December 5, 2011

Mr. Richard A. Wilson
Chair, Connecticut Advisory Committee
United States Commission on Civil Rights
Thomas J. Dodd Research Center
405 Babbidge Road Unit 1205
Storrs, Connecticut 06269-1205

Via Email: Richard.wilson@uconn.edu

Re: Connecticut Advisory Committee, United States Commission on Civil Rights

Dear Mr. Wilson:

In anticipation of the December 6, 2011 hearing conducted by the Connecticut Advisory Committee of the United States Commission on Civil Rights (Committee), I am submitting to the Committee this advance, written testimony.

At the outset of the Committee's September 20, 2011 hearing, you noted that it is clear that Connecticut's system of collecting racial profiling data "no longer works." Respectfully, the American Civil Liberties Union of Connecticut (ACLUCT) submits that the system never worked. Since 1999, state and municipal actors have inexplicably failed and refused to fulfill their responsibilities to comply with and enforce the obligations to collect data and prohibit racial profiling. In order to restore faith in state law enforcement agencies, changes are necessary to create a system of data collection in which agencies that fail and refuse to comply with the law are held accountable for compliance and, in the end, the state will have the data necessary to identify racial profiling by law enforcement. With the changing demographics in Connecticut, as demonstrated by the Connecticut State Data Center, effective data collection is more critical now than ever. For the safety and equal protection of all people in Connecticut, the state must enforce the obligation to collect and analyze data in Connecticut General Statutes Annotated §54-1l and §54-1m, together known as the "Alvin W. Penn Racial Profiling Prohibition Act" (Penn Act) and then find effective ways to prevent racial profiling in future.

The History of the Penn Act's Requirements:

The Penn Act defines "racial profiling" as the "detention, interdiction, or other disparate treatment of an individual solely on the basis of the racial or ethnic status of such individual." Section 1(b) provides that "No member of the Division

of State Police within the Department of Public Safety, a municipal police department or any other law enforcement agency shall engage in racial profiling." Further Section 2(a) mandates "Not later than January 1, 2000 each municipal police department and the Department of Public Safety shall adopt a written policy that prohibits the stopping, detention, or search of any person when such action is solely motivated by considerations of race, color, ethnicity, age, gender or sexual orientation, and the action would constitute a violation of the civil rights of the person." Collectively, these provisions amount to a general prohibition against the use of racial profiling by any state, municipal, or other such law enforcement agency. These aspects of the law were never subject to any sunset provision.

Under the Penn Act, beginning on January 1, 2000, each municipal police department was charged with recording and retaining the following information: "(1) The number of persons stopped for traffic violations; (2) characteristics of race, color, ethnicity, gender, and age of such persons, provided the identification of such characteristics shall be based on the observation and perception of the police officer responsible for the stop and the information shall not be required to be provided by the person stopped; (3) the nature of the alleged traffic violation that resulted in the stop; (4) whether a warning or citation was issued, an arrest made or a search conducted as a result of the stop; and (5) any additional information that such municipal police department or the Department of Public Safety, as the case may be, deems appropriate."

Under the statute, the Chief State's Attorney was obligated to develop and promulgate a form for the collection of the data by January 1, 2000. Use of this form under the Penn Act is mandatory for all police departments. After being collected, the information had to be compiled into a summary data report to be delivered to the Chief State's Attorney pursuant to §2(f) which provides that "On or before October 1, 2000 and annually thereafter, each municipal police department and the Department of Public Safety shall provide to the Chief State's Attorney…a summary report of the information recorded". The Chief State's Attorney is then required under §2(g) to "within the limits of existing appropriations, provide for a review of the prevalence and disposition of traffic stops and complaints reported pursuant to this section . . . ." and further "[n]ot later than January 1, 2002, the Chief State's Attorney shall report to the Governor and General Assembly the results of such review, including any recommendations."

Both the requirements of compiling the traffic stop data reports on the police department's end and the corresponding duty of reviewing and reporting that data on the Chief State's Attorney's end, were subject to a sunset provision embedded in Section 2(h) which provided that: "The provisions of subsections (f) and (g) of this section shall be in effect from the effective date of this Act *until* January 1, 2002." (emphasis added). Shortly thereafter the Connecticut General

Assembly extended that deadline to January 1. 2003 and finally with the amendment in 2003 removed the sunset provision altogether.

The 2003 amendment also relieved the Chief State's Attorney from his obligation to review and report on the data summary reports. Instead the African American Affairs Commission (AAAC) was charged with review and reporting duties.

The 2003 amendment essentially allowed the "sun to set" on the Chief State's Attorney duties to both review the traffic summary data reports provided by law enforcement agencies and to report on the results of that review to the Governor and the Connecticut General Assembly. Under Connecticut General Statutes §54-1l and §54-1m, state and municipal law enforcement agencies are required to provide the traffic summary data reports to both the Chief State's Attorney and the AAAC, but it is now only the AAAC who has a duty to review, analyze, and report upon the data. According to the Connecticut Police Chief Association witnesses at the September 20, 2011 hearing, the Chief State's Attorney lobbied successfully in 2003 to extricate his office from its unfulfilled Penn Act obligations.

Although the Penn Act prohibits racial profiling, it nonetheless fails to provide any legal remedy for a violation thereof. The only hint of legal recourse mentioned at all is related to the duty of compiling and providing the traffic summary data reports. §54-1m(d) provides an exemption for civil liability for police officers who in, good faith, record traffic stop information pursuant to the statute unless the officer's conduct was unreasonable or reckless. Further, under §54-1m(e), "[i]f a municipal police department or the Department of Public Safety fails to comply with the provisions of this section, the Chief State's Attorney" *may* recommend and the Secretary of the Office of Policy and Management *may* order an appropriate penalty in the form of the withholding of state funds from such department or the Department of Public Safety" (emphasis added). The decision to withhold funding is entirely discretionary and does not to appear to have ever been employed. Further the Chief State's Attorney's power regarding withholding of funds appears limited to a mere recommendation, while the final say seems to reside with the Secretary of the Office of Policy and Management (OPM).

The Chief State's Attorney and Law Enforcement Agencies Have Failed and Refused to Meet Penn Act Requirements

In 2010, representatives from the U.S. Department of Justice, Civil Rights Division ("Justice"), visited the ACLUCT in the course of their investigation into allegations of racial profiling by the East Haven police department. Justice had observed a failure to comply with the Penn Act in East Haven and was inquiring whether other departments had also failed to comply with obligations to collect

and report traffic stop data. As a result, the ACLUCT began in July, 2010 to research compliance with the Penn Act.

The ACLUCT issued Freedom of Information Act (FOIA) requests to police departments in Bridgeport, New London, Waterbury, Danbury, Torrington, Hartford, Stamford and Willimantic. The ACLUCT made a bifurcated request, pursuant to the Connecticut Freedom of Information Act, requesting both information and documents. ACLUCT requested that the towns provide responses to five separate inquiries: (1) whether the town is recording and retaining information on traffic stops; (2) whether the town is using the appropriate form; (3) if the town is providing annual summary reports on the traffic stop data to the AAAC; (4) if the town has provided copies of: (a) complaints regarding allegations of racial profiling and (b) written notification of the review and disposition of such complaints to the AAAC; and (5) whether the town adopted a written policy prohibiting the stopping, detention, or search of any person when such action is motivated by consideration of race, color, ethnicity, gender or sexual orientation.

Additionally, the ACLUCT requested the following documents: (1) documents containing information on the town's traffic stops for June 2004 and June 2010; (2) the town's records for traffic, driving or moving violations for June 2004 and June 2010; (3) summary data reports submitted for review to the AAAC; (4) documents which contain (a) complaints regarding allegations of racial profiling and/or (b) written notifications of the review and disposition of complaints for June 2004 and June 2010; and (5) any documents relating to the town's written policy of prohibiting the stopping, detention, or search of any persons when the action is motivated by consideration of race, color, ethnicity, gender or sexual orientation.

Thereafter, the ACLUCT continued in their attempt to collect this information from the above mentioned towns. As necessary, we wrote second requests to explain what information the town had failed to provide. ACLUCT requests and most of the responses to our requests are attached hereto in Exhibit A, although some of the correspondence is omitted as are the individual reports from New London, as they proved to cumbersome to attach.

The lack of uniform reporting procedures for traffic stop data across the state was confirmed by responses from the New London and Willimantic police departments to the questions included in the FOIA request. New London reported that they were "not familiar" with any forms promulgated by the Chief State's Attorney and instead used their own forms. The Willimantic Police Department explicitly confirmed the lack of a standardized reporting form as required under §54-1m. Willimantic reported that the West Hartford Police Department specifically requested a new form following an article published in the Hartford Courant in July, 2009, which was highly critical of the lack of compliance with the Penn Act. In response to the request for a new form, the Chief State's

Attorney told the West Hartford Police Department they either "did not have or could not locate any form" and would try to work on one for 2010. However, there is no indication of any follow through by the Chief State's Attorney in 2010 on this point.

Despite the lack of a standardized reporting form, the Willimantic Police Department reported that they continued to provide data to the AAAC through early 2009, when their electronic disc reporting system broke. After requesting a new disc from both the AAAC and the Chief State's Attorney, the Willimantic Police Department was explicitly told that "neither the Chief States Attorney nor African American Affairs would be doing anything with the information." Further, they were told that the AAAC "neither had the personnel nor the money to deal with this issue" and that all of the old files were "sitting in a box." It is the Willimantic Chief of Police's understanding that no police department in the state of Connecticut has been able to comply with §54-1m. Although police chiefs have repeatedly been told in their legal update training to retain the data in "in house" computer systems, "African American Affairs has not collected or summarized the data" and claims they "do not have personnel" to deal with compliance.

Bridgeport, despite a follow-up request from ACLU-CT and an appeal to FOIA commission for failure to comply with request, never provided anything in response to our requests.

We gave all of the data we ultimately obtained in response to our FOIA requests to law student interns from Western New England University School of Law who began the process of data compilation. Specifically, their task included placing all of the data into spreadsheets in order to analyze it. First, the students separated the data into eight separate categories, by police departments. Second, they separated the information by the two requested time periods: June 2004 and June 2010. Third, they began to attempt to categorize the stops by race, ethnicity and gender (for each town and in both time periods).

When the students found that the police departments sent us the requested information in varying ways, they realized that an analysis of the data became impossible. For example, many of the police departments complied with our request by sending their arrest data by date; many of the dates had well over one hundred arrests. Thus, in order to properly compile the data, we would have been required to sort through the information provided by each police station's different format of report. We found that some police departments provided a paper copy of the data, while others provided a CD-ROM drive with scanned files of each stop made. In order to analyze the data, we would have had to review hundreds of pages of documents and/or PDF files in order to accurately analyze the racial profiling practices of the eight departments. After completing a review of Stamford's data, which was provided by the police department in hard-copy

format, our students realized that the project could not be accomplished without more time and people working on it. Our difficulties in attempting to analyze the disparately reported traffic stop data underscore the need for a uniform, statewide reporting mechanism, as dictated by the Penn Act, but disregarded by the chief State's Attorney and law enforcement agencies.

The only centralized record of state activity in connection with the Penn Act's requirements is the Report on Traffic Stops Statistics For the State of Connecticut (2001 report). The 2001 report expressly and implicitly demonstrates the wholesale failure and refusal to enforce the Penn Act requirements.

The inadequacies in the 2001 report are numerous and include:

•An acknowledgment that a uniform device for reporting data was not required: "Officers were permitted to use either paper forms or electronic forms, depending on the preference of the individual police agencies. Police agencies were not required to use the form created by the Chief State's Attorney." 2001 report, at 13.

•A lack of internal confirmation that all departments reported data or that there was full reporting with within all departments.

•A failure to use those methodologies for analysis of data that are "most appropriate" for determining the benchmark percentages of race and ethnicity in a given driving population. 2001 report, at 14.

As acknowledged in the 2001 report, "[t]he numbers presented . . . do not definitively confirm or disprove the existence of racial profiling among individual departments or individual police officers." 2001 report at ii. By comparison, Rhode Island's efforts to fulfill statutory obligations to collect racial profiling data appear to have been much more effective. See generally June 30, 2003 Rhode Island Traffic Stop Statistics Act Final Report, attached as Addendum A (includes successful format for mandated data collection practice, enforcement of reporting requirements and use of acknowledged experts in methodology to analyze the data, with legislative follow up in response to the results reported).

Even with its inadequacies, the 2001 report manages at least to set forth one "important" finding: "that police departments stopping a higher percentage of minority drivers bordered towns or cities having a high percentage of minority residents." 2001 report, at 38. The changing demographics in the state and the anecdotal references during the hearing to higher incidence of stops in so-called "ring suburbs" surrounding highly diverse urban areas, reinforce the need to begin in earnest data collection and analysis.

Based on the testimony from the AAAC at the September 20, 2011 hearing, the failure and refusal to enforce the Penn Act has continued to date. None of the appointed state officials have demonstrated the will or the capacity to enforce the law.

Legislative and Executive Failure to Strengthen the Penn Act in 2010-2011

Similar to the inexplicable failure and refusal by the Chief State's Attorney and law enforcement agencies to comply with the Penn Act, there has been inexplicable executive and legislative reluctance to strengthen and enforce the law's requirements of data collection and analysis, despite overwhelming evidence that the Penn Act has been blatantly disregarded.

Beginning in December, 2010, the ACLUCT began to try to meet with state leaders to determine who would be able to best enforce the obligations to uniformly collect and analyze racial profiling data. In January, 2011, the ACLUCT met with the newly elected Attorney General and some of his staff, and suggested that the Attorney General work toward legislation that would enable the Attorney General to take the lead on enforcing the requirements of the Penn Act. The ACLUCT during the meeting shared a copy of the June 30, 2003 Rhode Island Traffic Stops Statistics Act Final Report, from Northeastern University Institute on Race and Justice, attached hereto as Exhibit B. During the meeting, the ACLUCT pointed out that there is full compliance with the reporting requirements in Rhode Island because the Attorney General was authorized to and did bring legal action to enforce the Rhode Island act. In addition, we suggested that the Rhode Island report, including the data card in Appendix 2 to the report, set forth a template for collection of traffic stop data that could be adopted with the help and support of existing Connecticut academic resources and intern support, possibly reducing the cost of the analysis. After the meeting, the ACLUCT provided the Attorney General with draft legislation making the Attorney General the enforcement authority and analyzer of data under the Penn Act.

In February, 2011, the Attorney General's staff informed the ACLUCT that the Attorney General, although concerned with enforcement of the Penn Act, could not take on the role of policing compliance with the anti-racial profiling statute. Through his staff, the Attorney General apologized but said there were not enough resources for his office to take on the Penn Act. In addition, his staff noted that the Connecticut Attorney General's lack of authority over criminal matters may present an impediment to taking on the role of enforcing the Penn Act requirements.[1]

[1] Although the Rhode Island Attorney General apparently has criminal jurisdiction and the Connecticut Attorney General does not, the ACLUCT fails to see how that difference creates an

On March 1, 2011, the ACLUCT met with Michael Lawlor, Under Secretary for Criminal Justice Policy and Planning OPM, again bringing the Rhode Island report and hoping to convince OPM to take over enforcement of the Penn Act. OPM seemed particularly well placed to take over in part because it already had discretion to withhold funds to law enforcement for any continued failure to comply but also because OPM was in the middle of a project to implement a new criminal justice information system that connected it to all law enforcement agencies. From the ACLUCT's perspective, the traffic stop data reporting card could easily be incorporated into the new information system.

Mr. Lawlor expressed interest in seeing the Penn Act enforced. However, in the existing fiscal climate, he could not support any changes in the law that would require OPM to ask for an additional allocation of funds, something he believed that the traffic study would require.

Subsequent to our meetings with the Attorney General and OPM, during the 2011 legislative session, Raised Bill 1230 emerged for a hearing before the joint Judiciary Committee (Judiciary). The bill provided for enforcement of the data collection on a uniform reporting mechanism so that a meaningful analysis and report could be done. The bill, is attached as Exhibit C. The legislative history of the ultimately failed bill is reflected in Exhibit D. During the April 4, 2011 public hearing on Raised Bill 1230, those testifying before Judiciary as well as members of the committee told compelling stories of racial profiling by law enforcement during Connecticut traffic stops. Despite this compelling testimony, there was opposition to the bill, including from Mr. Lawlor at OPM who, consistent with what he had said during the March 1, 2011 meeting, opposed on fiscal grounds. Judiciary voted favorably on the bill and the bill was sent to the more challenging Public Safety Committee where it also received a favorable vote.

Despite the success of the Penn Act revisions in Public Safety and Judiciary committees, the bill was inexplicably sent to Planning and Development for a vote at a time when almost only those who opposed the bill were present for a vote. As a result, the motion to advance the bill received an unfavorable vote and the bill died.

ACLUCT Recommendations for Changes to the Penn Act

The ACLUCT continues to advocate for the following changes to the Penn Act:

•Place enforcement duties with OPM, the centralized agency that by current law has the discretionary capacity to withdraw funds to agencies for non-compliance

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impediment for the Connecticut Attorney General to become the authority for enforcing the Penn Act, a civil statute.

•Fund the data collection and analysis

•Mandate immediate distribution and utilization of a uniform data form

•Add religion as a reported category

•Replace the "unknown" option under race, gender or ethnicity with "other" and a blank, consistent with the stopping officer's duty to report perceptions of race and ethnicity

•Improve statewide training to include the data collection process but also include a meaningful recognition of differences in religion, race and ethnicity across populations that can create risks of profiling

Given its pending project to unify data systems for law enforcement across the state with the Criminal Justice Information System, OPM is well situated to take the lead on enforcing this act. The current law already invests OPM with discretionary funding authority for law enforcement agencies.

In addition to the categories of data mandated to be collected under the Penn Act, the ACLUCT suggests that religion should also be included on the form. In the aftermath of September 11, 2001, there have been widespread reports in the media, and specific complaints to the ACLUCT and other civil rights organizations, that the Muslim community has been targeted for stops by state and local law enforcement agencies simply on the basis of indicia of faith such as head garb.

Conclusion

Racial, ethnic and religious profiling presents a great danger to the fundamental principles of our Constitution and is abhorrent and cannot be tolerated. The Connecticut legislature meant to do something about this serious issue in 1999 but we know now that the law needs to be improved in order to have its intended effect. We need to uncover the extent of the problem so that something can be done to eradicate the practice.

The people of this state greatly appreciate the hard work and dedication of law enforcement agents in protecting public safety. The good name of these agents and their ability to fulfill their mandate should not be tarnished and undermined by the actions of those who commit unlawfully discriminatory practices.

We hope this written submission will assist the Advisory Committee in preparing its recommendations and we remain available as needed to support the work of the Committee.

Very truly yours,

Sandra J. Staub
Legal Director

cc. Barbara De La Viez, Deputy Director, U.S. Commission on Civil Rights, Eastern Regional Office, via email, bdelaviez@usccr.gov