.

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March 17, 2010
Introduction

They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety.

-Benjamin Franklin – 1775

The intelligence lapses that failed to prevent the September 11 terrorist attacks prompted an overhaul of U.S. domestic and foreign intelligence systems, including the creation of an expansive new domestic security infrastructure. A key part of this new infrastructure is the Suspicious Activity Reporting Initiative, a framework that guides, orchestrates, and connects the federal government’s nationwide “Information Sharing Environment.” In this initiative, we see the seeds for a possible repeat of past intelligence abuses, particularly with the weakening of civil liberties safeguards and mobilization of police as intelligence officers.

The Suspicious Activity Reporting Initiative (SAR Initiative) is a useful focus for understanding how the new domestic security infrastructure works because it feeds and links together components of the system, reaching into the populace and forming an intelligence pipeline between the “fusion centers” charged with managing the program and various other agencies. We have found that these new fusion centers – ostensibly designed to counter terrorism – seem to devote most resources and attention to solving common crimes rather than protecting national security. If it is the case that Fusion Centers perform a primarily policing function, rather than counter-terrorism, the public should weigh whether their excessive secrecy and surveillance powers are justified on that basis.

In an attempt to peer inside these secretive agencies and contribute to public knowledge about the extensive domestic security infrastructure, Political Research Associates launched an investigation into how the SAR Initiative works. Our questions included SAR’s role in the larger domestic security apparatus, the rules under which it functions, and how its practices affect those individuals and communities most singled out for suspicion of terrorism. This report includes data from our investigations in Boston, Los Angeles, and Miami, as well as a comprehensive analysis of federal and local policies and reports. Based on our Los Angeles investigation, the report contains a thorough case study of the Los Angeles Joint Regional Intelligence Center.

The report is broken up into four sections, which contextualize and explain the SAR Initiative, as well as elucidate the potential hazards of the program:
In Section 1 of this report, we describe the shape and identify key components of the domestic security infrastructure. Although many levels of government are involved in Suspicious Activity Reporting (such as the National Security Agency, Coast Guard, Department of Defense, Department of Energy, and private sector advisory councils), this report focuses on fusion centers and state and local police departments.

In Section 2, we explain the origins of the national Suspicious Activities Reporting (SAR) Initiative and analyze faulty assumptions upon which it is based. We call attention to an aggressive new form of policing called “Intelligence-Led Policing” whose pre-emptive approach violates core American values.

In Section 3, we explore how the SAR Initiative becomes a platform for several types of prejudice. We document the pattern of racial, ethnic, and religious profiling evident in this approach to intelligence gathering. We also explore political biases that manifest themselves in Suspicious Activities Reporting criteria and intelligence analysis. Further, we examine how the SAR Initiative lowers the threshold for government data collection in ways that fuel both profiling and political policing, and violate long-standing civil liberties protections.

Lastly, in Section 4, we use a case study of the fusion center based in Norwalk, California, the Joint Regional Intelligence Center, to identify how domestic intelligence collection and sharing jeopardizes civil liberties. Los Angeles’ Fusion Center spearheaded the national SAR Initiative, uses extremely broad criteria for so-called “suspicious” activity, and vigorously encourages the public to report suspicious activities through its controversial iWatch program.

However, as with any investigation of intelligence agencies, the excessive secrecy of the system posed many challenges. Several agencies and departments failed to make their policies available online and to respond to our formal requests for interviews or documents.

I and my colleagues at Political Research Associates believe the United States faces two real and serious threats from terrorists: the first from terrorist acts themselves, which have the demonstrated capacity to cause mass casualties, severe economic damage, and social dislocation; and the second from the possibility that disproportionate and inappropriate responses will do more damage to the fabric of society than that inflicted directly by terrorists themselves. This report strongly suggests that gathering data on lawful activity through Suspicious Activity Reporting amounts to this second kind of harm: the self-inflicted wound. Simply put, the SAR program does more damage to our communities than it does to address real and continuing threats of terrorism.
Executive Summary

Americans need to question whether or not the substantial sacrifices to our Constitutional liberties since the terror attacks on September 11, 2001 have made us significantly more safe and secure. In the case of the Suspicious Activity Reporting Initiative, our conclusion is “No.”

The Suspicious Activity Reporting (SAR) Initiative, a new framework that guides, orchestrates and connects the federal government’s nationwide “Information Sharing Environment,” undermines civil rights and liberties while not significantly expanding safety and security. The SAR Initiative is highly problematic, because it creates a platform for prejudice that targets two major groupings as potential terrorists: 1) Arabs, Middle Eastern persons, South Asians, and Muslims living in the United States; and 2) people with dissident views across the political spectrum. These prejudices—one based on ethnic, racial, and religious identity, the other based on ideology and belief—threaten the very foundations of our democracy.

This study provides a comprehensive analysis of the Suspicious Activity Reporting (SAR) Initiative including an overview of its role in the domestic intelligence matrix and a case study of Los Angeles’ SAR Center.

In this report we:

- demonstrate that the SAR Initiative has been built on various faulty assumptions;
- expose the structural flaws that promote a reliance on existing prejudices and stereotypes;
- explain how the program erodes our Constitutional civil liberties; and
- question the basic soundness of the “Intelligence Led Policing” paradigm.

OVERVIEW

The factual record demonstrates that the main terrorist threat to people living in the United States comes from foreign terrorists linked to Al Qaeda or similar groups. Yet a revived focus on domestic “extremism” appears to have supplanted systematic, sustained investigation of foreign threats as the highest counter-terrorism priority.

The intelligence lapses that failed to prevent the September 11 terrorist attacks prompted an overhaul of U.S. domestic and foreign intelligence systems, including the creation of an expansive new domestic security infrastructure. Every official review of U.S. intelligence failures prior to the attacks concluded that bureaucratic cultures at the Central Intelligence Agency (CIA) and Federal Bureau of Investigation (FBI) impeded effective information sharing and analysis.

However, there is reason to question whether the bewilderingly complex domestic security bureaucracy that has emerged in recent years has solved the government’s persistent information sharing problems. This vast, Byzantine bureaucracy includes new mechanisms for federal, state, and local collaboration. At the top of the system, federal institutions sift, coordinate, analyze, and direct. At the center of the intelligence matrix, two key organs of interagency coordination stand out: 1) state and major metropolitan intelligence Fusion Centers loosely overseen and partly funded by the De-
department of Homeland Security, and 2) the FBI’s Joint Terrorism Task Forces.

At the base of the system, local police departments, ranging in size from rural sheriff’s offices to major urban departments, are dedicating resources to form intelligence units. These agencies are key players in Suspicious Activity Reporting, which is based on a concept called Intelligence-Led Policing, in which local law enforcement officials take on new intelligence-gathering roles. The SAR Initiative takes these agencies’ reporting and funnels it to Fusion Centers, key components of the national security Information-Sharing Environment (ISE) that facilitate the movement and exchange of terrorism-related information within the bureaucracy. Municipal police departments, county sheriffs, transit police, campus security agencies, and other law enforcement agencies lacking their own intelligence capacity have been encouraged to plug into the Information Sharing Environment through the intelligence-gathering Fusion Centers.

The SAR Initiative is slated to go nationwide at all 72 Fusion Center sites in the spring of 2010. Before the initiative becomes fully operational, the public has a right to know whether collecting intelligence about non-criminal activity is an effective counter-terrorism tool, how their Constitutional rights will be affected by this major development, and whether the program merits continued and expanded taxpayer investment.

This report maintains that, rather than fixing the existing problem of insufficient information sharing across intelligence agencies, the U.S. government has created an expanding bureaucracy of agencies whose untested information-gathering and sharing processes are flooding already overburdened intelligence systems with junk data, or “noise.” In data-systems analysis, this is a familiar and well-studied phenomenon known as GIGO, or “garbage in garbage out.” This overabundance of junk data does little to protect us from terrorists and much to threaten our civil liberties. The Christmas Day 2009 attempted bombing in Detroit shows on the one hand that information sharing hurdles have not been fixed, and secondly, part of the problem may be the overwhelming volume of data. Programs that lower the threshold for intelligence gathering and thereby lower the quality of data contribute to this problem.

ISSUES & FINDINGS

Unsubstantiated Claims Create a Flawed Intelligence Paradigm

The soon-to-be national SAR Initiative does not rest on an empirically solid foundation. Our investigation shows that supporters of the vast SAR Initiative have employed four myths to justify expanding the program.

Myth #1: Data-mining can spot terrorists

The SAR Initiative is tasked with producing more raw material to feed into data mining and pattern analysis systems. Initial results from the 2008-2010 SAR pilot project indicate that the Initiative is indeed producing substantially more data to be mined by Fusion Centers and federal intelligence analysts.

When fully operational, the SAR Initiative will feed the FBI’s existing National Security Analysis Center (NSAC), a collection of more than 1.5 billion government- and private sector-generated records. The NSAC will use these documents to conduct pattern analyses: searching data sets for certain predictive models or patterns of behavior. This software solution sounds sexy, but its efficacy is dubious. So far, attempts to develop a “terrorist profile” are either so broad that they sweep up vast numbers of “false positives” – innocent individuals or organizations incorrectly flagged as potential threats – or so narrow that they are useless in predicting dangerous or criminal conduct. Data mining programs not only intrude into the privacy of millions of innocent people, they risk overwhelming intelligence systems with data garbage, forcing law enforcement to waste
critical resources on bad leads and false alarms. In the world of intelligence, more is not necessarily better.

**Myth #2: Police are the front line in preventing terrorism**

Because it views local officers as initial collection points and producers of investigative leads for suspicious activity data, the SAR process mobilizes neighborhood police as the front lines of the “war on terror.” However, local police are not trained as intelligence agents nor is intelligence gathering integral to local law enforcement’s mandate. Nonetheless, neighborhood police are now expected to protect communities from terrorism by: developing local intelligence about possible terrorist activity, hardening the most vulnerable targets, and developing effective response and recovery procedures. In the long run, this new surveillance role is bound to erode community trust. Police chiefs around the country have argued out that immigration enforcement duties – e.g. under the §287(g) program – reduce crime reporting within immigrant communities. Similarly, Political Research Associates has found that surveillance of South Asian, Muslim, Arab, and Middle Eastern people creates pervasive feelings of fear, mistrust, and alienation cannot but undercut police-community relations.

**Myth #3: Tracking common crimes can uncover terrorist plots**

Many believe that sharing SAR Reports among all levels of government and combining them with existing intelligence and crime data will uncover terrorist plots within the United States. Given the rarity of terrorism incidents relative to the overall incidence of crime, the validity of this proposition remains uncertain. Nonetheless, it is used to justify institutionalizing and intensifying surveillance as a tool to address conventional crime. The SAR Initiative is based on the unproven theory that possible “precursor” crimes can be screened to expose linkages to larger-scale terrorist activities. This approach may encourage or even direct police and intelligence analysts to penetrate deeper into people’s personal lives when common crimes of any severity are committed by South Asians, Muslims, Arabs, or people of Middle Eastern descent or others profiled as potential threats.

**Myth #4: Traffic stops are key to detecting terrorism**

Literature on the SAR Initiative often refers to missed opportunities to identify September 11 hijackers during routine traffic stops as justification for increased vigilance and intensified use of this everyday local law enforcement tool. Given that even suspected terrorism is rare, heightened suspicion of drivers and passengers can easily translate into racial, ethnic, or religious profiling. Surely officials are not suggesting that all traffic violations should be categorized as “suspicious activities”? Traffic enforcement gives local police an opportunity to collect and share vast amounts of data on millions of U.S. residents and their everyday travel. But increased vigilance on our streets and highways is much more likely to endanger civil rights and liberties than to prevent a terrorist crime. Prejudice and discrimination ultimately harm national security by dividing communities and victimizing stereotyped individuals, sending ripples of alienation and distrust throughout key segments of society.

**Flawed Intelligence Paradigm Undermines Counter-terrorism Efforts**

The SAR Initiative reflects the new philosophy called Intelligence-Led Policing. The term itself is misleading. Pre-Emptive Policing, the more accurate term, emphasizes surveillance and seizures of individuals before a criminal “predicate” exists, raising critical questions about its compatibility with American Constitutional principles such as the presumption of innocence and the warrant requirement. Also problematic is that the pre-emptive Intelligence-Led model of policing assigns disproportionate [power and influence to intelligence analysts, who may be unsworn, under-trained,
and prone to politicization and bias, in part because their training and education requirements are not standardized. Furthermore, a cottage industry of private counter-terrorism training firms, such as Security Solutions International, has emerged that pushes highly inflammatory and discriminatory views about Muslims and Arabs into the ranks of analysts and law enforcement personnel.

At its core, pre-emptive policing severely undercuts the basic notion that police are public servants sworn to protect and serve, rather than intelligence agents whose job is to feed daily observations into data streams winding their way into a nationwide matrix of Fusion Centers and federal agencies. The SAR Initiative casts a wide net of surveillance: it encourages local police, the public, and corporations and businesses to engage in vaguely-defined “pre-operational surveillance” and report activities of a non-criminal nature. Ultimately, government surveillance of Constitutionally-protected, core activities such as the practice of religion and spirituality, political protest, and community organizing will weaken civil liberties and erode community trust.

The SAR Initiative is a Platform for Prejudice

The SAR Initiative enables and institutionalizes racial, ethnic, religious, and political profiling by legitimizing prejudicial assumptions about certain groups’ alleged propensity for terrorism.

The history of domestic law enforcement intelligence collection is a minefield of prejudicial practices, many of which constitute civil rights violations. During the last major expansion of domestic-surveillance-as-policing, from 1956 to 1971, so many civil rights lawsuits were filed against local law enforcement agencies for maintaining intelligence files on American citizens that many opted to close their intelligence units.

The seeds for a repeat of similar abuses are evident in the policies of the SAR Initiative, which dismantles important features of the civil liberties safeguards enacted by Congress in the 1970s in response to overreaching security initiatives, notably COINTELPRO.

The SAR Initiative Invites Racial, Ethnic, and Religious Profiling

The SAR Initiative operates in a context that includes intense surveillance of racial and ethnic minority (particularly Arab, Muslim, and South Asian) communities. When collecting information, FBI agents are now authorized to enter mosques, churches, synagogues, and other places of worship without identifying themselves. A Justice Department-financed study found that following September 11, Arab Americans have a greater fear of racial profiling and immigration enforcement than of falling victim to hate crimes.

The SAR Initiative’s new information sharing systems allow racialized fears about terrorism to be magnified. Its broad definition of “suspicious activity” and emphasis on so-called “pre-crime” (i.e., innocent) activity creates confusion among police, encourages subjective judgments, and opens the door for habitual, often unconscious stereotypes to enter police decision-making on reporting and investigations. Sometimes the results stretch credibility. On July 3, 2005, a man photographed three Middle Eastern men videotaping the iconic pier at Santa Monica beach. Weeks later, police seized the video, which they characterized as “probing” for a terror attack because the tourists themselves were not in the footage. Police consulted with the FBI, the Los Angeles Terrorism Early Warning Group (precursor to today’s Fusion Center), and the state Department of Homeland Security. As a result, Santa Monica police requested $2 million to install pre-emptive measures such as surveillance cameras, additional patrols, and bomb-sniffing dogs to beef up security at the pier. No arrests were made, and tax payers picked up the tab. This episode shows how racial profiling harms us all.

The increased involvement of local and state law enforcement officials, who lack sufficient training and expertise in national security and counter-terrorism practices, will likely in-
crease misconduct based on the race, ethnicity, and religion of targeted groups. Nationwide information sharing also increases the chances that innocent people caught in the surveillance web will experience ongoing difficulties.

Notwithstanding official policies prohibiting the use of racial profiling, biases in input and analysis will likely lead to an over-representation of South Asian, Middle Eastern, Arab, and Muslim populations in SAR data. This will create an untenable situation that will alienate these communities from civil society, at a time when nearly all their leaders want to work to improve safety and cultivate mutual trust.

**The SAR Initiative Gives License to Target Legal Dissident Activity**

The SAR Initiative jeopardizes free speech by reinvigorating urban intelligence units that have historically abused their investigative authorities for political purposes. Collecting information based on political speech, as opposed to known or suspected crimes, is disastrous for democracy. For example, the Los Angeles Police Department lists “persons espousing extremist views” as suspicious. The SAR process provides an opening for local intelligence units to shift from legitimate counter-terrorism investigation (and following leads gained from tested information sources) to broad surveillance and open-ended political fishing expeditions. Intelligence sharing between local police, sheriff’s departments, the federal government, and the private sector is now being codified, mandated, and encouraged, making it far more likely for innocent people to be swept up in the anti-terror dragnet. For example, in 2008 a group of Maryland peace and anti-capital punishment activists experienced surveillance and harassment after an intelligence database categorized them as “extremists.”

**The SAR Initiative Erodes and Evades Time-Tested Civil Liberties Rules for Information Collection**

The SAR Initiative undermines key privacy and civil liberties protections by lowering the standard for storing and sharing intelligence information generated by local police forces. When they collect, maintain, and disseminate criminal intelligence information, all law enforcement agencies receiving federal funding must follow the standards and civil liberty safeguards set forth by a federal regulation called 28 CFR 23. This regulation creates standards aimed at ensuring that intelligence gathering and dissemination systems are not used to violate privacy and Constitutional rights. However, the SAR Initiative circumvents these safeguards by: 1) downgrading the reasonable suspicion requirement; 2) picking and choosing when 28 CFR 23 (and its civil liberty protections) apply to a report; and 3) mischaracterizing SAR Reports as “fact based information.”

**Downgrading the Reasonable Suspicion Requirement.**

Downgrading a protective threshold that has been in place for the last thirty years, the SAR Initiative mandates that a criminal intelligence record can be submitted to a database based on a “reasonable indication” rather than a “reasonable suspicion” of potential terrorist or criminal activity. Suspicious activity has morphed into “observed behavior reasonably indicative of pre-operational planning related to terrorism or other criminal activity.” By decoupling so-called “suspicious activity” from actual crime, the definition of reasonably indicative information has become so broad as to make it virtually meaningless as a guide for law enforcement professionals. Taking the “crime” out of criminal intelligence makes it easier for reports to be based on racial and ethnic characteristics, or political ideology.
Picking and Choosing When Safeguards Apply to SAR Reports.

The SAR Initiative seems to take a back door approach to weakening proper oversight by limiting the application of 28 CFR 23 to SAR Reports. The Program Manager for the Information Sharing Environment has taken a “hands-off” approach to 28 CFR 23, letting states and local agencies determine when and how to apply the regulation and its protections. Under federal standards, a SAR Report must meet 28 CFR 23 criteria only if an agency wants to pass the information on to a formal criminal intelligence system such as the Regional Information Sharing System (RISS).

But under the SAR Initiative, formal systems of this kind are being supplanted by new databases such as “Shared Spaces,” where information gathered can be shared and stored even if it does not have a criminal predicate. The SAR Initiative enables the government to monitor people and organizations who have committed no crime, thereby weakening fundamental American freedoms, such personal privacy, the right to challenge government policies, and the presumption of innocence.

Mischaracterizing SAR Reports as “Fact Based Information.”

The SAR Initiative undermines civil liberties by categorizing SAR Reports as “fact based information” rather than “criminal intelligence.” This categorization allows SAR Reports to sidestep the 28 CFR 23 safeguards. This enormous loophole gives enormous—and dangerous—power, allowing law enforcement to amass unverified data about people and organizations while asserting “compliance” with civil liberties protections. Ironically, the government resists public demands to see SAR Reports which fall below Constitutional standards for record retention on the ground the reports are exempt from disclosure because they constitute “criminal intelligence.” This fluidity in the characterization of SAR Reports has shielded Fusion Centers from public scrutiny, thus reinforcing the concern that data prohibited by 28 CFR 23 is nonetheless entering national criminal intelligence databases.

CONCLUSIONS & RECOMMENDATIONS

As we approach the tenth anniversary of the terror attacks of September 11, a reevaluation of our domestic security infrastructure and practices is in order. The SAR Initiative’s broad criteria encouraged reporting of routine, perfectly legal activities or incidents that “just don’t seem right.” This enables people to fall back on personal biases and engrained stereotypes of what a terrorist looks or acts like when deciding whether to report a “suspicious activity” to police. Throughout United States history and to this day, racial and ethnic minorities have disproportionately been victimized by police violence, false arrest, and harassment. Several studies have linked higher arrest rates for Blacks and Latinos to officer’s personal attitudes and perceptions, a conclusion supported through other research that focused on police prejudice and suspicion based on skin color. In light of this historical and current context, it is not unreasonable to conclude that when following up on or sharing Suspicious Activity Reports, some police will consciously or unconsciously, consider subjects’ racial, ethnic, religious, and/or ideological characteristics. As a result, Suspicious Activity Reporting may magnify existing or introduce new patterns of racial and ethnic profiling.

The SAR Initiative’s concern with “extremist” language gives police license to conflate free speech of dissidents with potential terrorism, inviting surveillance of people and organizations across the political spectrum whose views may be unpopular or unusual.

The lack of a consistent, uniform legal framework governing the overall SAR Initiative exacerbates the potential for prejudices to be operative throughout the system. Masses of data have been funneled to Fusion Centers across the country. Although federal standards have somewhat narrowed the criteria for suspicious
activities reporting, they remain inconsistent with time-tested civil liberties safeguards. Flawed assumptions about the efficacy of data-mining to identify terror plots, plus other myths used to justify the SAR Initiative are fueling an unwise and risky strategy that targets innocuous lawful activity, rather than concentrating national resources on criminal activity and terrorism. In so doing, the SAR Initiative both erodes Constitutional liberties and threatens to food the national security intelligence pipeline with junk data that distract analysts from actual terrorist threats.

America’s counter-terror effort should enable local agencies to share incidents of reasonably suspicious criminal activity with intelligence agencies. The country has made enormous strides in developing that sharing capacity and connectivity. The SAR Initiative, however, promotes procedures that can ultimately undermine national security, individual safety, and civil liberties.

**Recommendations**

1. **Congress Should Hold Hearings on the SAR Initiative Prior to National Deployment.** Americans have a right to know whether these programs actually fulfill their mandate to keep the population safe. Congress should evaluate the effectiveness, lawfulness, and consistency of the SAR Initiative before it can be deployed and periodically thereafter. This evaluation should be required as a condition for all information-based counter-terrorism programs. Public opinion polls reflect the distressing reality that many Americans have been willing to compromise liberty for the promise of security. All who fall under the protection of the U.S. Constitution – whether or not they accept that bargain – deserve an honest accounting of whether the government has delivered on that promise.

2. **Rigorously Oversee All Suspicious Activity Reporting.** Since Fusion Centers are run by state and local agencies, State lawmakers should not wait for Congress to take action. States should immediately monitor local domestic intelligence practices. The history of internal surveillance in the United States demonstrates that lax oversight leads to abuses that undermine democratic civil society. External checks and balances on Fusion Centers, which process SAR Reports, are virtually nonexistent; most supervision is done by law enforcement itself. Advocates should consider following the lead of the ACLU of Massachusetts in crafting state-level independent oversight mechanisms for all Fusion Center activities to ensure compliance with Constitutional safeguards.

3. **Fill Seats on the Privacy and Civil Liberties Oversight Board.** Vigorous oversight is desperately needed to counterbalance the government’s enormous capacity to share information and spy on innocent persons. To ensure that far-reaching surveillance technologies track terrorists rather than innocent people, Congress formed the Privacy and Civil Liberties Oversight Board. Since taking office, President Obama has allowed the board to languish, and its 2010 budget allocation sits unspent. The President should move quickly to fill all of the Board’s seats with strong representation from affected communities and experienced civil liberties advocates.

4. **Congress Should Pass the End Racial Profiling Act (ERPA).** Passing the proposed ERPA – without a national security exemption – is a critical step to ensuring safety for all of our communities. This Act would bar certain law enforcement agencies from using racial profiling as an investigatory tool. Lengthy detentions, unwarranted scrutiny and/or harassment by government agents have unduly harmed people who have done nothing illegal. Profiling violates Constitutional guarantees and international human rights norms and distracts law enforcement from real terrorist suspects, putting everyone at risk. Further, the harm created by targeting ethnic communities only provides more ideological fodder for foreign terrorists that seek to recruit supporters within our borders.

5. **Remove Non-Criminal Activity from SAR Report Criteria.** SAR Programs lower the Constitutional threshold for information gathering and sharing. In its current form, the SAR Initiative will likely lead police to increas-
ingly stop, question, and even detain individuals engaged in First Amendment-protected activity, including harmless legal conduct like photography, or on the basis of racial, ethnic, or religious characteristics. The Justice Department should amend the civil liberties safeguard 28 CFR 23 to stipulate that Suspicious Activity Reports constitute “criminal intelligence” which may only be stored if data meets the long-utilized standard of reasonable suspicion of criminal conduct. Failing that, at a minimum, the Justice Department must revise suspicious activity criteria to completely bar photography, protest gatherings, demonstrations, political lectures and other First Amendment activities as indicators of suspicious conduct. Such changes will reduce the amount of irrelevant data and increase safety and security; they should be made compulsory for any agency that wishes to participate in the Information Sharing Environment.


7. Expose Domestic Surveillance. Excessive secrecy limits public knowledge of local intelligence practices. Litigators defending the rights of political dissenters should routinely request records maintained in the SAR Initiative system. City, county and state governments should require local law enforcement and Fusion Center officials to detail their surveillance and documentation practices. Community activists should demand that public officials answer questions like:

- Who is responsible for the collection of intelligence information?
- What information is being collected and for what purpose?
- With whom will the information be shared?
- How long will it be retained?
- How accurate and reliable is the information?
- How will the data be secured against loss or unauthorized access?
- Will individuals know the basis for decisions affecting them, such as searches, detentions, or an intimidating knock on the door?
- How are surveillance cameras contributing to this network?
- How will individuals be able to respond to false and erroneous information?
- Are procedures in place to purge inaccurate and irrelevant data?
- Who audits the system?
- Which agencies have which missions?
- What is the role of the military in domestic intelligence?

8. Restore Constitutional Checks and Balances. Legislators should enlist courts as a critical check and balance for the new nationwide intelligence apparatus by requiring judicial permission before agencies can access personal identifying information in SAR Reports. Lawmakers should require a judicial determination whenever the government seeks to unveil the names of persons identified through data collection or mining.

9. Enhance Privacy Protections in Information-Sharing Systems. The Markle Foundation’s Task Force on National Security in the Information Age and the Center for Democracy and Technology developed detailed recommendations concerning privacy protections that should be built into information sharing systems. They clearly identify steps to bring privacy laws into the 21st Century. Policymakers should refer to these guides to ensure that systems are structured appropriately. Some recommendations have already made it into law. Policy leaders need to recognize that while architects of SAR Initiative policies often claim that SAR programs abide by safeguards, the fact that standard operating procedures call for
collecting non-criminal data strongly suggests that SAR practices do not adhere to the law.

10. Revisit the Need for Fusion Centers in the Post-September 11 Bureaucracy. With 72 new Fusion Centers, an intelligence net is being cast inward, bringing more of us under the government’s watchful eye. The FBI’s Joint Terrorism Task Forces (JTTF), which operate under the clearly-defined authority and oversight of the Department of Justice, already take the lead in investigating and stemming potential terrorist plots across the country. The redundancy of certain activities and the lack of Congressional oversight of Fusion Centers warrant the attention of public interest researchers, journalists, and policy makers. It is worth considering whether the public might be better served by relocating the Fusion Centers’ data fusing function to JTTFs, thereby achieving increased of public accountability while also streamlining the bureaucracy.

11. Reject Intelligence-Led Policing in favor of Community Policing and Traditional Law Enforcement. Our research fails to find a justification for mandating that local law enforcement adopt a pre-emptive policing model. The term “intelligence-led policing” masks the fact that it is really pre-emptive policing, which raises serious Constitutional issues. Should police have the right to investigate non-criminal behavior indefinitely, with no limits—or built-in safeguards? Endless tracking of individuals such as outspoken political activists or religious leaders in any community to maintain “situational awareness” of alleged potential terrorism chills First Amendment rights and erodes public trust.

Pre-emptive policing is a concern not only for civil libertarians and affected communities, but also for law enforcement executives. The International Association of Chiefs of Police should reject the functional re-classification of officers as intelligence agents. Law enforcement agencies around the country have raised questions about the value of deputizing local cops as immigration agents because doing so makes certain people afraid to report crime, jeopardizing public safety. Chiefs of police should seriously consider whether it is useful to reassign officers as intelligence analysts, removing them from community problem-solving and crime response. Supervisors should take into account the detrimental effects of the intelligence-gathering approach, such as the sowing of mistrust, especially within communities that are preemptively targeted. A traditional law enforcement approach to deterring terrorism—rather than an intelligence paradigm—would allow police to focus on their core competencies and actionable leads, rather than casting a broad net and wasting resources by monitoring many innocent activities.