

U.S. COMMISSION ON CIVIL RIGHTS

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COMMISSION MEETING

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FRIDAY

MARCH 19, 2004

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WASHINGTON, D.C.

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The Commission convened at 9:30 a.m., in Room 540 of the U.S. Commission on Civil Rights, 624 Ninth Street, N.W., Washington, D.C., Chairperson Mary Frances Berry, presiding.

PRESENT:

- MARY FRANCES BERRY, Chairperson
- CRUZ REYNOSO, Vice Chairperson
- JENNIFER C. BRACERAS, Commissioner
- CHRISTOPHER EDLEY, JR., Commissioner
- PETER N. KIRSANOW, Commissioner
- ELSIE M. MEEKS, Commissioner (Via Telephone)

LESLIE R. JIN, Staff Director

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STAFF PRESENT:

DEBRA CARR, Deputy General Counsel
 IVY DAVIS, Chief, Regional Program Coordination Unit
 TERRI DICKERSON, Assistant Staff Director, Office of
 Civil Rights Evaluation
 PAMELA DUNSTON, Chief, Administrative Services and
 Clearinghouse Division
 GEORGE M. HARBISON, Chief, Budget and Finance Division
 SOCK FOON MACDOUGALL
 TINALOUISE MARTIN, Director, Human Resources Division
 KWANA ROYAL
 JOYCE SMITH, Parliamentarian
 AONGHAS ST. HILAIRE
 ALEXANDER SUN
 DEBORAH VAGINS
 AUDREY WRIGHT
 TIFFANY WRIGHT
 MIREILLE ZIESENISS

COMMISSIONER ASSISTANTS PRESENT:

KRISTINA ARRIAGA
 JOY FREEMAN
 CHRISTOPHER JENNINGS
 KIMBERLY SCHULD
 MELISSA SHARP
 KRISHNA TOOLSIE

PANELISTS:

TIMOTHY H. EDGAR, American Civil Liberties Union
 MARY ROSE OAKAR, Arab-American Anti-Discrimination
 Committee
 PAUL ROSENZWEIG, The Heritage Foundation

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P-R-O-C-E-E-D-I-N-G-S

9:36 a.m.

I. Approval of Agenda

CHAIRPERSON BERRY: We have a quorum, I guess. Could I get a motion to approve the agenda?

VICE CHAIRPERSON REYNOSO: So moved.

COMMISSIONER KIRSANOW: Second.

CHAIRPERSON BERRY: Any discussion or does anybody have any discussion of the agenda? No.

All those in favor indicate by saying aye.

(Ayes.)

Opposed.

(No response.)

So ordered.

II. Approval of Minutes

CHAIRPERSON BERRY: The next item on the agenda, if I can find my page, is approval of the Minutes of February 20, 2004. Could I get a motion to approve the Minutes?

VICE CHAIRPERSON REYNOSO: So moved.

COMMISSIONER MEEKS: Second.

CHAIRPERSON BERRY: Is there any discussion? Does anyone wish to change anything or add anything to the minutes? Hearing none, all those in favor, indicate by saying aye.

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(Ayes.)
Opposed?
(No response.)
So ordered.

III. Announcements

The next item is Announcements. First announcement I wish to make is that the U.S. Commission on Civil Rights received this very nice award from the National Congress of American Indians at their meeting on February 24, 2004. And I attended the meeting to accept the award on behalf of the Commission and I was told that we were given this award for the excellence of our work on Native American civil rights issues and that in particular we were given this award, well, first of all, it says it recognizes our work in documenting the unique challenges facing American Indians and Alaska Natives in their quest for equal justice.

And I wanted to mention that in particular at the meeting, they announced that they wanted to cite us especially for our report, "A Quiet Crisis: Federal Funding in Indian Country", which was done by Terri Dickerson and her staff in the Office of Civil Rights Evaluation. So kudos to Terri and her staff and we're very grateful to the Congress of American

1 Indians for recognizing our work.

2 COMMISSIONER MEEKS: Mary, can I say a
3 couple of things?

4 CHAIRPERSON BERRY: Sure.

5 COMMISSIONER MEEKS: I do want to commend
6 Terri and her staff. I think it was a great report
7 and people knew that last month Senator Daschle
8 delivered a speech on the Senate Floor and said that
9 the executive summary was submitted as part of the
10 Congressional Record.

11 And I also would just like to say a little
12 bit about our trip last week to the Tulalip Tribes.
13 The Tulalip was a very poor tribe and they have had
14 some good efforts with some of their economic
15 development, particularly in the casino and some other
16 contracts, just an example of how adequate funding in
17 tribal programs can successfully provide for its
18 members.

19 CHAIRPERSON BERRY: Thank you, Elsie. We
20 will put this plaque somewhere on the wall here
21 somewhere so that it be there. It's the first time
22 I've known about anybody giving us a plaque. People
23 have given us a whole lot of other things, but --

24 VICE CHAIRPERSON REYNOSO: Madam Chair, I
25 just want to comment that I received several comments

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1 from Indian leaders about the report that we issued
2 and I, too, would just like to mention how inspiring
3 it was to spend the whole day with the tribe that was
4 mentioned because we were first met by little
5 children, preschool and kindergarten children, I
6 believe, singing a song of welcome both in English and
7 their own native tongue. And we were told through the
8 years the native tongue and culture had been under
9 such stress that it was only the elders that really
10 knew the tongue that well. But they're teaching it to
11 young people, who in turn are teaching to these
12 youngsters. So it was inspiring, not only to see the
13 economic development, but the cultural evolution and
14 development of the Tribe.

15 CHAIRPERSON BERRY: All right, well, this
16 is Women's History Month and the Commission, of
17 course, has for years done work on issues of
18 particular concern about gender equality and we, of
19 course, recognize the great strides that women have
20 made in terms of equal opportunity in our society and
21 the issues and problems that remain.

22 March 21, 1965 was the occasion of the
23 Selma to Montgomery March for Voting Rights. The
24 Voting Rights Act passed in March. That is an
25 important part of our history. It originally, of

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1 course, focused on enfranchising the African
2 Americans, but the scope of it and its interpretations
3 have been used to benefit other people of color who
4 have been left out historically in enfranchisement.
5 The Voting Rights Act, at least part of it is up for
6 reauthorization in 2007 and as you know, we have a
7 project under way on that. We have an intern, Ms.
8 Kamala Sessums, a third year law student at MSU-DCL
9 College of Law is interning with our Office of General
10 Counsel.

11 Are you here, Ms. Sessums? Could you
12 stand up, please? Welcome.

13 MS. SESSUMS: Thank you.

14 CHAIRPERSON BERRY: She graduated from
15 Oberlin with a degree in Political Science. Oberlin
16 is one of my alma maters. Welcome aboard.

17 Okay, the next item on the agenda is the
18 Staff Director's Report. Does anyone have any
19 questions on the Staff Director's Report?

20 Did you want to say something? Did you
21 have a question, Commissioner Braceras?

22 COMMISSIONER BRACERAS: No.

23 CHAIRPERSON BERRY: I couldn't tell
24 whether you were --
25 Staff Director?

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IV. Staff Director's Report

1
2 STAFF DIRECTOR JIN: Yes, Madam Chair, a
3 couple of things. The main one is the Commissioners
4 will remember that at the last meeting we raised the
5 issue that the Arizona Advisory Committee wanted us to
6 look at, they wanted us to look at a couple of
7 matters, one regarding the Tohono O'odham Indians and
8 the second one regarding migrant border deaths. And
9 they wanted the Commissioners to endorse congressional
10 hearings regarding the migrant border deaths and
11 endorse a piece of legislation regarding the Tohono
12 O'odham Indians.

13 At that last meeting, I think the
14 Commissioners had some questions and you asked the
15 Staff to go back and find out some information. I
16 think we have that information at this point.

17 As for the Tohono O'odham citizenship
18 issue, we were asked to find out if Congressional
19 Staff had either created a summary of the bill or had
20 hearings on these issues and neither has occurred up
21 to date. The issue was also raised as to whether a
22 request for legislation towards citizenship in this
23 type of a situation was unique and the answer to that
24 is that it is not. In fact, in 1983, the citizenship
25 was granted to the Kickapoo Indians of Texas which is

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1 part of the subgroup of the Kickapoo Tribe of
2 Oklahoma. And among the reasons given for that action
3 was that although many members of the band were U.S.
4 citizens, some of them could not prove that U.S.
5 citizenship and that legislation was necessary to
6 allow them to pass and repass along the southern
7 border.

8 And Commissioners might remember from
9 discussion last month as well as the transcript of the
10 Arizona Advisory Committee Forum that included a
11 discussion of this issue that those were some of the
12 same issues that are reported here, except I think it
13 would increase security. The concern is much more
14 enhanced.

15 As far as the Arizona Advisory Committee
16 request for hearings on the border deaths, we found
17 out that Congress did have some hearings, in general,
18 on the general subject, but upon further examination
19 that focus was definitely on the law enforcement
20 issues involved and that the witnesses were, I think,
21 all from the government. And although I think maybe
22 perhaps one witness did raise the issue of the civil
23 rights from a human toll perspective that clearly that
24 was not the real focal point of those hearings, nor
25 were they addressed in a significant way.

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1 So in addition, the Advisory Commission
2 believes that it would be beneficial for the Congress
3 to have hearings, either in Arizona or along the
4 border somewhere and hopes that such a request would
5 be part of an endorsement the Commission might make.
6 Congressional hearings on site, or otherwise away from
7 Washington, D.C., is not uncommon when warranted. And
8 the Arizona Advisory Committee believes this is such a
9 case here. And in fact, I was told that Henry Hyde,
10 who of course is the Chairman of the House Committee
11 on the Judiciary --

12 CHAIRPERSON BERRY: International
13 Relations.

14 STAFF DIRECTOR JIN: International
15 Relations, he had noted, I think, back in the 1980s,
16 in 1980, I guess when he was on the Subcommittee of
17 the Judiciary, he was persuaded to vote for the
18 extension of the Voting Rights Act because the
19 Subcommittee field hearings were held in Montgomery,
20 Alabama and San Antonio, so field hearings can be very
21 useful and the Advisory Committee feels that this is
22 one of those situations. So that's the request.

23 CHAIRPERSON BERRY: Could I get a motion
24 to endorse, and then we can discuss it, the Arizona
25 SAC's request and view that we recommend or forward it

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1 with our recommendation to the appropriate
2 subcommittee that this is the kind of issue that they
3 should consider?

4 VICE CHAIRPERSON REYNOSO: So moved.

5 COMMISSIONER KIRSANOW: Second.

6 CHAIRPERSON BERRY: Discussion?

7 VICE CHAIRPERSON REYNOSO: Madam Chair, I
8 just want to note that as I understand it, there's at
9 least one treaty on this same subject matter with the
10 tribe that abuts the Canadian border or under the
11 treaty, the members of that tribe can move back and
12 forth in each country.

13 CHAIRPERSON BERRY: Further discussion?

14 Yes.

15 COMMISSIONER BRACERAS: Are we voting to
16 recommend -- I didn't hear. Are we voting to
17 recommend that they hold hearings or are we voting to
18 endorse the piece of legislation?

19 CHAIRPERSON BERRY: No, we're voting to
20 recommend that the subcommittee hold field hearings on
21 these issues as we're endorsing the SAC's -- we're
22 voting to endorse the SAC's recommendation.

23 Isn't that what you want?

24 STAFF DIRECTOR JIN: Madam Chair, there's
25 two separate requests and --

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1 COMMISSIONER BRACERAS: That's why I want
2 to break them down.

3 CHAIRPERSON BERRY: The only one I
4 mentioned was holding field hearings.

5 STAFF DIRECTOR JIN: The other one had to
6 do with the Tohono O'odham Indians and the request
7 that they be given citizenship.

8 CHAIRPERSON BERRY: Right, I was going to
9 do that next, but if you want to put them all together
10 --

11 COMMISSIONER BRACERAS: I prefer not to,
12 that's why I just wanted to be clear on what we were
13 doing because I didn't hear what you said.

14 CHAIRPERSON BERRY: We're just voting,
15 we're considering whether we would endorse the
16 recommendation that the subcommittee hold field
17 hearings on the border issue as you described it.

18 Any further discussion of that issue? All
19 those in favor indicate by saying aye.

20 (Ayes.)

21 Opposed?

22 (No response.)

23 So ordered. Now, what was the second one?

24 COMMISSIONER KIRSANOW: Record an
25 abstention from me.

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1 CHAIRPERSON BERRY: I beg your pardon?

2 COMMISSIONER KIRSANOW: Abstention.

3 COMMISSIONER KIRSANOW: Commissioner
4 Kirsanow is abstaining.

5 Now the second issue, what is it you'd
6 like us to do?

7 STAFF DIRECTOR JIN: The SAC requests that
8 the Commission endorse H.R. 731 which would grant the
9 Tohono O'odham Indians citizenship.

10 CHAIRPERSON BERRY: Okay, would you like a
11 motion or would you like to discuss it and express
12 your views and we'll see whether it's appropriate that
13 there be a motion.

14 This is what they're asking us to do.

15 VICE CHAIRPERSON REYNOSO: I do have a
16 question as to what the status is right now.

17 STAFF DIRECTOR JIN: The status is the
18 bill has been introduced and my understanding is that
19 there's about 100 co-sponsors, but no hearings have
20 been set up and it's not obvious to us that it's like
21 moving forward or moving forward very, very fast. I
22 mean it's introduced, but we're not aware of any
23 opposition or anything. It's just not really kind of
24 moving.

25 COMMISSIONER BRACERAS: There's a lot of

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1 that going around.

2 COMMISSIONER KIRSANOW: You say there
3 haven't been any hearings, has it been in conference?
4 What is the status in terms of -- is this a House
5 bill?

6 STAFF DIRECTOR JIN: It is a House bill.

7 COMMISSIONER KIRSANOW: It's not gone to
8 conference or anything or is it simply a House bill?

9 STAFF DIRECTOR JIN: It's just simply a
10 House bill at this point. My understanding is it's
11 just been introduced and it hasn't really moved
12 forward anywhere.

13 CHAIRPERSON BERRY: Maybe they could hold
14 hearings on it. Maybe we, instead of endorsing the
15 bill, maybe we could propose that they have hearings
16 on the legislation.

17 VICE CHAIRPERSON REYNOSO: Madam Chair,
18 I've been conscious of these types of problems in the
19 Southwest for many years, but I think that we would be
20 better off to suggest that Congress have hearings on
21 the issue, rather than simply endorsing it because I
22 think once the hearings take place, I think, in fact,
23 it will gather support. But I think we should take it
24 a step at a time.

25 COMMISSIONER MEEKS: I agree with Cruz on

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1 this. This is something that whatever we can lend to
2 pushing this forward, it's such a small -- one tribe
3 and unless they get some support from groups like ours
4 they will have trouble moving it forward.

5 CHAIRPERSON BERRY: So, maybe a motion
6 then, if you want to make it?

7 VICE CHAIRPERSON REYNOSO: Yes. I make a
8 motion that we urge the House of Representatives which
9 is where the bill is pending to have hearings on this
10 bill. I forget the number.

11 STAFF DIRECTOR JIN: H.R. 731.

12 VICE CHAIRPERSON REYNOSO: 731.

13 CHAIRPERSON BERRY: Could I get a second
14 to that?

15 COMMISSIONER KIRSANOW: Second.

16 CHAIRPERSON BERRY: Any discussion? All
17 those in favor indicate by saying aye.

18 (Ayes.)

19 Opposed?

20 COMMISSIONER BRACERAS: Opposed.

21 CHAIRPERSON BERRY: Commissioner Braceras
22 is opposed, otherwise, motion carries.

23 Anything else you need to raise, Staff?

24 STAFF DIRECTOR JIN: Just one other thing
25 real quickly --

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1 CHAIRPERSON BERRY: Wait a minute.

2 VICE CHAIRPERSON REYNOSO: Madam Chair, we
3 did have something pending from the last meeting, if I
4 remember correctly, that had to do with our request of
5 the EEOC for some information.

6 STAFF DIRECTOR JIN: Yes, Commissioner,
7 Mr. Vice Chair. The Commissioners had asked that the
8 Staff write to EEOC as a result of the presentation
9 that the Blumrosens and others made regarding what
10 appeared to be in a change in practice at the
11 Commission over at EEOC regarding making public
12 certain EEO-1 data. So we wrote them in that regard
13 and we've been in communication with them and we're
14 still in the process.

15 CHAIRPERSON BERRY: So you're still
16 following up?

17 STAFF DIRECTOR JIN: We're still following
18 up.

19 CHAIRPERSON BERRY: Okay, and what was the
20 other thing you wanted to ask?

21 STAFF DIRECTOR JIN: Vice Chair Reynoso
22 read my mind.

23 CHAIRPERSON BERRY: The only thing I
24 wanted to mention here is that you sent out a notice
25 to the Commissioners that at our April meeting will

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1 have a briefing on the technological issues
2 surrounding this, the equipment and so on for voting
3 for the elections in light of HAVA and various changes
4 that have taken place around the country. And then I
5 would, in talking to you when we're talking about it,
6 that it may be necessary after that to have some
7 briefings, perhaps, in local places where particular
8 problems are identified by the staff, to follow up and
9 to urge people to make whatever changes they need to
10 make before the election so that they -- we won't have
11 problems that could have been foreseen with the
12 equipment and other things that may end up with people
13 claiming that they've been disenfranchised.

14 In the Leadership Conference on Civil
15 Rights, as Wade has suggested to me, that the
16 Commission's -- he reminded me that the Commission's
17 authority, of course, and responsibility extends to
18 looking into matters of voting rights if anyone's
19 right to vote is claimed to have been denied which is
20 what we did before and have done for a long time. And
21 in my discussions with a lot of people over the last
22 two or three months, people have complained about
23 various aspects of what's going on in their state on
24 the issue of voting rights. Some of it is about their
25 fears and other things about things that have

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1 happened. So I think it's very important that we do
2 this.

3 I understand that Terri is preparing us a
4 briefing paper for next time so that we can sort of
5 summarize where we are on these and I'm looking
6 forward to getting that and that since we're getting
7 it, that means that she is going to have to delay by
8 three or four weeks one of the things she is doing
9 which I think is one on the Bush civil rights record,
10 is that what you told me, Staff director?

11 STAFF DIRECTOR JIN: Yes, Madam Chair.

12 CHAIRPERSON BERRY: So it will be about
13 three or four weeks because of that. But I think it's
14 important that we get this done and you've adjusted
15 the MIS to reflect that as I saw in it. But I also
16 wanted to suggest that when we go to local
17 communities, after you've identified where we need to
18 go, it may be that some local officials will be
19 reluctant to come forward to have discussions with us.
20 We found that in the past, especially in places where
21 most problems are identified and what you and I have
22 discussed is that it might be useful for the Staff,
23 for us to be able to use our subpoena power if we need
24 to in order to get people to come, rather than just
25 asking them to come voluntarily if it turns out that

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1 way. What that would require is that the Commission
2 agree that you could do so or that we could do so and
3 that the Commission then would be denominated a
4 hearing instead of a briefing, if that should happen.

5 So I wanted to suggest, unless there is some
6 objection, that we proceed with the briefings and that
7 if it turns out that it is necessary from the Staff's
8 efforts to get people to come to use the subpoena
9 power that they may be turned into hearings and we
10 would operate in that manner, unless somebody has some
11 objection to doing so.

12 Yes?

13 COMMISSIONER EDLEY: I think it's an
14 interesting idea, especially I suspect a lot of
15 officials, at least from what I've heard, a lot of
16 officials are concerned about the delays in getting
17 the federal money from the HAVA to Help America Vote
18 Act. I guess the appropriation wasn't what states had
19 been expecting or what states had wanted and so forth.

20 But anyway, I think there may be officials
21 who are reluctant to complain about some of the
22 constraints that they've been operating under and
23 maybe a subpoena would give them cover to talk more
24 candidly.

25 VICE CHAIRPERSON REYNOSO: I think --

1 COMMISSIONER BRACERAS: Well, I just had a
2 question. If it's as to what exactly it means to
3 convert it into a hearing in terms of post-hearing
4 activity, in other words, if it's converted into a
5 hearing by virtue of the fact that subpoenas are
6 issued, does that mean that a report is going to be
7 issued by this body or what implication does it have
8 for what we publish or do after?

9 CHAIRPERSON BERRY: Now unless we say
10 we're going to do a report, we don't have to do one.
11 If we say we are going to do a full-blown report, I
12 wasn't suggesting that we do one. I was just
13 suggesting that in terms of what lesson I've talked
14 about, if it turns out that say they want to do a
15 briefing in Ohio, and I just made that up here, sorry,
16 I'll mention some other state, let's see, Wyoming.

17 (Laughter.)

18 I don't know anybody in Wyoming, and that
19 some local registrar or something just won't come and
20 that's the place where all the people say we would
21 just issue a subpoena. That's all.

22 COMMISSIONER BRACERAS: I understand why
23 the Commission might need to use subpoena power, but I
24 guess this brings me back to the ever present
25 confusion as to the difference between a briefing and

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1 a hearing and what substantive --

2 CHAIRPERSON BERRY: How different it would
3 be?

4 COMMISSIONER BRACERAS: Yes, what
5 substantive difference is the distinction between a
6 briefing, a hearing, only that you use subpoena power?

7 CHAIRPERSON BERRY: No. Hearings may be
8 what we call full-blown hearings where you do
9 interviews ahead of time and there's a whole bunch of
10 stuff that you do.

11 But what I'm suggesting, and you may have
12 a report, and you may agree that you want a report
13 when you start out way back two years ago with some
14 project that you were going to do. What I would
15 suggest in this case is that all we're really talking
16 is that at the end we would have a briefing summary
17 just like we always do, a summary of what we heard at
18 the briefing and a transcript that anybody who wants
19 to see it, can see.

20 COMMISSIONER BRACERAS: So there would be
21 a document produced which is a summary of the
22 testimony?

23 CHAIRPERSON BERRY: Right, and the
24 testimony in a transcript which is what we do now, so
25 if the public wants the transcript they can have it,

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1 and they can have a little summary of what happened.

2 COMMISSIONER BRACERAS: I'm just trying to
3 clarify for the record what the difference is between
4 a briefing and a hearing?

5 CHAIRPERSON BERRY: And a hearing report
6 has findings, recommendations and all the rest of it.

7 COMMISSIONER BRACERAS: A hearing report
8 does?

9 CHAIRPERSON BERRY: Yes.

10 COMMISSIONER BRACERAS: And so would we be
11 doing that in this case?

12 CHAIRPERSON BERRY: No.

13 COMMISSIONER BRACERAS: Are you suggesting
14 that we do it?

15 CHAIRPERSON BERRY: I'm not suggesting
16 that we do it, unless you want to suggest it?

17 COMMISSIONER BRACERAS: No, I'm simply
18 trying to clarify what's going on, that's all.

19 CHAIRPERSON BERRY: I'm not suggesting
20 anything. I'm not.

21 VICE CHAIRPERSON REYNOSO: Madam Chair, I
22 guess the idea, the staff goes out and talks to people
23 and they would come back to us and say everything is
24 okay, all the officials that want to come are coming
25 or they would come back to us and say we've had

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1 problems and then at that point, assuming we agree --

2 CHAIRPERSON BERRY: No, we're going to
3 agree now.

4 VICE CHAIRPERSON REYNOSO: If they have
5 problems, there could be a hearing.

6 COMMISSIONER BRACERAS: I guess -- I have
7 another question and it's not that I object
8 theoretically to what you're proposing, I don't. I'm
9 just trying to understand the rules and the parameters
10 as to the use of the subpoena power.

11 Are you saying that unless we authorize
12 the use of the subpoena power here today that the
13 Staff Director does not have the power on his own to
14 issue those subpoenas?

15 CHAIRPERSON BERRY: No, he can't, no, not
16 unless we -- if we object which is why I say does
17 anybody objects.

18 COMMISSIONER BRACERAS: So we're voting to
19 basically delegate the authority to the Staff Director
20 to make the decision as to who should be subpoenaed
21 without coming back to us in specific instances?

22 CHAIRPERSON BERRY: If we decide to
23 subpoena for a specific hearing, we would subpoena
24 everybody for that hearing, routinely. That's just
25 procedurally, we wouldn't pick out people and say

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1 we're subpoenaing you and that one. And that's what
2 he would be saying, that for that particular locale,
3 it's necessary to subpoena people, if it's necessary
4 that we do it. Otherwise, we wouldn't do it.

5 COMMISSIONER BRACERAS: What about
6 documents or other evidence?

7 CHAIRPERSON BERRY: We're not suggesting
8 documents. I'm not.

9 COMMISSIONER BRACERAS: Okay, I just want
10 to be clear on what we're voting on.

11 CHAIRPERSON BERRY: No, I'm not suggesting
12 documents.

13 COMMISSIONER EDLEY: Can I? At least as I
14 understand it, so we can all be on the same page here,
15 we're really doing a briefing. We're really doing a
16 briefing. It's just that we want to make sure that
17 the people we want to hear from will make themselves
18 available, so we're using the subpoena power to help
19 us do that.

20 CHAIRPERSON BERRY: If we need to.

21 COMMISSIONER EDLEY: If the Staff Director
22 concludes that he needs that in order to make a
23 briefing work. But this is different from the formal
24 hearings that we sometimes do that are more
25 evidentiary in nature where we're trying to build a

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1 record that's the basis for some set of policy
2 recommendations, some sort of factual findings and
3 policy recommendations.

4 CHAIRPERSON BERRY: Absolutely.

5 COMMISSIONER EDLEY: We're not trying to
6 do factual findings and policy recommendations.

7 COMMISSIONER BRACERAS: Just to be clear,
8 we're not going to issue anything with policy
9 recommendations and factual findings and --

10 CHAIRPERSON BERRY: We're going to issue a
11 briefing summary, just a summary of the testimony.

12 COMMISSIONER BRACERAS: Can I finish?
13 Right. We're not going to issue policy
14 recommendations or factual findings and the subpoena
15 power is going to be used merely to get the witnesses
16 --

17 CHAIRPERSON BERRY: If we need to.

18 COMMISSIONER BRACERAS: If we need to and
19 it will be used for all of them equally and it will
20 not be used to subpoena records or documents.

21 CHAIRPERSON BERRY: Right.

22 VICE CHAIRPERSON REYNOSO: Madam Chair, I
23 just want to mention that by custom in the Commission,
24 if it's a hearing, we subpoena everybody. Those who
25 are friendly, those who are not.

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1 COMMISSIONER BRACERAS: Right, I
2 understand that.

3 VICE CHAIRPERSON REYNOSO: To not have a
4 sense of discrimination, if you will.

5 COMMISSIONER EDLEY: And I take it you
6 feel we ought to do the same thing, even though this
7 is not a fancy evidentiary hearing, that we ought to
8 be uniform within -- at a given site?

9 CHAIRPERSON BERRY: Sure. People can be
10 told that we're just -- when we subpoena, we subpoena
11 everybody. That just makes sense.

12 COMMISSIONER EDLEY: So the issuance of a
13 subpoena isn't becoming news in itself.

14 VICE CHAIRPERSON REYNOSO: I've had
15 complaints sometimes of friendly witnesses saying we
16 would come, how come you gave me the subpoena and I
17 say we just do it as a matter of fact.

18 CHAIRPERSON BERRY: The Staff should
19 explain it to them.

20 STAFF DIRECTOR JIN: And we do when it has
21 happened in the past.

22 COMMISSIONER EDLEY: You could give it to
23 them in the form of a plaque that they could hang on
24 the wall.

25 (Laughter.)

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1 CHAIRPERSON BERRY: Any other questions or
2 considerations? So if there's no objection, then we
3 would --

4 COMMISSIONER BRACERAS: Well --

5 CHAIRPERSON BERRY: Do you object?

6 COMMISSIONER BRACERAS: I'm not sure to
7 tell you the truth.

8 CHAIRPERSON BERRY: You're not?

9 COMMISSIONER BRACERAS: No, I'm not sure.

10 CHAIRPERSON BERRY: Whether you do or not?

11 COMMISSIONER BRACERAS: I'm not sure I'm
12 on to what you're up to here, let's put it that way.

13 CHAIRPERSON BERRY: I'm not up to
14 anything, except trying to make sure we get people who
15 are responsible for whatever it is, wherever they go
16 to come and talk, so that we don't just end up with
17 people who want to complain, coming to complain about
18 it, but no one who isn't responsible coming to say
19 here's what I'm doing and here's what I plan to do and
20 I've got this thing under control. That's all I'm
21 doing.

22 And I don't expect, I really don't expect
23 most people to object to coming and I don't think it
24 will --

25 COMMISSIONER BRACERAS: I wouldn't either.

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1 CHAIRPERSON BERRY: But for planning
2 purposes, I just think that -- and Les and I have
3 talked about this, it's a good idea to at least be
4 able to function and not have a briefing where nobody
5 shows up or you can't get anybody.

6 COMMISSIONER BRACERAS: I guess I'm going
7 to abstain because I don't think I have enough
8 information about how it's going to be used. I think
9 the way it's been presented is very theoretical. If
10 we decide we need to do it, we're going to do it and
11 we don't know who it's going to be sent and blah,
12 blah, blah.

13 So it's not that I object in theory. I
14 just don't have enough information about how it's
15 going to be used in practice and therefore I abstain.

16 CHAIRPERSON BERRY: Okay.

17 VICE CHAIRPERSON REYNOSO: Madam Chair, I
18 just want to comment that when we've had the Advisory
19 Committee hearings where two or three of us have been
20 invited or all of us have been invited or all of us
21 have been invited to be there and several us have been
22 able to go.

23 In fact, all of the parties that have been
24 asked to show up have shown up, so like you, I don't
25 expect any problems, but you know, just in case.

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1 CHAIRPERSON BERRY: Okay, any other
2 discussion? Yes.

3 COMMISSIONER EDLEY: I was going to move
4 on. I had a slightly different --

5 CHAIRPERSON BERRY: You should record
6 Commissioner Bracer's abstention.

7 Yes?

8 COMMISSIONER EDLEY: I just wanted to
9 raise the possibility, just a thought. I don't know
10 if makes sense, but if I recall correctly, we can hold
11 a briefing or a hearing with just two Commissioners.

12 CHAIRPERSON BERRY: You can have a hearing
13 with two Commissioners, so long as they're not from
14 the same political party and for a briefing, we all
15 are asked to go, for anything, we're all asked to go.

16 COMMISSIONER EDLEY: Right, right.

17 CHAIRPERSON BERRY: But if it turns out
18 that it is a hearing or a briefing, if you have a
19 couple of Commissioners there with the SAC, that's one
20 configuration we've used before and then we've just
21 done it ourselves. So you can do it in those
22 configurations.

23 COMMISSIONER EDLEY: Let me just toss out
24 an idea. I think one possibility would be for the
25 Commission to go to a number of different states or

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1 just sort of split up and fan out and go to a number
2 of different states, especially if there are SACs who
3 are interested in what's the state of election
4 preparation in their state.

5 Well, let's pick Ohio. I mean Pete and I
6 could, with the Ohio SAC, we could do a thing in Ohio
7 and then you can go to Wyoming, if you wanted to go to
8 Wyoming.

9 CHAIRPERSON BERRY: And Commissioner
10 Braceras could do whatever state she thinks --

11 COMMISSIONER BRACERAS: Hawaii.

12 (Laughter.)

13 STAFF DIRECTOR JIN: Actually, there are
14 no election issues in Hawaii.

15 CHAIRPERSON BERRY: You'd have to take
16 another Commissioner with you.

17 COMMISSIONER BRACERAS: I'll take you.

18 (Laughter.)

19 We'll have a great time.

20 (Laughter.)

21 COMMISSIONER EDLEY: But I'm just
22 thinking, especially if there are some SACs who are
23 interested in this issue and it might be more
24 productive than having all of us go to a single state.
25 We could sort of pick the places that are of

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1 interest.

2 CHAIRPERSON BERRY: I think that's great.
3 We've found that if you have two Commissioners go
4 with a SAC say, that that works very nicely. It gets
5 the public's attention because there are two
6 Commissioners who come.

7 COMMISSIONER BRACERAS: Would it preclude
8 the other Commissioners?

9 CHAIRPERSON BERRY: They can come if they
10 want to, but I'm just saying that he was talking about
11 two and two works very nicely and it does. If people
12 can't go everywhere, then two can go one place and
13 another in terms of scheduling, but Staff, why don't
14 you think about the configurations. That's a great
15 idea.

16 **V. State Advisory Committee Report**

17 Anything else on the Staff Director's
18 report? All right, now we have State Advisory
19 Committee Report, Civil Rights Implications of Post-
20 September 11 Law Enforcement Practices in New York.

21 Can I get a motion to approve that?

22 VICE CHAIRPERSON REYNOSO: So moved.

23 CHAIRPERSON BERRY: Could I get a second?

24 COMMISSIONER EDLEY: Second.

25 CHAIRPERSON BERRY: All those in favor,

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1 oh, discussion. Sorry about that.

2 VICE CHAIRPERSON REYNOSO: Madam Chair, I
3 just want to say that the testimony that I read here
4 in New York sounds very much like things that have
5 happened in California too.

6 CHAIRPERSON BERRY: New York is like
7 California.

8 (Laughter.)

9 Does anyone else have anything on the SAC
10 Report? Yes?

11 COMMISSIONER EDLEY: Let me just say that
12 this is not a
13 -- I found it very interesting that it did not -- it
14 doesn't purport to make findings and facts and so
15 forth. It's just a compilation of what people have
16 said in these panels. With that said, I thought it
17 was very interesting. I just want to encourage the
18 Staff to make sure that appropriate folks at DOJ and
19 Department of Homeland Security get copies of it, not
20 that it's telling them things they haven't heard, but
21 I think --

22 CHAIRPERSON BERRY: They've probably heard
23 it from other states, don't you think, other people.
24 I thought it was a very interesting report about
25 what's happening, what has happened in New York State

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1 and we thank the State Advisory Committee for putting
2 it together.

3 VICE CHAIRPERSON REYNOSO: It's a very
4 good report.

5 CHAIRPERSON BERRY: Does anyone want any
6 further comment?

7 All those in favor indicate by saying aye.

8 (Ayes.)

9 Opposed?

10 (No response.)

11 So ordered.

12 One thing we forgot to do, Staff Director
13 is the last time we had talked about the guy, Lewis
14 Sanks King in St. Augustine, Florida who was shot and
15 there was a dispute about it and we have gotten
16 letters and we asked that the Regional Director
17 monitor what was going on.

18 Could you remind us and tell us what the
19 follow up is on that?

20 STAFF DIRECTOR JIN: Sure.

21 CHAIRPERSON BERRY: Because I had a couple
22 of inquiries about it from people.

23 STAFF DIRECTOR JIN: Sure. Yes, we had
24 asked our Southern Regional Office Director Bobby
25 Doctor to follow up and he and I talked just a couple

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1 of days ago. He had talked to a number of people,
2 including the lawyers for the family of the young man
3 that died and his understanding is that the Department
4 of Justice is looking into this, that both the Civil
5 Rights Division as well as the FBI. And so at this
6 point, he's continuing to do further investigation,
7 but he feels that at this juncture he should just
8 continue to monitor and that's where that is at.

9 CHAIRPERSON BERRY: And I guess was the
10 claim that he was shot under the state's fleeing felon
11 law?

12 STAFF DIRECTOR JIN: He wasn't -- my
13 understanding is that Florida does have the fleeing
14 felon rule which gives the police officers, under law,
15 a fair amount of latitude when someone is fleeing.
16 The young man, he wasn't shot, he was tasered and
17 basically the police say that they followed all normal
18 procedures and the autopsy is not official in yet, I
19 think there's some sense that in this case, because
20 the young man had an enlarged heart, that that might
21 have contributed to his death.

22 CHAIRPERSON BERRY: What's a taser? Is
23 that the same as a laser?

24 STAFF DIRECTOR JIN: My understanding is
25 that -- I'm going to say something I'm not sure --

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1 CHAIRPERSON BERRY: If you don't know,
2 that's okay.

3 COMMISSIONER EDLEY: It's a stun gun.

4 CHAIRPERSON BERRY: Oh, a stun gun. Thank
5 you. Thank you, stun gun. I know what that is.

6 STAFF DIRECTOR JIN: The view is again
7 it's less lethal than a gun, but of course, it still
8 hurts.

9 **VI. Future Agenda Items**

10 CHAIRPERSON BERRY: All right, does anyone
11 have any other comments on anything else or any future
12 agenda items which is next item before we get ready
13 for the briefing?

14 Anything else? Okay, hearing none, then
15 we will move on. Are the people here for the
16 briefing.

17 STAFF DIRECTOR JIN: Madam Chair, we're
18 getting close. I understand two of the speakers are
19 here, Mr. Edgar from ACLU is not here yet, but I'm
20 told that he will be here literally any minute.

21 CHAIRPERSON BERRY: We'll take a five
22 minute break and then we'll start the briefing.

23 (Whereupon, the proceedings in the
24 foregoing matter went off the record at
25 10:14 a.m. and went back on the record at

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1 10:24 a.m.)

2 **VII. Briefing on the USA Patriot Act**

3 CHAIRPERSON BERRY: Today we are having a
4 briefing on the civil rights implications of the
5 Patriot Act and related antiterrorism efforts.

6 In response to the tragedy of
7 September 11th, Congress passed, and President Bush
8 signed into law, the US Patriot Act, USA Patriot Act.

9 In addition, other numerous executive orders,
10 regulations, and government programs were initiated to
11 reduce the risk of another attack in the United
12 States.

13 These efforts and legislation have led to
14 various results, including expansion of the
15 government's detention, deportation, and surveillance
16 powers, changes in immigration policy, and use of
17 computerized airline passenger screening methods to
18 identify potential threats.

19 While the Department of Justice reports
20 that there have been no instances in which the Patriot
21 Act has been invoked to infringe upon civil rights or
22 civil liberties, other reports indicate that there
23 have been increases in discrimination activity based
24 on religion, race, or national origin, resulting from
25 or being fueled by the policies developed to combat

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1 threats to national security.

2 The Commission's mission is to analyze
3 those federal laws and policies relating to
4 discrimination or denial of equal protection of the
5 laws because of race, color, religion, sex, age,
6 disability, or national origin, or in the
7 administration of justice.

8 As a result, in October of 2001, the
9 Commission held a briefing and issued an executive
10 summary entitled "Boundaries of Justice," which
11 examined the civil rights implications of immigration
12 policies and antiterrorism legislation that were in
13 place or proposed immediately after September 11th.

14 Within days of the September 11th attacks,
15 the Commission also established and publicized a
16 unique complaint hotline to solicit and catalog
17 discrimination complaints, helping to identify
18 affected communities and hate crime patterns and
19 discrimination patterns.

20 Additionally, the Commission continued to
21 focus attention on post-September 11 civil rights
22 issues throughout the year. We held a briefing on
23 bioterrorism and health care disparities in
24 March 2002, and we facilitated a briefing presentation
25 in Detroit, Michigan, on civil rights issues facing

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1 the Muslim and Arab communities in July 2002.

2 In June of 2003, the District of Columbia,
3 Maryland, and Virginia advisory committees of the
4 Commission published a report entitled "The Civil
5 Rights Concerns in the Metropolitan Washington, D.C.
6 Area in the Aftermath of September 11th."

7 Several of the Commission's other SACs --
8 state advisory committees -- published reports on the
9 aftermath of 9/11 as well, noting that as a result of
10 new antiterrorism regulations there was also an
11 increase in instances of harassment of, and
12 discrimination against, Muslim and Arab-Americans as
13 well as individuals of South Asian and Sikh
14 backgrounds.

15 With DOJ drafting the Domestic Security
16 Enhancement Act, or Patriot Act 2, the Commission is
17 particularly concerned with the impact of existing and
18 new measures and what they will have -- the impact
19 they will have on the civil rights of Muslims, Arab-
20 Americans, and people who people think are Muslims or
21 Arab-Americans, and lawful immigrants to the United
22 States.

23 Today's briefing will provide an update on
24 the civil rights implications of the Patriot Act and
25 related areas of ethnicity, with a particular focus on

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1 immigration, racial profiling, national origin, and
2 employment discrimination concerns.

3 So without further delay, I want to thank
4 our distinguished panelists for coming and start the
5 briefing.

6 Let me say -- introduce them first very
7 briefly. First, we have Mary Rose Oakar, who has been
8 the President of the American-Arab Anti-Discrimination
9 Committee, ADC, since June 2003, and has served on its
10 Advisory Board since the organization's inception in
11 1980. From 1977 to 1993, Ms. Oakar served as a
12 representative in the United States Congress. Welcome
13 to you, and thank you very much for coming.

14 The ADC is the largest Arab-American-based
15 organization in the United States. This non-partisan
16 organization is committed to empowering Arab-
17 Americans, defending the civil rights of all people of
18 Arab descent, promoting civil participation, and
19 supporting freedom and development in the Arab world.

20 ADC has brought lawsuits challenging, for
21 example, the Patriot Act, special registration, secret
22 detentions, and inclusion of immigrant information in
23 the national crime database.

24 Next, I want to welcome Paul Rosenzweig,
25 who is a Senior Legal Research Fellow for the Center

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1 for Legal and Judicial Studies at The Heritage
2 Foundation, as well as a part-time professor at George
3 Mason University School of Law. He has authored and
4 co-authored several articles on terrorism-related
5 issues for The Heritage Foundation.

6 Before coming to the Foundation, he was in
7 private legal practice specializing in federal
8 appellate work, criminal law, and legal ethics. He
9 has also served as the Chief Investigative Counsel for
10 the House Committee on Transportation and
11 Infrastructure, as well as the Senior Litigation
12 Counsel and Associate Independent Counsel for the
13 Office of the Independent Counsel.

14 Finally, we have Timothy Edgar -- welcome
15 -- who is the Legislative Counsel in the Washington
16 Legislative Office of the American Civil Liberties
17 Union, responsible for national security, terrorism,
18 and immigration. Mr. Edgar joined the ACLU four
19 months before the attack of September 11th. He has
20 submitted testimony to Congress and previously
21 testified before this body on antiterrorism-related
22 measures.

23 He is a graduate of Harvard, where he
24 served on the Law Review and a law clerk for Judge
25 Sandra L. Lynch of the United States Court of Appeals

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1 for the First Circuit from 1997 to 1998. Prior to
2 joining the ACLU, Mr. Edgar was a lawyer in the
3 Washington, D.C. law firm Shea and Gardner.

4 Welcome to all of you, and we are going to
5 begin the discussion with opening statements from each
6 one of you, and then after that the Commissioners will
7 have some questions. And first I want to ask
8 Congresswoman Oakar, please proceed.

9 MS. OAKAR: Thank you very much, Madam
10 Chair, and members of this very important and
11 distinguished Commission. Thank you for inviting me
12 on behalf of ADC, which you have already explained is
13 a non-partisan, non-sectarian organization with
14 members in every state in the union.

15 What I would like to do, if I may, is
16 refer you first and foremost to this passout. And in
17 the middle of the passout you'll see the range of
18 countries -- 24 to be precise -- that we're talking
19 about, and also the hate crime report that we wrote,
20 which is part of the Congressional Record, etcetera.

21 But it's not just Arab-Americans, it's
22 anybody who looks like Arab-Americans, anybody who may
23 be Muslim or other religions that unfortunately there
24 is a painful unawareness of, etcetera.

25 So the Arab-American, Muslim, and South

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1 Asian communities in particular have faced
2 extraordinary difficulties in these days, weeks, and
3 months since September 11th. The anxiety created in
4 the community by hate crimes and discrimination was
5 compounded by serious civil liberties concerns
6 regarding aspects of the investigation into the
7 terrible terrorist attacks and the new homeland
8 security policies and legislation.

9 The atmosphere of fear and suspicion was
10 exacerbated by a campaign in American popular culture
11 and media of vicious defamation and vilification
12 against Arabs, Islam, etcetera, including defamation
13 by well-known public figures.

14 While we may presume -- now, public
15 figures have suggested maybe we should intern -- for
16 example, as we did with the Japanese -- all Arab-
17 Americans, and so on. While we may presume that such
18 remarks were made in a non-malicious manner, many took
19 these and similar remarks as a signal to produce with
20 advocating such point of view.

21 In this case, should we raise the
22 possibility of internment for -- of Arab-Americans
23 such as General John Abizaid, Commander of the U.S.
24 Central Command in charge of all U.S. military
25 operations in Iraq and Afghanistan.

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1 How about two Congress members -- Nick
2 Rahall and Darell Issa? Or how about Secretary of
3 Energy Spencer Abraham, Senator John Sununu, former
4 Senator George Mitchell, Kasey Kasem, Doug Flutie,
5 etcetera? So, I mean, the presumption of internment
6 is totally absurd, but that has been, unfortunately,
7 some of the dialogue that has been throughout our
8 country.

9 While civil liberty abuses have been deeply
10 troubling, even at times outrageous and concerns
11 remain high, the situation could easily have been
12 worse than it was. The most onerous aspects of the
13 backlash, particularly the upsurge in violent hate
14 crimes -- and we gave you a hate crime report here, in
15 two years we're doing another one that will be out in
16 September -- concentrated in the first nine weeks
17 following the September 11th attacks.

18 Statements of support by leading Americans
19 and aggressive action by some federal, state, and
20 local law enforcement against vigilantes, and the
21 widespread public outcry against -- by some against
22 hate crimes, combined to contain the level of violence
23 and terminated sooner rather than later in some cases.

24 One noted government official, a good
25 friend of the Arab-American community, is Secretary of

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1 Transportation Norman Mineta, who went out of his way
2 repeatedly explaining to the airlines that removing
3 passengers based on their national origin, race, or
4 religion is not only "illegal," but also immoral.

5 It is ADC's hope that the information
6 provided in this presentation is used as a record of
7 the experiences of the community during this period of
8 unprecedented difficulty, and that it will contribute
9 to the continuing development of tolerant, secure, and
10 free American society.

11 So let me go into hate crimes and illegal
12 discrimination. Between 2001 and September 2002, ADC
13 received more than 800 complaints of employment
14 discrimination representing a fourfold increase over
15 previous annual rates for employment discrimination in
16 the past decade.

17 During the first nine weeks following
18 September 11th, ADC confirmed over 700 violent
19 incidents aimed at Arab-Americans and those perceived
20 to be Arab-Americans, including in my hometown and
21 Peter's -- the distinguished Commissioner's hometown
22 of Cleveland, Ohio.

23 Institutionalized discrimination is
24 defined a bias occurring within a specific system,
25 procedure, or organization. Following the rash of

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1 hate crimes and violence against Arab-Americans and
2 others in the first nine weeks, institutionalized
3 discrimination from both government and private
4 sectors became the most prevalent form of anti-Arab
5 discrimination.

6 In the first six months following
7 September 11th, ADC received four times its usual
8 volume of calls, e-mails, letters from its
9 constituents, reporting illegal airline, police, FBI,
10 INS misconduct; denial of service; physical and
11 psychological attacks.

12 Focusing on Arabs, Arab-Americans,
13 etcetera, not only flies against our constitutional
14 dedication to equality under the law, but it is also
15 an ineffective tool of law enforcement. It does not
16 adequately respond to the horrendous violence and
17 extreme terrorism posed by al-Qaeda and their allies
18 who come from various backgrounds and ignores the
19 considerable threats posed by fanatical extremists and
20 potential terrorists from completely different
21 political movements and perspectives.

22 One of the most striking features of the
23 backlash has been the extent to which the government
24 has strongly opposed discrimination by private
25 employers against Arab-Americans and others, but at

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1 the same time has reserved its right toward the
2 enactment of discriminatory policies or selected
3 enforcement of laws and regulations in a
4 discrimination fashion.

5 For example, President Bush and other
6 members of the administration have made numerous
7 statements against racial profiling and illegal
8 discrimination, yet they initiate programs targeting
9 Arabs and Arab-Americans such as the special call-in
10 registration program, and we find that somewhat
11 ironic.

12 This country's experience with terrorism
13 demonstrates the ineffectiveness of using racial or
14 religious markers as keys to finding terrorist
15 suspects, both actual and potential. Americans of
16 non-Arab descent, such as John Walker Lindh, Jose
17 Padilla, Richard Reid, a British national of English-
18 Jamaican heritage, Zacarias Moussaoui, a French
19 national, are all examples of how neither ethnicity
20 nor national origin are consistent characteristics of
21 potential al-Qaeda operatives.

22 Terrorist threats to this country flow not
23 only from international sources, but from domestic
24 ones as well. The second-worst terrorist attack on
25 U.S. soil is the attack on the federal building in

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1 Oklahoma City that was the act of domestic terrorism
2 including caucasian men. We did not see racial
3 profiling then when that happened.

4 The anthrax murders widely were considered
5 to be instances of domestic terrorism. The conspiracy
6 to bomb the California office of an Arab-American
7 Congressman and a major mosque has been determined by
8 the Department of Justice to be plots of Jewish
9 militants and extremists.

10 The October 2002 sniper rampage that
11 terrorized suburban Washington is another example of
12 homegrown terrorism. So terrorism exists across the
13 board in many other instances.

14 Immigration -- I have already asked you to
15 take a look at the map, and this is what is
16 particularly selective. Among the subjects of
17 greatest concern to Arab-Americans in the wake of
18 September 11th are the new set of government policies
19 regarding immigration and immigration law enforcement,
20 which represent the reintroduction of ethnic and
21 national origin discrimination into the American
22 immigration system.

23 Peter Rodino, who did a lot on immigration
24 law when I was in Congress, is probably looking upon
25 us saying, "What happened?" One of the most troubling

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1 pieces of this sort of legislation is the call-in
2 registration component of the National Security Entry-
3 Exit Registration System, aimed exclusively at men
4 over the age of 16 who entered the U.S. before
5 September 2000 on non-immigrant visas from 25
6 countries, all of which are Arab or Muslim, with the
7 exception of North Korea. And I don't know too many
8 people who come from North Korea, so it's pretty much
9 exclusively those individuals.

10 These men were required to register with
11 local immigration offices by a specified date
12 deadline, and also required to register at designated
13 ports of departure prior to leaving the U.S. Finding
14 the immigration offices at airports was a major
15 problem, if they were even open, for many individuals.

16 And I understand the problem, because they
17 transfer 186,000 federal employees into various other
18 agencies. So they weren't prepared to have everything
19 in order, and as a result many of these individuals
20 became deportable and resulted in criminal charges
21 because they failed to register, in many cases through
22 no fault of their own.

23 While two of the requirements have been
24 suspended with the initiation of the U.S. Visit
25 Registration Program, the other requirements continue

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1 to be in effect. And as a result of this program
2 there are 13,000 Arab and Muslim men that have been
3 issued with notices to appear for possible
4 deportation.

5 For example, a group of Kuwaiti students,
6 most of whom are in their senior year here in the
7 United States, could not register at an airport in
8 time, because nobody was at the Homeland Security
9 Office when they wanted to take their flight, and so
10 they took the evening flight and did not register out.

11 And as a result, now they can't come back into the
12 country to finish their senior year.

13 In addition to imprisonment, those who are
14 detained under the program face immediate deportation
15 if their visa status is found to be out of status,
16 even though many have been rendered as such due to
17 processing delays out of their control and were not
18 notified properly.

19 Once behind bars, detainees may wait
20 anywhere -- this is I think somewhat significant --
21 from several hours to several months before either
22 learning the reason for their detention or being
23 allowed to contact an attorney. Allegations of
24 physical and psychological abuse of detainees have
25 been supported by the Inspector General at the

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1 Department of Justice in his latest report.

2 It is important to note that the
3 overwhelming majority of these individuals are not
4 accused, or even suspected, of any involvement in or
5 knowledge of any form of terrorism. It was simply
6 Arab or Muslim men who are in some often trivial
7 manner out of status.

8 Most of these individuals were ones who
9 were eligible for relief by either having a U.S.
10 citizen spouse who has already petitioned on their
11 behalf, or the service -- with the services element of
12 immigration, or who have already been approved but
13 they weren't yet notified that they were approved for
14 a green card, and as a result they were out of status.

15 In December 2001, ADC joined 18 other
16 civil and human rights organizations, including ACLU
17 and Amnesty International, in a lawsuit against the
18 DOJ requesting the basic information on the detainees.

19 On the August 2nd -- on August 2, 2002, Judge Gladys
20 Kessler of the Federal District Court ordered the
21 government to comply with the request to release the
22 names of the detainees.

23 The government successfully appealed the
24 decision, winning its case on national security
25 grounds. Unfortunately, the Supreme Court denied to

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1 hear the case, and it has not been heard. But until
2 all of the names are released, we will never be sure
3 just how many people were arrested, how many were
4 deported or released, how many still remain in
5 detention under conditions that we feel are against
6 the Constitution of the United States.

7 We could go into unjust deportations, and
8 I would be happy to give you all kinds of examples.
9 In the interest of time, I won't. I'll just give one
10 -- Ansar Mahmood, who is Pakistani, not Arab, but
11 looks like it. He's an Arab. Was unjustly deported
12 for nothing more than helping a fellow immigrant who
13 he did not know was out of status with housing needs.

14 And so the list goes on and on. There
15 have been also court rulings that criticize the secret
16 detentions and clandestine immigration trials -- for
17 example, the one in New Jersey on March 26, 2002,
18 where Judge D'Italia ruled that county jail
19 authorities could not keep secret the names of
20 individuals detained on immigration charges.

21 He warned that law enforcers must not
22 compromise civil rights even in a state of emergency.

23 And there are other very fine examples of judges who
24 have criticized the constitutionality of secret
25 immigration hearings.

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1 Racial profiling is another topic that
2 I'll briefly cover in law enforcement interviews. The
3 government has been in the process of informally
4 investigating thousands of young men, mostly of Arab
5 descent. While the interviews were technically
6 voluntary, many of the men felt that they had little
7 choice in the matter. It is frightening when somebody
8 calls you or wants to see you about, you know, why
9 you're here or ask you questions because your name is
10 Mohammed or other similar names.

11 This information is being gathered into a
12 national database, suggesting that the whole point of
13 the exercise is to collect and maintain dossiers on
14 people of certain description -- young Arab men --
15 particularly because federal terrorism investigators
16 insisted that none of the 8,000 men were terrorist
17 suspects and that they have no reason to believe that
18 they had any useful knowledge regarding these issues.

19 These interviews seemed driven by
20 interviews -- interviewees' ethnicity, gender, and
21 country of origin. This is --

22 CHAIRPERSON BERRY: You'll have to sum up.

23 MS. OAKAR: Oh, I'm sorry. Okay. Well,
24 let me just give you one example of that. I'm sorry.
25 I forgot those red lights are --

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1 (Laughter.)

2 Let me just give you one quick example,
3 and then --

4 CHAIRPERSON BERRY: Okay.

5 MS. OAKAR: I wanted to go into the
6 Patriot Act, but let me just give you one quick
7 example of this EEOC problem. If FBI agents visit an
8 employer's place of work and find no problem at all
9 and say everything is fine -- we have many cases where
10 these people were suspended, just because they came to
11 interview them.

12 On the Patriot Act, let me just quickly
13 say that we find the fact -- I do as a former member
14 of Congress -- that it had no hearing before the
15 committees. Many members say that while they voted
16 for it, they thought it was the Patriot Act that
17 really came out of the Judiciary Committee in a
18 bipartisan manner and did not read the entire Patriot
19 Act, and that's one reason why 290 entities, cities,
20 and states, etcetera, have passed resolution against
21 the entire Act. We are not against the entire Act,
22 but we have filed a lawsuit against Section 215.

23 I'll be glad to answer any questions that
24 your distinguished committee, Madam Chair, may have.

25 Thank you so much.

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1 CHAIRPERSON BERRY: Thank you very much,
2 Congresswoman Oakar.

3 MS. OAKAR: Yes.

4 COMMISSIONER BRACERAS: Are we holding all
5 of our questions --

6 CHAIRPERSON BERRY: Yes, we are.

7 COMMISSIONER BRACERAS: -- until the end?

8 CHAIRPERSON BERRY: Please.

9 COMMISSIONER BRACERAS: Okay.

10 CHAIRPERSON BERRY: Mr. Rosenzweig.

11 MR. ROSENZWEIG: Yes. Is this on? Yes.
12 Thank you very much, Madam Chairman, members of the
13 Commission. I appreciate very much the opportunity to
14 come and talk to you.

15 The issue of civil rights and civil
16 liberties after September 11th is both a very
17 important one and a very broad one, and one cannot
18 possibly hope to cover the entire field. Ms. Oakar's
19 inability to finish in 15 minutes kind of demonstrates
20 that.

21 (Laughter.)

22 And I will attempt to address what I see
23 as some of the important issues, bearing in mind that
24 I'm happy to answer questions about others as we go
25 along.

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1 I think one of the things to begin with is
2 the realization that much of the unfortunate response
3 to -- discriminatory responses to Arab-Americans after
4 9/11 are non-governmental. Almost -- you know, most
5 of the issues that Ms. Oakar recorded -- you know,
6 employment discrimination, acts of violence -- are the
7 acts are the acts of Americans, other Americans.

8 And as Ms. Oakar acknowledged, the
9 Department of Justice has stood fast and steadfast in
10 combatting those. The President has spoken on a
11 number of occasions against racial discrimination
12 based upon ethnicity or national origin of this sort.

13 The Department of Justice has established an entire
14 unit that -- it has been processing more complaints of
15 discrimination of this private sort against Arab-
16 Americans than in the entire time before September
17 11th.

18 I recently saw an ad for a new director,
19 and I thought it was going to be very hard to fill
20 because one of the mandatory requirements is speaking
21 Arabic. And, you know, I'm not sure how many people
22 are both trained in civil rights and speak Arabic, but
23 that, too, is going forward.

24 So I think that we should at least begin
25 by acknowledging that the government's response to

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1 private acts of discrimination has been pretty good
2 since September 11th, except that I think the other
3 thing we need to sort of start with is something that,
4 Madam Chairman, you mentioned, which is the Inspector
5 General has conducted an extended series of
6 investigations.

7 And at least as to the particular act
8 itself, the Patriot Act, that is kind of the locus of
9 most people's anger or concern, he is determined that
10 none of the acts of discrimination and civil rights
11 violations that he has investigated are tied to that
12 Act.

13 They are I think not tied to policies of
14 the government, but rather to preexisting events that
15 have had unfortunate repercussions through our society
16 -- understandable ones, but unfortunate ones.

17 I want to take a chance to use this
18 opportunity to speak positively about some of the
19 things that are coming down the road that might
20 actually be answers to these problems, because we
21 can't eliminate people -- you know, the average
22 American's unfortunate reaction.

23 We can try and counsel against them. We
24 can try and urge them not to. But you can't change
25 human nature, as I'm sure this Commission well knows.

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1 But there are I think ways of moving forward that can
2 ameliorate those problems.

3 Madam Chairman, you mentioned in your
4 opening statement the computer-assisted passenger
5 prescreening is something that has struck concern.
6 And I've seen technological answers like that as
7 actually opportunities rather than areas of concern.
8 They are areas of concern for privacy advocates, to be
9 sure, because they think that this may generically
10 invade Americans' privacy. And that's a different
11 kind of discussion. I'm happy to talk about that as
12 well. I testified two days ago on that.

13 But assuming that this can be made to
14 work, so that investigative resources can be focused
15 on people who are of real concern, without invading
16 privacy generically, the institution of this kind of
17 prescreening will actually minimize the opportunities
18 for the types of governmental discrimination that so
19 trouble people -- the invidious choice for secondary
20 screening by a TSA screener of people who happen to
21 look Arab.

22 We can train them not to. We can urge
23 them not to. We can conduct oversight not to, but
24 that's always going to happen at some level. What
25 technologically offers us as a promise, a potential if

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1 you will, is the opportunity to modify that primary
2 behavior of governmental employees by actually
3 compelling them to focus resources not on people
4 because of race or national origin, but because of
5 external factors -- an inability to identify their
6 identity, appearance on a watch list, something like
7 that -- that is objective and not based upon the
8 immutable, subjective, invidious characteristics of
9 race or national origin.

10 So that's, you know, the positive side of
11 this. I suspect my role here, though, is to actually
12 defend some of the actions of the administration thus
13 far. And I don't want to stint on that, but I don't
14 want us to lose sight of the positive that's out
15 there.

16 I wanted to talk briefly -- Ms. Oakar
17 mentioned portions of the Patriot Act, Section 215.
18 And I know that Tim is probably going to talk about
19 Section 213. By and large, I think the concerns about
20 the Patriot Act are overblown, and you really don't
21 have to take my word for it. Senator Joe Biden, at
22 the oversight hearing the Senate Committee had the
23 other day said, "Criticism is misinformed and
24 overblown."

25 Dianne Feinstein said, "I haven't had a

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1 single abuse reported to me," and she said,
2 "particularly of Section 213, the 'sneak and peek'
3 provisions, that civil liberties are actually better
4 protected now in California, Idaho, New York, and in
5 other states that fell under jurisdictions, than they
6 were before the Patriot Act."

7 I think that's a significant kind of data
8 point, because obviously Senator Feinstein is not
9 predisposed to be a -- necessarily a positive
10 cheerleader for the Bush administration. Why is that?
11 Why is it that Section 213, to take but one example,
12 is deemed by some to be a success rather than a
13 failure?

14 Well, the authority to conduct delayed
15 notification warrants, which is exactly -- which is
16 the formal name for them -- has been around since the
17 1970s, right? The standard that was codified in the
18 statute has been around since the 1980s in an opinion,
19 U.S. v. Villegas, that was actually written by Judge
20 Amalya Lyle Kearse, a Carter appointee, very
21 distinguished jurist, brilliant lady.

22 Delayed notification of that sort is
23 obviously necessary, right? Think of the FBI's use of
24 delayed notification to install a listening device in
25 John Gotti's eating club in Little Italy. Would it

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1 have been of any use to have at the same time left him
2 a notification, "Dear John, Be sure and speak into the
3 microphone clearly, so that we can get what you have"?

4 (Laughter.)

5 No. Clearly, there are situations in
6 which this is of utility, and there have been
7 situations in which it has been of utility since
8 September 11th. The Department of Justice has
9 reported to the Judiciary Committee, and they do it
10 every six months, biennial report.

11 The last one suggested that they used this
12 47 different times, in many instances, for example, to
13 search suspected safehouses of terrorist
14 organizations. In one instance, to secure, through
15 delayed notifications, the records of illegal money
16 transfers to Iraq. That's an indicated case called
17 U.S. v. Dhafir.

18 The idea that we would have the same sort
19 of law enforcement techniques available to us to
20 investigate John Gotti and not apply them to
21 investigate Osama bin Laden seems to me a bit of a
22 mistaken setting of priorities. You know, I have no
23 brief for the mafia, but it seems to me that if we're
24 measuring balances of harm terrorism is at least as
25 bad, if not worse.

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1 Turning to Section 215, which is the one
2 that is the subject of Ms. Oakar's lawsuit, this is
3 the one that expands the authority under the FISA
4 statute to permit the government to secure business
5 records.

6 Now, it's called the angry librarian
7 provision, but, of course, it doesn't mention
8 libraries at all. It mentions all forms of business
9 records, in which librarians are legitimately
10 included.

11 Prior to September 11th, those sorts of
12 records could be secured through grand jury subpoena,
13 subject only to post-service review. This was done,
14 for example, in the Unabomber case, the Zodiac murder
15 case in New York, or the Versace murder in Miami. The
16 FISA provisions allow for preenforcement review by a
17 judiciary.

18 Now, one of the issues that I'm sure Tim
19 will mention, because we've actually had this debate
20 before, is whether or not that preenforcement judicial
21 review is effective. He suggests that the word "shall
22 issue" means that the judge has no discretion and
23 that, therefore, the preissuance review is a chimera.

24 I say that "shall issue" or "as requested"
25 or "as modified" allows the judge the review scope to

1 modify the warrant in forms that he sees fit. This
2 hasn't been tested yet, so obviously we don't know
3 what the court's answer is going to be. But to some
4 degree, we have to recognize that the picture of a
5 government running rampant through libraries around
6 the country is a bit of a chimera, a bit of a bugaboo,
7 and not a -- necessarily a reality.

8 I see that I'm getting close to the end,
9 so let me turn back to what I think are some kind of
10 core issues relating to this Commission. One that Ms.
11 Oakar discusses is the issue of secrecy in immigration
12 proceedings. In that issue, I'm a great deal more
13 sympathetic to the complaint, to be honest with you.

14 I think that there has got to be limits.
15 Clearly, there are situations in which the
16 government's presentation of evidence against a
17 potential deportee may impinge upon national security.

18 I think, however, candidly that the administration
19 has gone too far in asserting a blanket right to close
20 all immigration hearings based upon a broad
21 declaration.

22 But it is also not right to say that all
23 immigration hearings per force must be immigration
24 deportation hearings per force must be open. We need
25 to recognize a concept of calibrated transparency,

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1 graduated transparency, flexible transparency. You
2 can pick your adjective however you want.

3 But we must understand that sometimes
4 secrecy serves a valid purpose -- national security.
5 One thinks, you know, of our own history, the
6 Constitutional Convention was conducted in secret --
7 not, you know, for invidious reasons but because the
8 delegates there recognized that publication of all of
9 their views while they were working on this thing
10 might very well short-circuit the entire process.

11 So sometimes we have to understand that
12 some degree of secrecy in the War on Terror is
13 necessary. That having been said, I think that the
14 presumption should be for transparency, for
15 disclosure, and we've expressed that presumption in
16 laws like the Privacy Act and the Freedom of
17 Information Act. But we can't take those as
18 absolutes, as without exception.

19 They must be, particularly in the current
20 context, read with some measure of reason, with some
21 deference to the government's assertion of a national
22 security justification, but nonetheless with some
23 skepticism.

24 The final issue that I would want -- I
25 would speak to is the issue of racial profiling. I've

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1 already expressed my view that I think that there are
2 actually better answers to using race or national
3 origin or religion as a proxy, because we all agree
4 that in general it is a rotten proxy. It's
5 ineffective, it's inefficient, and it's invidious --
6 the three I's.

7 At the same time, we cannot, again, sweep
8 with too broad a brush. Ms. Oakar read a list of
9 people who have been involved who are in various acts,
10 like the sniper, who weren't Arabs or Muslims. And
11 that's absolutely true.

12 But at the same time if we go down the
13 litany of Madrid, Bali, Mombasa, you know, Casablanca,
14 Najif, Baghdad, we have to recognize that there is a
15 group of people who unfortunately are Muslim-Arab who
16 have as their goal the killing of Americans and
17 American allies based upon their radical conceptions.
18 They are not representative of other Muslims.

19 They have absolutely -- you know, they
20 don't speak for anybody I know who practices Islam,
21 all of whom recognize that Islam is a religion of
22 peace. But we can't simply blithely ignore the fact
23 that this group exists and that by and large it may
24 unfortunately be identified to a large degree, not
25 completely but to a large degree by ethnicity.

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1 How we balance that is terribly difficult.
 2 I think that the right answer is to preclude the use
 3 of race as a general indicator, but when in
 4 conjunction with, for example, other intelligence of
 5 an impending attack or something like that, we have to
 6 allow that to be one of the factors. And that's what
 7 I read the Department of Justice's racial profiling
 8 policy to say.

9 If there's a specific threat indicator
 10 that Washington Reagan is going to be -- is going to
 11 be hit, then at that point we might consider whether
 12 or not adding a racial component to our screening is
 13 worth it. Other than that, it's not worth it, but
 14 that's all that I read the Department as reserving.

15 I see that my time is up, so I will thank
 16 you for your attention and look forward to your
 17 questions.

18 CHAIRPERSON BERRY: Thank you very much,
 19 Mr. Rosenzweig.

20 Mr. Edgar, please.

21 MR. EDGAR: Hi. Thank you very much,
 22 Madam Chair, Justice Reynoso, and distinguished
 23 members of the Commission. On behalf of the American
 24 Civil Liberties Union, and its over 400,000 members, I
 25 welcome this opportunity to testify before you at this

1 important hearing on the impact of federal
2 antiterrorism measures on civil rights and civil
3 liberties.

4 The topic is a broad one, so I'm not going
5 to reverse the whole subject this morning. But I do
6 thank you for the opportunity to submit a written
7 statement, and I would remark that even in that
8 written statement there are important issues and
9 questions that I glossed over or that I didn't
10 include.

11 So if there are any of you that have more
12 questions about some of our arguments or positions,
13 please give me a call. We have extensive testimony
14 and writings and memos and reports that we can share
15 with you, if you think there's something more that you
16 want to look at.

17 On September 11th, American history was
18 forever changed when terrorists attacked our country,
19 murdering 3,000 of our fellow citizens and citizens
20 from around the world. The ACLU can never forget that
21 day. Our national offices in New York and Washington
22 were evacuated, and many of us lost friends and loved
23 ones.

24 The ACLU, believe me, understands the
25 threat of terrorism, and we have pledged to support

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1 the government's efforts to fight terrorism, even as
2 we stay true to the values of our organization in
3 standing strong for civil liberties.

4 Unfortunately, since that day we have seen
5 too many government actions adopted in haste under the
6 name of national security, which sacrificed civil
7 liberties without making us safer. These include new
8 initiatives which expand racial profiling and other
9 discriminatory practices, regulations and laws
10 curtailing basic due process and other rights of
11 immigrants and non-citizens, and surveillance laws and
12 programs that undermine the Fourth Amendment.

13 These initiatives share a common theme.
14 They eliminate the essential checks of judicial review
15 and public scrutiny that serve to protect the innocent
16 by giving judges, Congress, and the public a
17 meaningful role in overseeing government action. They
18 do so either by eliminating that role altogether --
19 for example, the Total Information Awareness Program,
20 other systems like that, or by reducing the standard
21 for review to the point where the judge has little to
22 do but rubberstamp the government's actions.

23 And I'll address the issue about "shall
24 issue" later.

25 Some might question whether these

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1 government actions, which go to the heart of the
2 structure of power within our society, are in fact
3 civil rights issues at all, because they view civil
4 rights primarily as a question of the government's
5 response to private discrimination.

6 These issues are in fact core civil rights
7 issues. Our history as a nation shows that excessive
8 powers, unchecked powers, that are used in the name of
9 national security have been the most potent weapon
10 against political and social movements that challenge
11 the status quo, including most especially the civil
12 rights movement.

13 These include the infiltration of the
14 civil rights movement by segregation as red squads and
15 intelligence agencies in the 1950s and '60s. The use
16 of deportation powers against labor activists and
17 others who were accused of flirtation with left wing
18 ideology. And perhaps the most famous example, the
19 FBI's use of a national security wiretap -- the direct
20 ancestor of today's foreign intelligence powers -- to
21 monitor the private life of Dr. Martin Luther King,
22 Jr.

23 These abuses of national security powers
24 are not relics of the past, nor do they respect
25 political ideology. We have uncovered, for example,

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1 in Denver just recently files that were being held by
2 the Denver police on thousands of political protesters
3 in that city, people who are members of such radical
4 organizations as the American Friends Service
5 Committee, and Amnesty International, which was
6 described in the files as a criminal extremist group.

7 Anti-abortion protesters, Second Amendment
8 groups, and other conservatives also fear that their
9 political activity could come under the watchful eye
10 of a hostile administration. The weakening of civil
11 liberties protections has another corrosive effect.
12 As described by Congresswoman Oakar, they set a
13 powerful example that is completely at odds with the
14 government's laudable and entirely commendable efforts
15 to condemn and punish private discrimination.

16 Justice Louis D. Brandeis said in *Olmstead*
17 *v. United States*, the opinion that legalized
18 wiretapping in this country, dissenting from that
19 opinion he said, "Our government is the potent, the
20 omnipresent teacher. For good or for ill, it teaches
21 the whole people by its example."

22 What, then, has the government been
23 teaching us since September 11th? It has taught us
24 that racial profiling, the use of race or ethnicity to
25 put whole groups rather than individuals under a cloud

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1 of suspicion, is actually an effective practice, which
2 while distasteful can and should be used when it
3 really matters, such as when national security is at
4 stake.

5 It has taught us that nationals of certain
6 countries, without any individual suspicion, can and
7 should be registered, fingerprinted, and questioned
8 about their political views and their religious
9 beliefs. It has taught us that when it becomes
10 inconvenient to comply with the orders of immigration
11 judges, the government will simply draft a rule
12 allowing it to nullify the orders for as long as
13 necessary while it appeals them.

14 It has taught us that your home can be
15 searched without your knowledge, even in garden
16 variety criminal cases unrelated to terrorism, and
17 that it will oppose any reasonable effort to define
18 with some greater degree of narrowness the specific
19 reasons when they should be allowed to use such an
20 intrusive power.

21 It has taught us that citizens of the
22 United States can be locked up in a military prison,
23 without charge or access to counsel, simply by being
24 labeled an enemy combatant in the War on Terrorism.
25 It has taught us that qualified, effective, legal

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1 immigrant airport screeners, including veterans of the
 2 U.S. Armed Forces, can and should be fired to satisfy
 3 an irrational new citizenship requirement that top
 4 security experts, including the former Director of LAX
 5 Airport, believe will undermine and not enhance
 6 security.

7 These lessons have certainly undermined
 8 the government's position that Muslims and Arabs in
 9 general, as opposed to specific suspects, should be
 10 equated with terrorists. For example, by sending
 11 mixed messages on the issue of racial profiling, the
 12 government severely undermines a very powerful reason
 13 the practice has been prohibited by many police
 14 departments. That reason: it doesn't work.

15 Focusing attention on large groups rather
 16 than individuals wastes law enforcement resources that
 17 should be spent running down leads and examining those
 18 who are in fact suspicious. It's just bad policy from
 19 a security standpoint to ignore the suspicious
 20 behavior of a Richard Reid or a John Walker Lindh who
 21 doesn't fit the profile, while harassing every young
 22 Arab male traveler.

23 And my point here is to point out that
 24 it's not only unfair, that it's not only distasteful,
 25 something that we all agree, but that it doesn't work.

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1 And that when you send a message that when it really
2 matters, when we're facing something that's really
3 important like terrorism, that we should do it, you
4 undermine the basic point that racial profiling
5 doesn't work. Instead, it's simply an argument about,
6 when is it really important and when isn't it? And
7 that -- that does more than anything possible to
8 encourage the use of racial profiling.

9 Fortunately, despite the government's bad
10 example, many ordinary Americans -- left, right, and
11 the center -- have joined together in an unprecedented
12 movement to defend the Constitution and American
13 freedoms against the false notion that America must
14 give up freedoms to guard its security.

15 And I find it very unfortunate that Mr.
16 Rosenzweig has, you know, in his written statement --
17 and I know he didn't say it orally here today --
18 joined some of the rhetoric of John Ashcroft and
19 others in claiming that this movement is anti
20 antiterrorism. In other words, providing comfort to
21 terrorists, which is deeply unfair and unworthy of the
22 nation's commitment to reasoned debate.

23 I'm also disappointed that I've seen that
24 some members of this Commission has issued a press
25 release that repeats some of the DOJ's own boilerplate

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1 about the Patriot Act. I think that -- look, I do
2 believe that there have been distortions of the
3 Patriot Act on both sides of the debate, including
4 those who are critics of the Act.

5 But I think that it's very important to
6 look at the specific provisions and to look at the
7 specific changes that we're proposing, which are
8 extremely modest and reasonable, and not to simply
9 repeat, you know, these are tools we had against the
10 mafia and now we're looking at terrorists.

11 I will explain to you -- and I'd be happy
12 to -- why that's an incredibly misleading statement.
13 It's not --

14 COMMISSIONER BRACERAS: Point of personal
15 privilege. Since you're talking about a statement
16 that I released, along with Commissioner Kirsanow, I'd
17 like to address that.

18 CHAIRPERSON BERRY: Did he mention your
19 name?

20 COMMISSIONER BRACERAS: No. He mentioned
21 the statement, and I would just --

22 CHAIRPERSON BERRY: What statement? Did
23 you give it to us?

24 COMMISSIONER BRACERAS: I don't have to
25 give it to you.

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1 CHAIRPERSON BERRY: For the record, I
2 would like to know what the -- I would like to inquire
3 into what the statement is that you are discussing,
4 Commissioner Braceras, since --

5 COMMISSIONER BRACERAS: That's fine.
6 Commissioner Kirsanow and I issued a press release
7 about our own views of today's hearing and our hopes
8 for today's hearing. But what I would like to address
9 -- and I -- I certainly agree with you that specific
10 criticisms of the Patriot Act need to be addressed and
11 taken seriously.

12 And I thought -- I very much intended in
13 the statement to make that clear, that what
14 Commissioner Kirsanow and I object to is some of the
15 overblown rhetoric, not specific challenges. And what
16 -- our aspirations for this hearing were to get into
17 some of that nitty-gritty, some of the technical
18 things about this particular law or other laws that
19 may be objectionable, so that this Commission can be
20 constructive in recommending ways to change them.

21 So it was not -- certainly not an attack
22 on the ACLU or on anyone else who might criticize this
23 law. This law is not a perfect law, and we all know
24 that. So I welcome your suggestions, and I -- I hope
25 to hear specific suggestions instead of just rhetoric.

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1 That's what I'm hoping to hear.

2 CHAIRPERSON BERRY: No. No. You will not
3 -- we will not engage in a debate about a statement
4 which has not been shared, and to which we know --
5 about which we officially know nothing.

6 COMMISSIONER BRACERAS: He raised it,
7 so --

8 CHAIRPERSON BERRY: If the statement is to
9 be discussed, I ask at this point that it be entered
10 into the record. That's number one. So that we all
11 know what it is we're discussing, and so that the
12 record will show what it is we're discussing.

13 COMMISSIONER BRACERAS: That's fine.

14 CHAIRPERSON BERRY: So unless it's a
15 secret statement --

16 COMMISSIONER BRACERAS: No, it's public.

17 CHAIRPERSON BERRY: -- then we would like
18 to have it.

19 Secondly, it is unprecedented for members
20 of this Commission to issue a press release concerning
21 a matter that is before this Commission while the
22 Commission is deliberating on a matter to get
23 information to find out what it thinks about an issue.
24 While I note that that is unprecedented, a lot of
25 things happen around here that are unprecedented.

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1 And we're taking up your time, so I'm
2 going to give you more time to have discussion, so
3 that you don't -- you're not cut off in your
4 discussion of the Patriot Act.

5 But I will recognize you, Commissioner
6 Edley.

7 COMMISSIONER EDLEY: Well, I have a copy
8 of it, and it does -- I have a copy of what was
9 distributed to the audience, and just -- and it does
10 say, Commissioner Braceras, "Opponents of the Patriot
11 Act" --

12 COMMISSIONER BRACERAS: Not all --

13 COMMISSIONER EDLEY: It does -- it says,
14 "Opponents of the Patriot Act" --

15 COMMISSIONER BRACERAS: Fine.

16 COMMISSIONER EDLEY: -- "have
17 irresponsibly suggested that the Act empowers the
18 government to spy on ordinary citizens."

19 COMMISSIONER BRACERAS: Well, perhaps I
20 should -- perhaps we should have said "some
21 opponents." But it does not say "all opponents." We
22 don't need to debate this right now. The point is --

23 COMMISSIONER EDLEY: You jumped in. All I
24 was saying in defense of the --

25 CHAIRPERSON BERRY: Oh, let's debate it.

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1 (Laughter.)

2 COMMISSIONER EDLEY: Because I'm an
3 opponent of the Patriot Act. I've been attacked as
4 irresponsibly suggesting --

5 COMMISSIONER BRACERAS: There have been
6 very many irresponsible attacks.

7 COMMISSIONER EDLEY: Right.

8 COMMISSIONER BRACERAS: Many.

9 COMMISSIONER EDLEY: But not -- but all
10 haven't, and let's find out whether the ACLU is one of
11 the opponents --

12 COMMISSIONER BRACERAS: Look, the only --

13 COMMISSIONER EDLEY: -- that you're
14 talking about.

15 COMMISSIONER BRACERAS: -- thing in -- the
16 purpose of that release was to express our aspirations
17 for this hearing, that it would help to clarify the
18 law, what the law actually does, that it would clarify
19 what the objections to the law are, and constructively
20 move forward to put forward recommendations about how
21 the law can be better.

22 CHAIRPERSON BERRY: I resent having this
23 meeting turn into a discussion of a press release by
24 some members of this Commission. As I say, it is
25 unprecedented for this behavior to occur in the first

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1 place. Of course, we can do nothing about it except
2 to point out that it is unprecedented, and I've been
3 on this Commission longer than anybody. And when I
4 was a dissenter and was angry about everything the
5 Commission did, I never would have had the temerity to
6 issue a press release denouncing people while the
7 Commission was trying to receive information to try to
8 make up its mind what they thought about --

9 COMMISSIONER BRACERAS: Although you issue
10 press releases all the time on behalf of all of us,
11 which most of us have never even seen.

12 CHAIRPERSON BERRY: However, as Chairman
13 of the Commission -- as a matter of fact, the chair is
14 the only spokesperson for the Commission, but that's
15 neither here nor there. All I will say is we'll give
16 you back the balance of your time, so that you can
17 give your testimony. And I will note that
18 Commissioner Braceras has said that she really did not
19 mean everybody who is opposed to the Patriot Act --

20 COMMISSIONER BRACERAS: I'll let the
21 statement speak for itself. And if you want to
22 discuss it later, we can.

23 CHAIRPERSON BERRY: -- if that satisfies
24 you, Mr. Edgar. And could you please address the
25 Patriot Act and --

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1 MR. EDGAR: Sure.

2 CHAIRPERSON BERRY: -- your position on
3 its provisions, so that we may be enlightened --

4 COMMISSIONER BRACERAS: Yes, please do.

5 CHAIRPERSON BERRY: -- and so that the
6 public may be enlightened about this issue.

7 MR. EDGAR: Well, Commissioner --

8 COMMISSIONER EDLEY: But please don't be
9 irresponsible.

10 MR. EDGAR: I promise not to be
11 irresponsible. And, Commissioner Braceras, I just
12 wanted to say I welcome -- that's exactly the
13 discussion that I want to have as well, which is to
14 talk about what the Patriot Act does and how we can
15 make it better.

16 Let me just continue to point out that --

17 CHAIRPERSON BERRY: And could the clock be
18 reset to give him eight more minutes. Thank you.

19 MR. EDGAR: Thank you. Thank you, Madam
20 Chair.

21 To point out that the critics of the
22 Patriot Act include not only the ACLU and other civil
23 rights organizations, such as the American-Arab Anti-
24 Discrimination Committee, but also some of the
25 nation's oldest and largest conservative

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1 organizations. The Free Congress Foundation,
2 Americans for Tax Reform, the American Conservative
3 Union, and the Gun Owners of America have all joined
4 us in criticizing certain ways in which this law
5 increases executive power.

6 These organizations and people from across
7 the country have passed resolutions in defense of
8 civil liberties and in protest of new government
9 policies, including the Patriot Act, in 272
10 communities in 38 states, including three state
11 legislatures -- Alaska, Hawaii, and Vermont.

12 The cities of New York and Washington,
13 D.C., whose leaders can certainly not be accused of
14 belonging to an anti antiterrorism movement, are among
15 those communities that have rejected some parts of the
16 Patriot Act and other actions that have undermined
17 basic freedom since September 11th.

18 Supporters of civil liberties have also
19 been accused of exaggerating the danger to civil
20 liberties. Many note that while there have been a
21 host of documented and very serious civil liberties
22 abuses involving the September 11th immigration
23 detainees and other quite concrete examples of federal
24 overreaching, many of the powers under the Patriot Act
25 to which the critics object, including the searches of

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1 library and other personal records, secret searches
2 and other things, have either not been used at all or
3 at least have not resulted in serious documented
4 abuses.

5 I think that there's a real problem with
6 this particular criticism, because the reality is that
7 those parts of the Patriot Act that involve detention
8 of people have not been used. Instead, the government
9 has used all sorts of other detention authorities,
10 including new immigration regulations, enemy combatant
11 detentions, material witness statute, and other
12 things. That's where we're going to see visible
13 abuses.

14 The other parts of the Patriot Act, those
15 that have been used or which we don't know whether
16 they've been used or not because it's secret, are
17 surveillance provisions. And it really is not fair to
18 ask the public to please come forward and prove that
19 they've been unlawfully surveilled by the government.
20 I mean, as a matter of common sense, unlawful
21 surveillance and invasion of privacy will probably be
22 secret, if it's happening. We don't know it's
23 happening; we don't know if it isn't happening.

24 We found out many years after some of the
25 worst abuses of the '50s and '60s. We didn't know

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1 they were happening at the time. We only found out
2 about them after Congress thoroughly examined them
3 under the Church Committee.

4 So I just think that it's a misplaced
5 criticism to say that, you know, an advocacy group or
6 anyone else is going to know whether there are certain
7 surveillance abuses that are happening, because that's
8 the nature of secret surveillance. You just don't
9 know whether it's happening or not. I assume that
10 it's not, but I don't really know, and I can't know.

11 I also believe the criticism is misplaced,
12 because it assumes that a badly written statute must
13 be misused before it can be amended to ensure against
14 very real and obvious potential for abuse. Under that
15 theory, the Founding Fathers should never have written
16 the Bill of Rights, since in 1789 there had not yet
17 been any civil liberties abuses under the new federal
18 constitution, which is what the Bill of Rights was
19 designed to prevent.

20 What are the aims of the ACLU and our
21 allies, the critics of the Patriot Act, and other
22 government action? Put simply, it's to restore
23 meaningful checks and balances to a government that
24 has seen a dangerous accumulation of all of its powers
25 -- executive, legislative, and judicial -- in one

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1 branch.

2 Again, this is exaggerated for effect.
3 The point is that the -- the point is that our
4 criticisms are about the accumulation of executive,
5 legislative, and judicial branch powers into one
6 branch, and that's what James Madison called the very
7 definition of tyranny.

8 We do not seek to repeal or take away any
9 surveillance or detention power. We believe that
10 terrorists should be wiretapped, or can be wiretapped.

11 We believe that terrorists can be searched under the
12 law, under the Constitution. They can be detained.

13 The question is whether there's going to
14 be a meaningful judicial check on those government
15 actions. And so as an example of that kind of
16 concrete and I think very modest but essential
17 improvement, I would suggest the Security and Freedom
18 Enhanced Act, the SAFE Act, which is sponsored by a
19 bipartisan team that includes Larry Craig, a Republic
20 of Idaho -- and I guarantee you not a card-carrying
21 member of the ACLU, and Dick Durbin, a Democrat from
22 Illinois.

23 We have three Republicans -- Larry Craig,
24 Mike Crapo, and John Sununu -- and three Democrats --
25 Dick Durbin, and I forget the other two -- who are

1 sponsoring this act. These adjustments to the Patriot
2 Act are quite modest, and yet would give great comfort
3 to the American people that rights will be respected
4 even in times of crisis.

5 So let's go through them carefully. On
6 Section 215, here's what it does. Under the current
7 act, if the government says, "I'm investigating
8 terrorism," or "I'm investigating -- I have an
9 intelligence investigation," I can obtain anybody's
10 records, and that can be library records, medical
11 records, or other records, simply by certifying to the
12 Foreign Intelligence Surveillance Court that these
13 records are relevant or are sought for my
14 investigation. That's an extremely broad power.

15 How broadly has it been used? Has it been
16 abused? I don't know. I can't know because those
17 records are classified. But it's a very broad power,
18 and it does say that the judge shall issue the order
19 if it's certified in the manner suggested.

20 Now, we could change that. We could point
21 to the thing that says modified, or we could change it
22 to "may." The problem is there's no standard.
23 There's no standard for whose records can be seized
24 under this provision.

25 Our view is that we should have a

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1 standard, and we should just simply have the same
2 standard that used to apply to a much more limited
3 version of this power before the Patriot Act passed,
4 and that is specific and articulable facts that these
5 records belong to a spy, a terrorist suspect, some
6 foreign agent, and that is a standard that's quite --
7 quite a ways below probable cause.

8 But it's quite a ways above nothing at
9 all, and that would give a great deal of comfort to
10 Americans to know that you can't launch an
11 investigation of everybody's reading habits. Now,
12 maybe they haven't done that yet, but you wouldn't be
13 able to if we passed this change to the SAFE Act.

14 The other provision would be to modify the
15 sneak and peek search of homes, businesses, and
16 others, without notice, to allow that, where you can
17 show that serious harm would result such as someone's
18 life being in danger, some -- you know, or other harms
19 like that that would cause people to flee.

20 But we wouldn't have a catch-all
21 provision. That's the problem with the provision as
22 it stands, that it basically threatens to allow these
23 kinds of secret searches to become routine. It says
24 that, look, if it will interfere with the prosecution,
25 I can deny notice. Well, that's a standard that

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1 really means -- means nothing. It's just something
2 the prosecution is going to be able to use when they
3 say it does.

4 And also, to have a presumptive seven-day
5 limit on these searches, so that -- the presumption is
6 seven days you give notice. Now, under a unusual
7 circumstance, of course you can get the judge to
8 approve and renew that notice, so that it -- so that
9 they can get an exception.

10 Roving wiretaps -- does it get rid of
11 roving wiretaps? No. What it says very simply is if
12 you want a roving wiretap you have to specify who
13 you're wiretapping. It seems pretty common sense. It
14 seems like what most people would think already is in
15 the law.

16 In fact, the law was badly written, and
17 the law seems to imply that you can have a roving
18 wiretap of an unknown suspect. And that's a very
19 serious thought. When you really think about it,
20 that's -- if that's really written the way it's
21 supposed to be written, that means that I can say, you
22 know, I imagine that I have a particular suspect, and
23 now I can -- I don't know what phone he is using, and
24 I don't know his identity.

25 So we say you have to know one or the

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1 other. You have to know the phone he's using, or you
2 have to know his identity. And you don't have to go
3 back to the judge every time he changes cell phones.

4 We want to narrow the definition of
5 domestic terrorism. Domestic terrorism currently
6 applies to any criminal act that might be seen as
7 dangerous and that is intended to influence the
8 government. This is the reason why the Patriot Act's
9 definition has given such pause and such fear to
10 members of protest groups that, you know, are involved
11 in demonstrations. Does that mean that there's
12 somebody who throws a rock through a window, that
13 that's going to be considered terrorism? Obviously,
14 it's criminal. They should be able to punish it.

15 So our idea would be, look, there's a list
16 of federal -- serious federal crimes of terrorism. If
17 you're a part of that, then you're a domestic
18 terrorist. If not, you are indeed -- you can be
19 investigated as a regular criminal.

20 And then we want to expand the sunset
21 clause of the Patriot Act to include a few provisions
22 that have been left out or left out of the sunset
23 clause, so that they can be reviewed when they come up
24 again. That would include national security letters.

25 And I'd like to welcome now that we -- I

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1 mean, I know that we've had some -- some fireworks
2 this morning, but I was hoping that maybe we could
3 work together, Mr. Rosenzweig and I, on the secret
4 hearings issue, because we in fact agree that hearings
5 can be closed when there are serious issues of
6 national security, or when there are other serious
7 issues that are involved.

8 Our basic disagreement with the
9 administration is that their policy was that they
10 could set a whole class of hundreds of hearings that
11 they said would not be open to the public, and that no
12 part of the hearing would be open to the public,
13 without any review by a judge as to whether the
14 hearing should be closed.

15 Our view is very simple. It's that if you
16 want to close the immigration hearing, you should have
17 to make a motion in front of the immigration judge,
18 and you should have to satisfy a certain standard that
19 shows that the hearing can indeed be closed on a case-
20 by-case basis. That's all we argued in the courts,
21 and that's the kind of legislation that we proposed.

22 So I hope that we can come to understand
23 that despite some of the fierce rhetoric on both sides
24 of the issue -- and I take responsibility for some of
25 what our friends have said -- whether I've said it or

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1 not, I take some responsibility -- that we can work
2 together to say, "Look, we can go back and look at the
3 Patriot Act. We can go back and look at some of these
4 policies on a bipartisan basis and change them."

5 But if we're wedded to this idea that any
6 time anyone criticizes parts of the Patriot Act or
7 other government actions that we have to circle the
8 wagons and defend every comma, I think that that's not
9 going to serve our country well.

10 So I hope that we can make some progress
11 today, and I welcome your questions, which I assume
12 will be very vigorous.

13 CHAIRPERSON BERRY: Okay. Questions from
14 -- thank you very much. Questions from Commissions?
15 Commissioner Kirsanow.

16 COMMISSIONER KIRSANOW: Thank you, Madam
17 Chair. I'd like to thank the panelists for appearing
18 today and giving us a very fine presentation. And I'd
19 also like to thank staff for getting these fine
20 panelists for us.

21 This has been a difficult issue with which
22 we've been wrestling for a long time -- balancing
23 civil rights and waging an effective war on terror. I
24 think all of the Commissioners here think that it's
25 important that we make sure that rights and liberties

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1 are protected, that individuals aren't singled out for
2 unfair treatment, subject to unsubstantiated charges,
3 false accusations, without the ability to defend
4 themselves.

5 I'd like to particularly welcome Mary Rose
6 Oakar. I was not one of your constituents, but you
7 are still one of the most beloved and respected people
8 in all of northeast Ohio.

9 MS. OAKAR: Thank you.

10 COMMISSIONER KIRSANOW: Because we're very
11 sensitive to that, I was a little disconcerted when I
12 was reading some of the materials that were presented
13 to the Commission, and particularly on page 3 of the
14 ADC's material which makes reference to me.

15 There's a paragraph that says -- and I'll
16 read it -- it says, "One noted public figure -- Peter
17 Kirsanow" -- I dispute that, I'm not that noted --

18 (Laughter.)

19 And one of President Bush's appointees to
20 the United States Commission on Civil Rights, has even
21 gone so far as to raise the possibility of mass
22 internment of Arab-Americans as a possible response to
23 any further terrorist acts on U.S. soil by persons of
24 Arab ethnicity.

25 Kirsanow raised the possibility of

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1 internment camps for the mass detention of Arab-
2 Americans at a Commission hearing in Detroit on
3 July 19, 2002. He did not condemn this idea, but
4 raised it as a serious and reasonable possibility in
5 the event of future terrorist attacks against the U.S.

6 Now, Ms. Oakar, I know you didn't write
7 this, and it is probably somebody else who wrote it,
8 who got it from somebody else, who got it from
9 somebody else, who got it from somebody else, and you
10 were not even the president when this was written.

11 Nonetheless, I think it's important
12 because this is something that has been going on for a
13 couple of years, and I think it's important for anyone
14 who may be alarmed that someone on the Commission
15 would make a statement like this understand what the
16 facts are.

17 In this short paragraph it says three
18 separate times that I raised the issue. It says I
19 didn't condemn it, and it indicates that I thought it
20 was a reasonable response. I did not raise the issue
21 in Detroit. The issue was raised by a member of the
22 ADC -- Mr. Saleh -- who is a member of the Detroit
23 chapter of the ADC. And he said that this, given the
24 current situation, does lead and could well lead to
25 situations as embarrassing as the Japanese internment

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1 camps in World War -- the second World War.

2 We're not unaware and we're not unmindful
3 of the fact that it was 18 months after the bombing at
4 Pearl Harbor that the internment camps were initiated.
5 We aren't 18 months away from September 11th. If
6 there is, in fact, another terrorist attack on the
7 United States, then such things can be revisited.

8 And then I went on to respond to that by
9 saying I agree with Mr. Saleh that we need always to
10 be vigilant to protect civil rights in the context of
11 -- even in this context, in the context of being at
12 war. I would suggest that the homeland security be --
13 may be one of the best ways of protecting civil
14 rights.

15 And then, specifically regarding his
16 concern related to Korematsu -- that is, internment --
17 I said I think the best way we can thwart that
18 Korematsu is to make sure that there is a balance, as
19 we're discussing today, between protecting civil
20 rights but also protecting safety at the same time.

21 Now, I want to reiterate it was not I who
22 raised it, and it indicates that I did not condemn it,
23 and that I thought it was a reasonable response.
24 First of all, with respect to not condemning it,
25 shortly after that particular meeting, I left and was

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1 standing out in the hallway in the presence of a
2 number of witnesses, several of whom are here today.

3 A reporter, who I later discovered was not
4 even in the meeting at the time that this exchange
5 occurred that I just described to you, was told --
6 again, I'm told by witnesses -- that a member of your
7 organization went up to him and said, "Kirsanow
8 supports detention camps."

9 He approaches me and says, "Can you
10 justify, Mr. Kirsanow, your insistence that we be
11 placed in internment camps?" I was astonished and
12 alarmed. I grabbed him by the arm, and even though
13 I'm an attorney I know that's a battery --

14 (Laughter.)

15 -- I pulled him to me and said, "If
16 there's anything you get out of this, make sure you
17 understand Kirsanow finds the very idea reprehensible.

18 That is repugnant to me." I was so alarmed mainly
19 because I thought in this hothouse environment that we
20 have, shortly after September 11th a member of the
21 Commission saying something like that could
22 unnecessarily agitate members of the Arab-American
23 community, the Southeast Asian community.

24 So I dragged him literally into the
25 restaurant of the hotel in which the meeting was being

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1 conducted, and for the next 15 minutes I repeated
2 again, perhaps a dozen times, again in the presence of
3 several witnesses, "This is abhorrent. I cannot stand
4 the idea. I do not think the government would ever do
5 something like that. It's completely off the table.
6 I reject it out of hand."

7 Nonetheless, there were a number of people
8 who believed that I had somehow raised the particular
9 issue. Now, I did condemn it, and, in fact, it
10 befuddles me why I, among all Commissioners, was
11 singled out for having failed to condemn it when I
12 did, in fact, do it. And, in fact, I didn't raise the
13 issue.

14 The material doesn't say that Ms. Braceras
15 failed to condemn the issue or that Commissioner -- or
16 Chairman Berry or Chris Edley failed to condemn it.
17 It singles me out.

18 Now, I will tell you this -- that I will
19 not retreat, however, from my position, that I think
20 the most effective means by which we can wage a war on
21 terror is to balance civil rights. The most effective
22 way we can protect civil rights is to wage a
23 relentless, unforgiving, vigorous war on terror. I
24 think we can balance the two, and I think history has
25 shown thus far that in the aftermath of 9/11 this

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1 administration has done a remarkable, if imperfect,
2 job of doing just that.

3 I agree there need to be adjustments to
4 the Act. No doubt about it. But for me the whole
5 idea of profiling and internment is not mere
6 conjecture. I look around here, and I suspect that
7 I'm one of the few people who has had actual
8 experience with profiling. And not just profiling,
9 but immediate family who have been profiled and have
10 experience with internment.

11 Not only internment for the purpose of
12 removing somebody from the population and singling
13 them out, but internment for the express purpose of
14 inflicting brutal punishment and privation. So for me
15 this is not theory, this is not some remote
16 possibility, it's vivid reality.

17 I didn't think it would ever happen in
18 this country. But for someone to suggest that somehow
19 I would not condemn it, or I would raise it as a
20 reasonable possibility, is an abomination and
21 despicable. And I've been trying to get that message
22 out for two years, but somehow there are people who
23 like to traffic in urban legends. Now --

24 CHAIRPERSON BERRY: Commissioner
25 Kirsanow --

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1 MS. OAKAR: May I respond to --

2 COMMISSIONER KIRSANOW: Point of personal
3 privilege. I just have a few other things to say.

4 CHAIRPERSON BERRY: Are you finished with
5 that point, though?

6 COMMISSIONER KIRSANOW: I have a request
7 of Ms. Oakar.

8 CHAIRPERSON BERRY: Ms. Oakar is --

9 COMMISSIONER KIRSANOW: I would say that I
10 am -- I will concede I'm not the most articulate
11 individual in the world, and that it's -- it's very
12 possible that because of some imprecision in language
13 or being maladroit in conveying my attempt, some good
14 faith individual actor could have misconstrued what I
15 had to say. So I say now for the hundredth time, I
16 condemn this. I would never raise the issue for the
17 reasons I have just mentioned.

18 And a couple of other things. One is --
19 again, I want to reiterate this is not directed at you
20 or your organization or the members of your
21 organization. There may be a few people who truck in
22 this kind of garbage, okay? But I'd like to ask you
23 one question and actually a couple of favors, one
24 Clevelander to another.

25 Could you please go back to the members of

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1 your organization and tell them they have no greater
2 ally in the protection of civil rights than Pete
3 Kirsanow. And, second, could you please really convey
4 to those who do traffic in this urban legend the fact
5 that they should cease and desist. Otherwise, I
6 should like to have a face-to-face discussion with
7 them. Could you do that for me, please?

8 CHAIRPERSON BERRY: Commissioner Kirsanow
9 -- before you answer the question, Congresswoman
10 Oakar, you should understand that most of what
11 Commissioner Kirsanow has told you about the occasion
12 is false. And we are getting the transcript, which we
13 will distribute to the audience when we have it, and
14 to the press, so that they can see how this actually
15 happened.

16 COMMISSIONER KIRSANOW: And you will see
17 the transcript --

18 CHAIRPERSON BERRY: And the transcript --
19 Commissioner Kirsanow, you have spoken for 10 minutes.

20 COMMISSIONER KIRSANOW: You just accused
21 me of --

22 CHAIRPERSON BERRY: I have just said that
23 the transcript, when we get it -- I don't want to
24 debate it. I'm not going to. We'll just hand the
25 transcript out, and people can see for themselves. I

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1 just don't want you to be --

2 COMMISSIONER KIRSANOW: That's fine.

3 CHAIRPERSON BERRY: -- locked into
4 agreeing to something when you don't understand the
5 circumstances and you were not there.

6 MS. OAKAR: Right.

7 CHAIRPERSON BERRY: The Detroit Free Press
8 paper -- and this is a matter of record, and you can
9 look it up on Nexis, anybody who is interested --
10 reported this whole incident, and the Detroit Free
11 Press was present when the hearing took place, the
12 briefing took place.

13 And I was about to close the meeting. It
14 was not when the man who was referenced was
15 testifying. I had said, "The meeting will now close."

16 We were finished. And just as I got ready to adjourn
17 it, Commissioner Kirsanow raised his hand and said he
18 had something else he wanted to say. The transcript
19 will bear me out when it's brought done.

20 And that's when he made the statement
21 about Japanese-Americans and Arabs. It was not in the
22 context of the statement made earlier. And the
23 reporter asked him -- and this is reported in the
24 story -- whether he would like to -- when it was all
25 finished came up and said -- asked him again did he

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1 really mean what he said.

2 I indeed, after the meeting, e-mailed
3 Commissioner Kirsanow to ask him to go on record
4 condemning what he had said, and to in fact repudiate
5 what he had said. I am not going to -- if he wants to
6 say something else he can, but I'll let the transcript
7 speak for itself when it is brought down in this
8 matter.

9 And I'll just say you may, of course, do
10 whatever you'd like. But if I were you, I would wait
11 until I saw what actually happened before I held
12 myself out.

13 And we're taking up this whole meeting,
14 which is supposed to be about the Patriot Act, to
15 discuss somebody's press release and somebody who
16 thinks somebody who is an opponent, and what somebody
17 said about something else. Maybe this is important.
18 Maybe I don't understand it.

19 But in any case, I would like to talk
20 about the Patriot Act if that's what we promised to
21 do. And if anybody has any questions about the
22 Patriot Act -- and we will give the transcript out as
23 soon as somebody goes up and finds it, so that we
24 can --

25 COMMISSIONER KIRSANOW: Point of personal

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1 privilege.

2 CHAIRPERSON BERRY: -- know what it is.
3 Yes.

4 COMMISSIONER KIRSANOW: Since I've just
5 been maligned again, I am very happy to send out the
6 transcript, because that was my saving grace. I have
7 witnesses present who were with me when the reporter
8 was there. That reporter is now present in the room.
9 We know precisely what transpired here. We also know
10 what transpired in terms of the distortion of my
11 statements.

12 I think it's reprehensible, and I'll tell
13 you what, if someone wants to continue to traffic in
14 that, it's up to them. I have certain options also.
15 But the fact of the matter is that, as I said before,
16 to me this is not speculative. I have -- I know
17 people who have been interned. I would never raise
18 such an issue.

19 The transcript will definitely show you I
20 was not the person who raised it. I was the only one
21 to address the issue. It was just raised, and it was
22 raised in the context of -- and here's some more of
23 the transcript for you, which I will read to you --
24 raised in this context.

25 This is -- and we have the transcript

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1 right here -- this is -- this is Mr. Saleh. "This is
2 why we hope it's a new America, it's not the same
3 America. There's a history of racism in this country.
4 It didn't stop being racist when the 14th and 15th
5 Amendments were enacted, as we're all painfully aware.
6 It hasn't changed substantially, and certainly
7 sufficiently, since 1964."

8 At that point, I then respond. Now I'll
9 let the transcript speak for itself, but I think it's
10 an incredible calami for someone to contend that
11 somehow I'm the -- the transcript is very clear --
12 that I raised it or I would approve of it or fail to
13 condemn it.

14 Commissioner Braceras was present.
15 Special Assistant Schuld was present. Other
16 individuals were present that I can name, who
17 overheard the entire conversation.

18 Ms. Berry, I don't believe you were there
19 at all, and I know what I heard. And I'm not going to
20 sit -- were you standing there when the reporter was
21 with me?

22 CHAIRPERSON BERRY: Oh, Commissioner --

23 COMMISSIONER KIRSANOW: No, you weren't.
24 And then you have the temerity to send out a press
25 release -- again, now blaming us for sending out press

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1 releases -- a press release without our approval, but
2 would -- could suggest that, in fact, I had indeed
3 made such a reprehensible statement, and stood behind
4 the possibility of a Korematsu being appropriate.

5 I kept my mouth shut about that. I kept
6 my mouth shut about that, but no more. I don't know
7 if you've had anyone who has been interned; I have.
8 I'm not going to take this anymore. If you could
9 please go to your organization and tell them, I'd
10 appreciate it. Thank you.

11 I'm out there to be a reputable person.
12 I'll accept her word. She's a fellow Clevelander.

13 And, finally, we get the record straight.

14 CHAIRPERSON BERRY: We will hand the
15 transcript as soon as we --

16 COMMISSIONER KIRSANOW: Hand it out.

17 MS. OAKAR: Madam Chair, let me just say
18 very quickly I would be happy to read the transcript
19 and decide if the transcript is -- you know, says it
20 all. But I do know this, and I -- first of all,
21 you've made your statement pretty clear to me, that
22 you're opposed to that for the record today.

23 CHAIRPERSON BERRY: Yes, which is good.

24 MS. OAKAR: And that's very important --

25 CHAIRPERSON BERRY: That's very good.

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1 MS. OAKAR: -- to me, and that -- that is
2 the essence of the way I'd like to leave it at the
3 moment.

4 And let me just say one thing also. I
5 have been misinterpreted and, in fact, by the press
6 many times. And there -- and I'm a guardian of the
7 First Amendment, as I'm sure you are. So if there was
8 a misinterpretation, you know, I'll make sure
9 something is changed.

10 COMMISSIONER KIRSANOW: Thank you, Ms.
11 Oakar. I appreciate it.

12 MS. OAKAR: After I read it, you know,
13 which is only fair. But I appreciate your statement
14 today.

15 I want to say one other thing, though,
16 about internment, if I might, and nothing to do with
17 you, Peter.

18 (Laughter.)

19 When I was in Congress before 9/11 -- I
20 left in '93 -- there was something going on in the
21 Justice Department where they were thinking of
22 interning individuals who happened to be Arab and
23 others who sort of look like them, in some place in
24 Louisiana. I mean, this is absolutely -- and they
25 came to my office.

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1 I remember Congressman Rahall and I and
2 some others -- one of the Senators, it may have been
3 Senator Mitchell, I'm not positive about that -- but
4 in any event, we asked to meet with them, and they met
5 in my office. And there was a plan of action to
6 intern certain individuals. And that was prior to
7 9/11, so I'm not -- I don't in any way relate that to
8 you at all, Mr. Kirsanow. I think you know that.

9 COMMISSIONER KIRSANOW: I know that.

10 MS. OAKAR: But I do think that that has
11 been a germ in certain individuals' minds. And you'll
12 notice I was generic when I mentioned that issue,
13 because I am very aware that that was -- the writing
14 was on the wall at times for different kinds of
15 people.

16 So I just wanted to state that. And thank
17 you, Madam Chair.

18 CHAIRPERSON BERRY: Does anybody have any
19 questions about the Patriot Act for this panel?

20 MS. OAKAR: And, Madam Chair, may I ask
21 that --

22 CHAIRPERSON BERRY: Yes.

23 MS. OAKAR: -- since I didn't get to give
24 that testimony because of my verbosity, I'd like to
25 submit that part for the record, if I may.

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1 CHAIRPERSON BERRY: Absolutely. Please
2 do.

3 MS. OAKAR: Thank you very much.

4 CHAIRPERSON BERRY: Your entire testimony
5 will be --

6 MS. OAKAR: Okay. Thank you.

7 CHAIRPERSON BERRY: -- included in the
8 record, yes. Go ahead.

9 VICE CHAIRPERSON REYNOSO: Well, Madam
10 Chair, it's manifest that this is a balance between
11 security and civil liberties. And I -- and each of
12 you have said in one way or another that the Patriot
13 Act is not perfect.

14 We heard from Mr. Edgar on his specific
15 suggestions to make it better. I wonder what
16 suggestions you have, Madam Oakar and Mr. Rosenzweig,
17 for changes, because I think all of you suggested that
18 it's not perfect. So I wonder, if it's not perfect, I
19 wonder what changes you would suggest.

20 CHAIRPERSON BERRY: Okay.

21 MS. OAKAR: You can go first, and I'll go
22 after you.

23 TELEPHONE OPERATOR: Excuse the
24 interruption. This is the coordinator. I saw Ms.
25 Meeks disconnected. Was that intentional?

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1 COMMISSIONER EDLEY: Yes.

2 CHAIRPERSON BERRY: Who did? Okay.

3 COMMISSIONER EDLEY: Thank you.

4 TELEPHONE OPERATOR: You're welcome.

5 MR. ROSENZWEIG: Oh, okay. I was confused
6 as to --

7 VICE CHAIRPERSON REYNOSO: That was the
8 voice from above.

9 MR. ROSENZWEIG: I was doing a conference
10 call some time ago, and all of a sudden somebody comes
11 in, "Detweiler here," and I was like, "What are you
12 doing participating" --

13 (Laughter.)

14 Yes, they connected him to the wrong call.
15 So now I understand.

16 (Laughter.)

17 Now I understand what is happening.

18 I think that there are a couple of areas
19 of the Patriot Act itself that can be fixed. There's
20 also I think at least one area where we haven't
21 legislated that I would urge legislation. In the
22 Patriot Act I think that there was some hasty
23 drafting.

24 I tend to agree with Tim that the
25 definition of domestic terrorism is inartful. I'm not

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1 concerned about that, because I'm quite confident
2 that: a) the Department of Justice won't use the
3 statute to go after people throwing rocks through
4 buildings; and b) if they did, then the ambiguities in
5 the statute would be properly interpreted by members
6 of the Article III branch to reject such an
7 interpretation.

8 Nonetheless, I have no objection to, you
9 know, doing fix-up/cleanup work like that. Let -- you
10 know, perfectly reasonable. It's also I don't think,
11 you know, anything that anybody would really object
12 to.

13 I wanted to modify your question, though,
14 a bit and actually mention an area of law that I think
15 is one that we need to address going forward. And in
16 this I join The Washington Post Editorial Board. We
17 have not developed a systematic way of thinking about
18 preventative detention -- areas in which there are
19 dangers but in which there is no crime, or something
20 like that.

21 We have, in response to September 11th,
22 developed a system of substituting existing laws that
23 don't quite fit. The material witness provisions, for
24 example, have been used to retain people who aren't,
25 you know, fairly read material witnesses.

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1 I understand -- I'm sympathetic -- perhaps
2 Mr. Edgar will think that this is, you know -- will
3 critique it, and I will critique it as well, but I'm
4 more sympathetic to the need, because we sit there
5 facing a problem.

6 VICE CHAIRPERSON REYNOSO: Would you say
7 if we're going to do it, we ought to do it in a legal
8 way?

9 MR. ROSENZWEIG: With a regularized
10 procedure. I take, for example, as a model the
11 British system. They actually have a very limited
12 preventative detention set of laws that they use
13 principally for northern Irish terrorists. They've
14 used it for two Britains of Arab descent since
15 September 11th, but there are I think 13 in
16 preventative detention in all of Britain.

17 They have a specialized court that deals
18 only with this, lawyers who are cleared to do it.
19 They have what I think is a great model, an
20 independent ombudsman reviewer, called the
21 independent, who is appointed by the Prime Minister
22 from the other party. I don't know if we could do
23 that in this --

24 (Laughter.)

25 -- country, but who is appointed by the

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1 Prime Minister from the other party. He is Lord
2 Alexander Carlisle, Queen's Counsel of the Liberal
3 Democratic Party, and he personally reviews each of
4 the 13 cases to assure himself and report to the
5 public, not on the details because many -- much of --
6 I mean, almost invariably that will be a national
7 security issue.

8 But his -- you know, a man of high
9 probity, his conviction that is -- okay, we can think
10 of many, many models of review that would satisfy my
11 concerns for oversight, but allow for calibrated
12 transparency, flexible transparency. That's kind of
13 my mantra these days.

14 But we don't have that now. I think it
15 would be wise of Congress to provide for it, because I
16 can certainly envision circumstances in the future
17 where it might be necessary. They would be
18 unfortunate.

19 I can envision abuses of that power as
20 well, so we want to structure it the right way so that
21 we can do something that protects, for example,
22 against a potential new terror attack, you know, and
23 dead Americans, whose civil rights are also at issue
24 here, without, you know, creating a system that allows
25 for indefinite preventative detention, that it should

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1 be reviewed, that sort of thing.

2 You know, that is -- there is lots of
3 structural issues to talk about, lots of
4 particularized issues, but that's one area where right
5 now there's a hole in American law. So that's another
6 area I would urge consideration of.

7 VICE CHAIRPERSON REYNOSO: Let me just ask
8 one question. I heard the debate -- the Senate
9 debate, such as it was, mostly Daschell saying,
10 "That's the best we could do in negotiating with the
11 administration." But one question was asked about
12 tapping telephones.

13 And the questioner said, as I read the
14 Act, if a person who is -- whom the government
15 believes has some activity pertaining to terrorism,
16 for some reason doesn't use his own phone at his own
17 house, but goes to the neighbor and uses the phone one
18 time, then the government is now authorized to tap
19 that second phone forever, even if the neighbor didn't
20 know about it, even though it was only used one time.

21 Was that a misunderstanding of the Patriot
22 Act, or do you think that could happen?

23 MR. ROSENZWEIG: I believe that's a
24 misunderstanding. The request for the authority to
25 listen to the second phone will, of course, have to be

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1 predicated upon its own showing that that is a phone
2 that this person has used in the past.

3 It will be, of course, also, as I
4 understand it, subject to review, also subject to
5 minimization requirements, of course, because to the
6 extent that that phone is used by the innocent
7 neighbor who unbeknownst to him has loaned his phone
8 to the terrorist, the law requires those who listen in
9 to -- as they do in normal Title III circumstances,
10 what we call minimize, delete, turn off, redact, and
11 remove non-directed conversations.

12 Tim is about to react, so I may have
13 gotten it wrong.

14 MR. EDGAR: Yes, I think actually you did.
15 And with all due respect, I think the problem here is
16 that --

17 MR. ROSENZWEIG: He only thinks I got it
18 wrong.

19 (Laughter.)

20 MR. EDGAR: It's the ascertainment
21 requirement problem, and that is that, you know, one
22 of the themes of the defenders of the Patriot Act is,
23 look, this is very reasonable because all we're doing
24 is taking powers that we had in criminal cases and
25 allowing their use in intelligence cases.

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1 And one thing I wanted to explain about
2 why I think -- that's a true statement, to say that,
3 from their perspective. I don't --

4 COMMISSIONER EDLEY: With the lower
5 threshold.

6 MR. EDGAR: Right. That's the problem.
7 It's not -- it's not the same threshold, and I think
8 the other problem -- it depends on the power, but the
9 other problem is that that's often shorthanded in an
10 extremely misleading way. And that is to say, look,
11 we used this to go after John Gotti, and we couldn't
12 use it to go after bin Laden.

13 That's just not true, and the reason it's
14 not true is because it assumes that when you go after
15 bin Laden you can't use criminal investigative powers.

16 Of course you can. Bin Laden is a criminal. He's in
17 charge of a massive criminal investigation. He has
18 committed a number of crimes that are predicate
19 offenses for criminal wiretaps.

20 So to say that you -- the difference with
21 terrorists is not that you have less power than you do
22 with organized crime, it's that you have more power,
23 because in addition to using all of the things that
24 you have available for you in criminal investigations,
25 which you have for terrorist investigations, you also

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1 have an entirely different and new and additional set
2 of surveillance powers under the intelligence laws,
3 under the Foreign Intelligence Surveillance Act.

4 And to say that, well, in one case, you
5 know, we didn't have, for example, the broadest
6 possible business records power under FISA. We could
7 get certain records, but not other records. And that
8 means we couldn't get all of the records in an
9 intelligence case that we could get in a criminal
10 case, because in a criminal case you have a grand jury
11 and you can subpoena whatever records you want.

12 That's true, but it also sort of begs the
13 question of, well, then, why don't you convene a grand
14 jury and ask them to subpoena the records that you
15 want? It assumes that you can't do that, and that's
16 where the civil liberties problems become most acute,
17 because one reason why you might not be able to do
18 that is because the people you're investigating aren't
19 criminals.

20 And that's, in fact, the whole point of
21 intelligence powers is it's supposed to give you
22 greater powers to investigate people who are involved
23 with foreign governments and foreign organizations for
24 purposes of foreign policy and other things, to be
25 able to invade their privacy but without having to

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1 show that -- and that's where the lower showing comes
2 in, without having to show probable cause or other
3 standards of criminal behavior -- of criminal
4 behavior. And that's the difference.

5 So in the case of the roving wiretaps, to
6 be -- to sort of boil it down, hopefully I can, roving
7 wiretaps were available on September 10th in criminal
8 investigations. So if you could show probable cause
9 that any terrorist suspect was involved in any crime
10 at all -- and blowing something up is certainly
11 criminal -- you could get a roving wiretap on that
12 person.

13 You couldn't get a roving wiretap in an
14 intelligence investigation. So, in other words, if
15 you can't show probable cause of a crime, but you're
16 using these other intelligence wiretaps, you would
17 have to go back to the court every time they changed a
18 phone. So they wanted to have roving wiretaps and
19 intelligence investigations.

20 Now, you know the ACLU. We don't really
21 like wiretaps, period, but we understood that we
22 weren't going to be able to be successful in arguing
23 that there should never be any roving wiretaps after
24 September 11th.

25 All we argued -- this is an example of a

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1 very reasonable thing we were arguing -- is that there
2 should be an ascertainment requirement. Well, what's
3 that? In criminal law, it says, "I don't have to get
4 a new judge, or I don't have to get review. I don't
5 have to go back and get another order if the person
6 changes phones." So there's no judicial review.

7 But I do have to ascertain that they're
8 using the phone. It seems pretty common sense. You
9 know, it's just to make sure that you're actually
10 tapping the phone of the person that you say is the
11 target of the roving wiretap.

12 So we said to the Congress in the course
13 of this six weeks of very hurried negotiations, okay,
14 roving wiretaps for FISA. You know, we fought you and
15 lost last time on criminal. We're not going to fight
16 you again, but we'd like an ascertainment requirement.
17 Make it the same.

18 They said no, and they insisted on saying
19 no. And I think that that's one of the things we
20 propose to fix in the SAFE Act. But the point is just
21 that our view is, look, if you're going to make an
22 argument like, "We want to have the same power in an
23 intelligence case as we do in a criminal case," you
24 know, at the same -- you should have the same
25 safeguards.

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1 An ascertainment requirement is just the
2 same safeguards. That's all it is. And that was what
3 that exchange was about in the debate that you read.

4 CHAIRPERSON BERRY: The Vice Chair said he
5 would let me ask a question about what you just said.

6 What I don't understand, Mr. Edgar, is why you don't
7 argue that it's wrong to treat all Arabs and Muslims
8 as if they are Osama bin Laden or as if they are John
9 Gotti. In other words --

10 COMMISSIONER BRACERAS: Who is doing that?

11 CHAIRPERSON BERRY: -- if you say that the
12 criminal -- which we do -- just treat -- we're just
13 using things that we go after criminal organizations
14 with, if that's the argument that folks made, and you
15 now are saying, as I understood the last thing you
16 said, yes, you can do everything to Osama bin Laden
17 that you can do to criminal organizations, and you can
18 do all kinds of other things, because he's a criminal.

19 Why is it that it's a good argument to
20 state that it's okay to treat Arab-Americans, under
21 circumstances that Mr. Rosenzweig was talking about,
22 if there's an alert and there's -- something is going
23 to happen in Washington. You should be able to treat
24 all Arabs and Muslims, because Arabs and Muslims are
25 people who have done things in this way.

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1 And what they're using is the same things
2 that they go after criminal organizations for. Do you
3 agree that that's what should be done?

4 MR. EDGAR: No, absolutely not. I mean,
5 we think that there should be individual suspicion.
6 Period. And what we're talking about I think with
7 discussing changes to the Patriot Act or racial
8 profiling, or any of these things, that the common
9 theme throughout here is that you have to have
10 suspicion of that particular person.

11 And it can't be based on a shorthand of
12 they're Arab or they're Muslim. And the tricky thing
13 about intelligence powers and the reason that we're so
14 sensitive about them -- and, you know, that's what the
15 Patriot Act is about a lot of -- is that it does pose
16 real dangers. It has always posed dangers, ever since
17 the beginning of our country. And certainly we have
18 seen those abuses.

19 The Foreign Intelligence Surveillance Act,
20 and other things, still pose those dangers. They are
21 designed to have some safeguards, but the dangers are
22 that they're not -- you know, they're dividing it away
23 from criminal investigation.

24 So you have the danger that you will use
25 things like racial or ethnic affiliation or political

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1 affiliation or involvement in unpopular groups, you
2 know, as a basis for making your decisions about how
3 to investigate.

4 Now, the purpose of the Foreign
5 Intelligence Surveillance Act is to reduce that danger
6 by saying you have to have a court that says, okay,
7 you have to show that this person is connected to a
8 foreign power -- that is, a foreign government or a
9 foreign organization. And when you start reducing
10 those things, you increase that danger. And that's my
11 only point that I'm saying is that we're talking about
12 incremental ways of reducing the danger of exactly
13 that happening.

14 It's always going to be there to some
15 degree, but if we can scale some of these things back
16 to put more individual suspicion into these
17 provisions, we reduce the likelihood of that kind of
18 thing happening.

19 MR. ROSENZWEIG: May I just briefly --

20 MS. OAKAR: May I -- okay.

21 CHAIRPERSON BERRY: You want to comment on
22 that?

23 MR. ROSENZWEIG: I just wanted to make
24 sure that it was clear that the wiretap requirements
25 under FISA would not -- do not authorize, you know,

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1 indiscriminate wiretapping of people because they are
2 Arab-Americans.

3 As Tim said, we may -- yes, we may
4 disagree about whether the standard is -- but each and
5 every wiretap is tied to a particular person who is
6 believed to be an agent of a foreign power, as that
7 statute is defined. So it would never be the case
8 that the FISA court would authorize the wiretap of
9 somebody simply on a declaration from the FBI that the
10 person is an Arab-American.

11 I mean, that just wouldn't be -- I mean,
12 the FBI would never seek such a wiretap, and the court
13 -- and no -- I mean, the FISA judges are Article III
14 judges. They just wouldn't issue such a request if
15 the FBI were foolish enough to do it. I mean, there's
16 a requirement of a tie-in to a potential terrorist
17 activity or the agency of a foreign power.

18 CHAIRPERSON BERRY: But, Mr. Rosenzweig,
19 what I was referring to when I asked him the question
20 was your statement when you were -- and it's in your
21 written statement -- about when you said if Washington
22 National Airport was under some kind of --

23 MR. ROSENZWEIG: Well, that's --

24 CHAIRPERSON BERRY: -- something you said.

25 MR. ROSENZWEIG: That's a different issue.

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1 CHAIRPERSON BERRY: And there was an
2 alert -- I know that.

3 MR. ROSENZWEIG: Okay.

4 CHAIRPERSON BERRY: But I thought of it
5 when he was talking, which is why I asked him the
6 question.

7 MR. ROSENZWEIG: Oh, okay.

8 CHAIRPERSON BERRY: That -- and I wasn't
9 restricting it to wiretaps.

10 MR. ROSENZWEIG: Okay.

11 CHAIRPERSON BERRY: I was just saying --

12 MR. ROSENZWEIG: Then we both
13 misunderstood.

14 CHAIRPERSON BERRY: -- that if you --

15 MR. ROSENZWEIG: I apologize.

16 CHAIRPERSON BERRY: -- if you thought it
17 -- I was connecting it to this idea that you're just
18 treating -- using the criminal -- the powers you'd use
19 of going against a criminal organization -- John
20 Gotti, Osama bin Laden, whatever -- and a lot of the
21 discussion seems to equate under situations of urgency
22 and when you suspect some imminent terrorist activity.

23 Treating all Arab-Americans and Muslims
24 under those circumstances, because they are the ones
25 who committed these things that we know about, as

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1 people who you can use those same powers against --
 2 and I was asking you whether you thought that it made
 3 sense to equate Arabs and Muslims with John Gotti and
 4 Osama bin Laden if there's an alert that something
 5 might happen at National Airport. That was all.

6 MR. EDGAR: Well, you know, absolutely
 7 not. And I just wanted to make one point here, which
 8 is that if there is a -- you know, if there is a
 9 heightened danger, and if we extend the analogy a
 10 little bit more, we're worried about the kind of use
 11 of these pretextual charges that we've seen in these
 12 investigations against Arab-Americans and others.

13 And they use a similar argument that I
 14 think has a similar flaw. They say, "Well, you know,
 15 we're just arresting mobsters for spitting on the
 16 sidewalk. You know, that's the way we got the mob.
 17 We used unrelated charges to get them." And so this
 18 is a perfectly legitimate law enforcement tactic, and
 19 I think that's not the right analogy.

20 I think it's the analogy of after some
 21 kind of mob murder, instead of arresting mobsters for
 22 spitting on the sidewalk you went into Little Italy
 23 and arrested everybody for spitting on the sidewalk,
 24 and then you didn't go into anywhere else and arrest
 25 anyone else for spitting on the sidewalk.

1 And that would understandably cause the
2 members of that community to feel like they were being
3 singled out. And I think that that's the danger of
4 that kind of policy, and I think that's also a danger
5 in a preventative detention law, because no matter how
6 carefully you design the safeguards of that law,
7 you're ultimately getting around the fact that you can
8 now give the government the power to put somebody in
9 jail who hasn't committed a crime.

10 And to think that there's a way to do that
11 so that it's very careful, and all of that, it still
12 means that walking down the street no one in America
13 can, you know, think that they are safe from being
14 arrested by the government just because they haven't
15 violated any law. They're not planning to violate any
16 law. They're not conspiring to violate any law.

17 And I think that's an example of something
18 that would create an additional danger, that if we
19 were in a time of heightened crisis that the
20 government could misuse some of those powers.

21 CHAIRPERSON BERRY: Congresswoman Oakar.

22 MS. OAKAR: I just want to respond to your
23 point, and also your question, if I may. You're
24 absolutely in the right track when you imply or ask
25 the question of the selectivity of presumption that

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1 relates to Arab-Americans or people that look like
2 them.

3 For example, with respect to immigration,
4 which may or may not be related, but nonetheless there
5 are 315,000 absconders. Who are the ones that they
6 deported for trivial things? Arab-Americans. There
7 were 6,000 of them. You know, I mean, there is a
8 perception -- I remember CNN when the Oklahoma bombing
9 took place, even prior to September 11th, indicated
10 for hours that it was Arab-American terrorists, and it
11 happened to be Americans of caucasian background.

12 Just in -- so there is this fear -- there
13 is this absolute fear, and I think other people in
14 this country have gone through that fear in the past.

15 I think African-Americans have over and over again,
16 and others. But there is this absolute fear that
17 because I'm an Arab or an Arab-American in this
18 country, this wonderful country of ours, that somehow
19 I'm going to be suspect of something.

20 Now, you may think that's a
21 generalization, but I think it's very, very prominent.

22 And part of it is because of some of the actions that
23 have taken place, either legislatively or in
24 guidelines by the Justice Department. I did want to
25 react to your point, Commissioner, about what would

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1 you do, how would you change, because we're up for
2 change.

3 I mean, it's going to -- this is the time
4 to review it and have hearings on this issue, as
5 opposed to not having a hearing on a law that passed
6 that most people didn't read.

7 So just in Section 412 -- I mean, in
8 general -- I want to just generalize for a second.
9 The issue of due process is a very important issue.
10 It's a constitutional issue. If you take Section 412,
11 it is true that -- and there's sweeping new powers to
12 detain immigrants and other foreign nationals.

13 And the presumably constitutional time
14 period is 48 hours. However, there is no requirement
15 that these detainees ever have a trial, ever have a
16 hearing with the government to prove they are
17 terrorists or not terrorists. I mean, why can't they
18 at least have some kind of open fresh air, so that
19 their point of view -- I'll give you one quick
20 example, because I think anecdotal examples tell it
21 all.

22 There is a nun -- a Catholic nun, lest you
23 think it's all Muslims and all one group or another, a
24 Catholic nun goes to get her citizenship. And they
25 immediately take her away -- she goes by herself, she

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1 is from Lebanon originally. She goes to -- she has
2 been here a number of years, and so on. They take her
3 away, put her in prison for three weeks without
4 anybody being able to know where she was, whether an
5 attorney could visit her, nothing.

6 She finally says, "Deport me back to
7 Lebanon, then. You know, I've been in this country
8 many years. I want to be American. What did I do?"
9 And finally -- she finally threatens to commit suicide
10 -- these are the kind of examples we have -- because
11 they kept her in jail and she didn't know why she was
12 there. They didn't charge her with anything. She had
13 no access to anybody.

14 And when she did that, then they called
15 the parish priest where she was stationed, and they
16 said, "Listen, we've got this woman, and if you want
17 to get her an attorney," and so we looked into it, and
18 we finally found that indeed when she first came here
19 she was in a K-mart or something like that, and she
20 went down the aisle the wrong way, and they thought
21 maybe she was trying to steal things. They never
22 accused her of -- I mean, it was -- she was never
23 prosecuted for it, and it was just a misunderstanding.

24 But somehow that blip of their questioning
25 her was on her record, and that's the thing that

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1 triggered her to be in the prison.

2 Now, somehow or other the issue of due
3 process, whether they're foreign in our country or
4 whether they're in good status, or American citizens,
5 we have cases of Americans who have not had due
6 process. And I think Section 412 needs some help.

7 I think the other area is I think
8 something that ACLU pointed out in its larger brief,
9 and that was the issue of judicial oversight. The
10 checks and balance issue has been selectively kind of
11 stripped away in certain areas, and I won't get
12 specific.

13 I think the SAFE Act is one way to amend
14 the Patriot Act, you know, and some of its provision
15 is very bipartisan. You have one of the most
16 conservative members of Congress, a Republican,
17 joining the most -- one of the most liberal members of
18 Congress, a Democrat. And I think that's -- that
19 consensus is very important. So those are just a
20 couple of things.

21 CHAIRPERSON BERRY: Commissioner Braceras.

22 COMMISSIONER BRACERAS: First of all, Mr.
23 Edgar, I want to thank you for the specificity with
24 which you presented your views, because that was
25 exactly the type of thing I was looking to hear. I do

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1 want to say that I don't think that anecdotes and
2 general hypotheticals and hearsay testimony is that
3 helpful to what we're trying to do here, because it's
4 the type of stuff of which urban legends are created,
5 and which can be taken out of context, and which we
6 can't test the veracity of in these proceedings.

7 So I don't think that that type of
8 testimony is that helpful to this Commission, or to
9 the public debate on the topic.

10 I think -- I guess I'm a little bit
11 disappointed in this briefing for this reason, that I
12 think there are many issues with the Patriot Act,
13 specific to the Patriot Act, related to civil
14 liberties, not necessarily civil rights per se but
15 more focused on the liberties side of the equation,
16 that deserve the attention of the public and of
17 Congress.

18 And I think we could have had a whole
19 briefing just on the SAFE Act and really getting into
20 the nitty-gritty and discussing where we agree changes
21 should be made, and where they shouldn't. And
22 something like that could have been very informative
23 to the public and to the public dialogue.

24 Equally, we could have focused exclusively
25 on detentions at Guantanamo or exclusively on racial

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1 profiling. And all of those are issues that deserve
2 our attention as a civil rights commission. Probably
3 the Guantanamo detentions and the racial profiling are
4 more within our institutional mandate than the civil
5 liberties questions, which is not to say the civil
6 liberties questions aren't important.

7 But this Commission would probably be
8 better served focusing on the civil rights issues that
9 come out of some of the other aspects of the War on
10 Terror and are not specifically related to the Patriot
11 Act.

12 So all of those areas could have been
13 useful areas of inquiry. I think the problem is that
14 we've been a little bit all over the map here, and as
15 a result have not been able to get into any of the
16 issues with the specificity that has been needed. And
17 for that reason, I'm a little bit disappointed with
18 how this briefing has turned out.

19 All of those things said, I guess one
20 specific question that I would pose to the ACLU, and
21 maybe this is on your website or been answered in
22 other places, but have you thought about or proposed
23 what specific remedy, if any, you would recommend for
24 unlawful surveillance? And would you support some
25 type of basically exclusionary rule?

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1 Would you support -- how would you propose
 2 that people who are unlawfully surveilled get better
 3 justice than is currently allowed? That's an issue
 4 that I was hoping to hear a little elaboration on, if
 5 you can.

6 MR. EDGAR: Well, sure. Thank you. And I
 7 certainly don't think that there's any -- anything
 8 wrong with this Commission. I mean, you decide how
 9 you want to do things. But if you wanted to have a
 10 series of hearings, I think that might be very
 11 educational.

12 I mean, part of what I wanted to do in my
 13 oral statement is to make the case that some of the
 14 civil liberties issues really are civil rights issues.

15 But I think that there is -- you know, there is
 16 certainly a lot to look at, and that a series of
 17 hearings might even be very beneficial to the public.

18 We've urged for the most oversight possible in the
 19 Congress and other bodies.

20 As for your specific question on unlawful
 21 surveillance, you know, I think that there is
 22 generally -- I mean, certainly the exclusionary rule
 23 is a very important way in which we can deter
 24 government misconduct. It basically says that
 25 illegally obtained evidence can't be used in court.

1 There is a weakness in the exclusionary
2 rule when it comes to intelligence surveillance, and
3 that is that the vast majority of intelligence
4 surveillance isn't used in court. And so in a sense
5 you could say, well, what other remedies might be
6 available?

7 The Patriot Act, in a provision that we
8 actually support -- Section 223 -- provides for civil
9 liability, civil liability for people who unlawfully
10 disclose the contents of wiretaps. As I read that, if
11 it had been in place when Dr. Martin Luther King was
12 illegally surveilled, maybe he could have sued under
13 that provision and gotten damages.

14 Is that going to be enough? I'm afraid
15 probably not, because you're likely never going to
16 know that you were unlawfully put under surveillance.
17 In Britain, there's a process where you can complain
18 that you think the MI5 has put you under unlawful
19 surveillance.

20 It hasn't been effective because it is a
21 totally secret, internal review, and they've never
22 found anyone was unlawfully surveilled. Well, that's
23 not surprising considering they're doing the
24 reviewing. And so --

25 MR. ROSENZWEIG: Actually, they have, but

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1 the determination was secret.

2 MR. EDGAR: Oh, oh.

3 (Laughter.)

4 So the one -- one proposal we have made
5 for dealing with this problem, which I believe has
6 been introduced in Congress by Senator Feingold, is
7 the -- this is going to really bore everyone to death
8 -- the FISA-SEPA Reconciliation Act, which has got
9 two, not just one, national security related acronym
10 in there.

11 But put fairly simply, what it says is,
12 look, when you have a criminal case, you, as the
13 defendant, have a lot of rights to see the underlying
14 surveillance application and a lot of other things to
15 make your best case, that either the evidence should
16 be suppressed, or if it's not to make your best
17 defense that the evidence doesn't show what the
18 prosecution says.

19 The biggest problem with FISA surveillance
20 is that it's all classified by definition. Everything
21 the FISA court does is classified, except for the
22 number of orders that they issue. So the government
23 introduces selected pieces of that evidence. It is
24 under a constitutional obligation to submit
25 exculpatory material, but there is not a sufficient

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1 process for the process to work.

2 We've proposed in this Act that because
3 now we are going to be sharing more intelligence and
4 criminal information together because of the Patriot
5 Act, and I don't think anybody believes we're going
6 to, you know, build that wall back up to the ceiling
7 where it may have been before, or that that would be
8 desirable.

9 The idea would be to allow the defense at
10 least to have an unclassified summary of some of those
11 other materials that they don't get when they are
12 defending themselves in a criminal case and they're
13 facing -- facing FISA surveillance. And that way they
14 can have a better ability to either say that the
15 evidence should be excluded because it was unlawfully
16 obtained or that the evidence actually doesn't show
17 what the prosecution says it shows.

18 And that's just one way in which, you
19 know, we have really been just dying to be able to
20 work with the Justice Department or, you know, other
21 -- others of our -- supporters of the Patriot Act to
22 make these kinds of improvements, and I think we've
23 made some progress. But I think there has been some
24 -- you know, the whole debate has become so -- so
25 politicized that it's getting more and more difficult

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1 to make those changes.

2 And I just implore that -- we have this
3 debate without, assuming that those who are urging
4 changes are trying to weaken our defenses against
5 terrorism. That's absolutely not what we want to do,
6 and I don't think it's what anyone wants to do with --

7 COMMISSIONER BRACERAS: I guess what --

8 CHAIRPERSON BERRY: Commissioner Edley is
9 recognized.

10 COMMISSIONER EDLEY: I wanted to ask --

11 COMMISSIONER BRACERAS: Are you moving to
12 another topic, or -- because I just wanted to --

13 COMMISSIONER EDLEY: Yes.

14 COMMISSIONER BRACERAS: Can I just say one
15 quick thing? Could you --

16 CHAIRPERSON BERRY: About this same topic?

17 COMMISSIONER EDLEY: It's fine with me.

18 CHAIRPERSON BERRY: About --

19 COMMISSIONER EDLEY: It's fine with me.

20 CHAIRPERSON BERRY: Okay. Go ahead.

21 COMMISSIONER BRACERAS: No, I mean, I do
22 think that your presentation here was very sober and
23 very reasonable, and a lot of the things that -- the
24 tinkering with the statute that you recommend are good
25 ideas. But I would -- you talk about, you know, how

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1 the debate has become so politicized, and I would --
2 you know, I would suggest that part of that
3 politicization occurs on your own website.

4 And when I've seen, you know, Ms. Strossen
5 talk about these issues in front of Congress and
6 elsewhere, it comes across to me as very different
7 than the tone that's struck on the website. And the
8 same with your presentation today.

9 So, you know, I respect your thoughtful
10 critiques of the Patriot Act, but I certainly would
11 recommend that, you know, a lot of the hype be toned
12 down.

13 MR. EDGAR: Well, I mean, just to say I
14 could -- I could try to evade that question by saying
15 that I don't write much of what's on the website, but
16 I do think that there is a point that there are
17 different audiences here. And, you know, we saw that
18 the American public was just going to be so terrified
19 of terrorism that they wouldn't even want to hear any
20 reasonable arguments about how to fix the statute or
21 anything.

22 And, it's important that there be a
23 countervailing political force, I think in this
24 country, for civil liberties. And that will,
25 inevitably I think -- the kind of language that

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1 activists and others, you know, use, but we try -- I
2 try very hard to make sure it's not misleading in any
3 way, but it's going to be language that gets people
4 excited and energized and wanting to be part of a
5 movement.

6 And I don't think that -- you're going to
7 be able to do that by droning on about Section, you
8 know, 342(b)(2) --

9 (Laughter.)

10 -- and, which is what I do, and that's the
11 reason why they don't put me in charge of writing the
12 --

13 (Laughter.)

14 -- website.

15 CHAIRPERSON BERRY: Okay, Mr. Edgar. We
16 get the point, Mr. Edgar. Mr. Edgar, we get the
17 point. In the interest of time, Commissioner Edley.

18 COMMISSIONER EDLEY: Yes. I think there's
19 some exaggeration and hype on both sides of this
20 debate, to be sure. I would like to understand better
21 than I currently do this -- the thresholds at stake.
22 So -- and forgive me, but being a law professor I do
23 truck in hypotheticals and even occasionally
24 anecdotes. I always thought it was --

25 (Laughter.)

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1 -- anecdote was data, so I don't see
2 what's wrong with that.

3 So if the purpose of a FISA warrant is an
4 intelligence investigation, I'm trying to figure out
5 who is a terrorist, who is an agent of a foreign
6 government. But then something one of you said
7 confused me. To get a FISA warrant, do I have to
8 assert/allege that I believe X is a foreign agent? Or
9 do I have to say I am investigating whether they are?
10 I thought it was the latter.

11 MR. ROSENZWEIG: You have to have a -- you
12 have to have some predication. You can't -- you have
13 -- in a FISA warrant context, you must allege a
14 reasonable basis for suspicion. I haven't quoted the
15 phrase exactly right, but it's a -- but it is a
16 demonstration to the judge of some predication for an
17 investigation.

18 I would imagine that there's no way that
19 they could come in and say you were --

20 COMMISSIONER EDLEY: "Militant anti-
21 Americanism and speeches applauding terrorist acts
22 conducted by al-Qaeda."

23 MR. ROSENZWEIG: Say that again.

24 COMMISSIONER EDLEY: "Militant anti-
25 American statements, including speeches, including

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1 statements praising terrorist acts are conducted by
2 al-Qaeda."

3 MR. ROSENZWEIG: Well, the Patriot Act
4 contains express carve-outs precluding the basis of a
5 warrant on protected First Amendment activity. You
6 know, it's actually the only provision that does.

7 So the question for the judge would be,
8 you know, the specifics of what was said and whether
9 he thought that this was First Amendment praise of,
10 you know, anti-Americanism, which is a perfectly
11 protected right, or trenched across the line towards
12 some sort of statement that seemed to be advocating
13 the -- you know, advocating violence which would --

14 COMMISSIONER EDLEY: So --

15 MR. ROSENZWEIG: So it would have to -- it
16 would -- I'd have to -- the judge would have to know
17 something about the specifics of what one said.

18 COMMISSIONER EDLEY: So, for example, you
19 don't think that there's any risk -- just as a
20 hypothetical, you don't think that there's any risk of
21 an investigation, a FISA warrant of some sort,
22 directed against, let's say, the teachers, the
23 faculty, the leaders of a school, an Islamic school of
24 the Wahhabists.

25 MR. ROSENZWEIG: I would never say that

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1 there's no risk. I mean, all human systems are
2 imperfect, and the goal in my judgment is always to
3 build in the right levels of oversight. I mean, there
4 are at least three hoops that one must need -- must go
5 through before the creation of such an investigation.

6 First, you know, there is the
7 investigative hoop at the FBI. They have an office of
8 lawyers, an Office of General Counsel, that has to
9 review the facts brought in by the people in the
10 field, and has to approve and say, yes, that's okay.
11 I actually know some of the people in there, and
12 they're, like you and I, by and large good people.
13 They don't, you know, purposely set their minds to
14 approving overbroad investigations. They make
15 mistakes. Sometimes in their zeal, you know, to
16 protect Americans they do so.

17 Then there's the hoop at the Department of
18 Justice, the Office of Intelligence Policy Review, on
19 up to the Attorney General, because either the
20 Attorney General or one of a very high level group of
21 designees, including only the AAG of Criminal, or the
22 FBI Director, is entitled to approve an application.
23 So there's that, and those people, you know, as a
24 sidelight are subject to what I would urge, which is
25 enhanced congressional review.

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1 You know, one of the answers I think to
2 your question, Commissioner Braceras, is that I think
3 that there needs to be more congressional review of
4 particulars, perhaps in classified settings, so that
5 we can review particular cases, and then there's the
6 judge, right? There's the FISA judge who is a
7 District Court Judge, Article III Judge, who sits on
8 the FISA.

9 So there's a lot of self-selection in the
10 process in the first instance. Is it a perfect
11 process that will ensure never again will the FBI
12 misuse its powers? You know, I -- you'd laugh at me
13 if I said it's a guarantee.

14 (Laughter.)

15 And rightly so.

16 MR. EDGAR: Yes. Just to -- I think
17 that's mostly right, but I think there's a couple of
18 things here that are important. There are two
19 different kinds of FISA powers. There's the kind that
20 are invasions of Fourth Amendment that you would see
21 in wiretapping and searches. And that requires
22 probable cause that the person is an agent of a
23 foreign power.

24 It doesn't require probable cause of
25 criminal activity necessarily, which is one of the

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1 civil liberties issues. But it does require that
2 showing.

3 Now, the problem is -- to me is with --
4 the bigger problem is with Section 215, and with PEN
5 registered which has the same standard, 214. And that
6 is that it just requires that they assert that they're
7 investigating terrorism or --

8 COMMISSIONER EDLEY: It's related to a --

9 MR. EDGAR: Right. And so, for example,
10 in your example of the Wahhabist school, they could
11 assert that they're conducting an investigation -- and
12 the actual phrase of the statute is an investigation
13 to protect against international terrorism or
14 clandestine intelligence activities.

15 So they could say, well, there's been a
16 lot of hearings in Senator Kyl's committee about the
17 dangerousness of this particular belief in Islam. So
18 we're going to protect against international terrorism
19 by conducting a wide-ranging intelligence
20 investigation of the influence of Wahhabism in the
21 United States. That would be investigation of what
22 Saudi Arabia is doing, or whatever.

23 And then they would not need probable
24 cause that a person in the school was an agent of a
25 foreign power to get all of their records.

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1 COMMISSIONER EDLEY: So now this is
2 analogous to the FBI in the '60s conducting intense
3 surveillance of civil rights organizations, because
4 they wanted to find out where their ties to Communism
5 are.

6 MR. EDGAR: Exactly. That's exactly --

7 MS. OAKAR: That's exactly right.

8 MR. ROSENZWEIG: No, it's slightly
9 different I think. I mean --

10 MR. EDGAR: You mean slightly the same.

11 MR. ROSENZWEIG: No. I don't think so. I
12 think the -- this lower standard applies to the PEN
13 registers, right? So that's an area that we've always
14 had. There's -- to get a PEN register in the criminal
15 context, all the prosecutor needs to do is make the
16 same filing. It is in part because of the Smith case,
17 and the Supreme Court said that, you know, the number
18 you call is not publicly exposed.

19 And in the context of the criminal
20 investigation, the analogy between the 215 order is
21 the relevant standard of the grand jury subpoena,
22 right? They are both requests for records. Neither
23 -- they are lesser standards, because they're
24 generally thought to be in both the -- in the criminal
25 context and in the terrorism context lesser

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1 intrusions.

2 The request for records, even from third
3 parties, has always been treated under our enterprises
4 as a -- the standard is, is it potentially relevant to
5 a criminal investigation? Which you're a Harvard law
6 professor, you know that relevance is about, you know
7 -- I mean, everything is relevant to everything.

8 MR. EDGAR: But that's the problem,
9 relevant to what? And in the intelligence context,
10 it's not limited by criminal activity. And that's why
11 there's a different way of having that individual
12 suspicion standard that we proposed in the SAFE Act,
13 and that is to show not probable cause but specific
14 articulable facts, which is a very low standard,
15 giving reason to believe that this person whose
16 personal records or whose telephone calls you want to
17 monitor, the -- not the content but the numbers, is an
18 agent of a foreign power, rather than just saying
19 we're conducting an investigation.

20 And I think that's where the danger really
21 is. And I do think it's relevant to look at history
22 and to show that was the FBI and J. Edgar Hoover just
23 paranoid? Well, maybe to some degree, yes, but there
24 were a definitely a wide spread of opinion that
25 thought, oh, the civil rights movement may be

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1 infiltrated by Communists. Or if it's not now, it may
2 be in the future.

3 And so that was really the underlying
4 pretext for using those powers. The pretext for using
5 those powers to investigate those groups was not that
6 they opposed government policy, but that they might be
7 involved with the Soviet Union.

8 And I do think that that's the purpose
9 behind having these tighter restrictions put back in
10 place, understanding that some of the Patriot Act and
11 some of the information-sharing that it did was an
12 appropriate reaction to some of the problems that
13 existed in the agencies prior to September 11th. And
14 we can debate -- you know, we can debate ways in which
15 they could have used their existing powers without
16 having a statute to solve those problems, but I think
17 that's really the divide between those things that we
18 really want to fix and see are real dangers, and some
19 of the positive of some of the changes that have been
20 made that we -- that we recognize.

21 CHAIRPERSON BERRY: Commissioner Kirsanow.

22 COMMISSIONER KIRSANOW: Yes. This has, as
23 you know, been fairly wide-ranging, and trying to get
24 a handle on the subject matter in one hearing is
25 virtually an impossibility. We could have dissected

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1 this and put it into, as you indicated, SAFE -- and
2 SAFE could be dissected into 15 other hearings.

3 But if we're going to try to prioritize,
4 just for the moment I'd like to ask everyone, but
5 starting with Ms. Oakar, is there a particular section
6 -- is it 213, 215, sneak and peek, whatever it may be,
7 of the Patriot Act that causes you the greatest
8 concern? And I would pose the same question to Mr.
9 Edgar. Is there one provision that more than any
10 other is something that you think needs to be
11 addressed immediately or more quickly than, say, other
12 provisions?

13 MS. OAKAR: Section 411, 215 -- it's in my
14 testimony. There are other sections as well. 411,
15 for example, the associate -- when you associate with
16 somebody who may be a problem, the issue of giving a
17 controversial speech, which I think relates to what
18 you were talking about, Professor -- Commissioner,
19 rather.

20 Those are areas -- we mentioned about four
21 different divisions, but those two in particular are
22 troublesome. And I think that they -- they could be
23 revised, and I think Congress wants to do that, and
24 the American people do. You didn't add Los Angeles,
25 Chicago, or New York, who passed -- New York passed a

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1 resolution. And of all cities, that would be a city
2 that you might think would not want to make some
3 changes in the Patriot Act. So those are -- and it's
4 a thoughtful question.

5 If I could just use my time to respond to
6 something you said, Commissioner. I can't resist.
7 Laws affect people. If you don't want to hear about
8 how it affects people, then I don't know why I'm
9 sitting here, because, we can talk theoretically about
10 the law, and so on, but we have case after case, and
11 in many cases we have found that the Justice
12 Department and others agree with us, that the best way
13 to --

14 COMMISSIONER BRACERAS: But it's only
15 hostile if it's not hearsay. Credible evidence, and
16 not just somebody tells somebody, tells somebody.

17 MS. OAKAR: No, no, no, no, no. These are
18 cases that came to our office. They are primary
19 sources. I know the difference between a primary
20 source and hearsay.

21 COMMISSIONER BRACERAS: But it's hard for
22 us as a -- it's a lot harder to assess the credibility
23 and to assess the validity of the evidence just from
24 generalized statements about something that happened
25 to somebody. I'm not saying it's not true.

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1 MS. OAKAR: Right.

2 COMMISSIONER BRACERAS: I'm not saying
3 it's not tragic. I'm just saying it's not a useful
4 piece of evidence to me --

5 MS. OAKAR: Right.

6 COMMISSIONER BRACERAS: -- without further
7 information.

8 MS. OAKAR: Well, let me just tell you
9 that in our statement we give the context of the law,
10 and we show the impact on cases. And you can come to
11 our office any time and look up these cases and these
12 human beings that have been absolutely brutalized and
13 abused in terms of their rights.

14 And I think that -- and I know this is why
15 we have a Civil Rights Commission. You want to change
16 whatever problems there are. So I, you know,
17 appreciated your comment, but I just felt -- and thank
18 you very much for --

19 MR. EDGAR: Well, thanks for your
20 question, Commissioner Kirsanow, and I think that the
21 answer would be pretty easy. 215 I think really is
22 our biggest problem. With the way it's used now, I
23 think 411 and 412 are very serious. They're the
24 immigration provisions, and I think they both -- they
25 all need to be changed.

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1 I guess one reason we're worried about 215
2 is that it is a power that sort of has -- it is a
3 power that has -- we found in the lawsuit we brought,
4 which we filed in Federal District Court, and you can
5 look at the testimony of the witnesses that we have,
6 that it has had a chilling effect on First Amendment
7 activities.

8 That said, I do want to point out that
9 like many people have said some of the biggest
10 problems are outside of the Patriot Act. And I think
11 that maybe the biggest problem of all has been the way
12 in which detentions have been dealt with, and you can
13 look at the Office of Inspector General of the
14 Department of Justice, so you don't have to rely on
15 our hearsay. But you can look at their findings, and
16 they found there were some real serious problems in
17 the way in which these 700 or more detainees were
18 treated after September 11th.

19 And although I did speak with -- had the
20 opportunity to speak with Asa Hutchinson yesterday,
21 and asked him if they were going to move forward with
22 correcting those problems, and he assured me that they
23 were. I think that Congress should look at
24 legislation that would make sure there are checks and
25 balances that would prevent detainees from being

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1 essentially locked up with a strategy that says,
2 "We're going to take months and months and months to
3 run these detainees' names through a system that
4 presumes that guilty, until we say that they're
5 innocent." And then only then will we let them go.

6 Even if they say these are people who
7 basically said, you know, I did commit some
8 immigration infraction, and I want to get on a plane
9 and go home, they weren't fighting their deportation
10 at all. They just wanted to be let out of jail, and
11 we have never, up until that time, essentially said,
12 you're not fighting your immigration deportation, but
13 we're going to hold you anyway.

14 And not only that, but there were also
15 other very serious problems about the way they were
16 treated. Access to counsel was impeded, possibly
17 deliberately. People were abused. I mean, Chairman
18 Hatch has condemned that. So I think that there needs
19 to be administrative reform of those detentions, but I
20 also think Congress needs to look and see if there are
21 some things that they can propose to safeguard those
22 rights.

23 COMMISSIONER KIRSANOW: And with respect
24 to those detentions, I don't recall seeing the
25 demographic data with respect to the IG's report. And

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1 I think, Congresswoman Oakar, you referred to the fact
2 -- I think it was an absconder --

3 MS. OAKAR: Right. Exactly.

4 COMMISSIONER KIRSANOW: -- that
5 approximately 6,000 of those individuals --

6 MS. OAKAR: Right.

7 COMMISSIONER KIRSANOW: -- of the 6,000,
8 the vast majority just would impact on Arab-Americans.

9 MS. OAKAR: Right.

10 COMMISSIONER KIRSANOW: With respect to
11 detentions, do you have any kind of data related to
12 that?

13 MR. EDGAR: Yes. I mean, I think that the
14 -- it was Senator Feingold who asked for that data,
15 and essentially it turned out, although they were
16 reluctant to admit this, I think it was embarrassing
17 to them. But I think all of those detainees were from
18 Arab or Muslim countries, and the vast majority were
19 from -- the largest I think group being from Pakistan.

20 But, you know --

21 MS. OAKAR: Who are not Arab-Americans,
22 incidentally.

23 MR. EDGAR: Right. Arab and Muslim.

24 MS. OAKAR: Yes.

25 MR. EDGAR: And also that in some of these

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1 policies, like the absconder initiative, if you just
2 look at the memo that announces the creation of it,
3 it's blatant. It's not even disparate impact. It's
4 disparate treatment. You know, it says we are going
5 to put the names of people from the Arab and Muslim
6 world into our system, and then we're going to get
7 around to doing everybody else.

8 And that's the analogy I used about we're
9 going to go into Little Italy and arrest everyone who
10 spits on the sidewalk, and then maybe we'll think
11 about going into, you know, other neighborhoods and
12 doing it the same way.

13 COMMISSIONER KIRSANOW: Do you have any
14 data with respect to the percentage of detainees who
15 are Southeast Asian in derivation?

16 MR. EDGAR: You know, I don't have it on
17 the top of my head, but the percentage is very large.
18 It's a very -- we can certainly get that data for
19 you.

20 MS. OAKAR: We do have -- we have some.
21 We'll give it to you.

22 CHAIRPERSON BERRY: Okay. All right. Did
23 everyone answer your --

24 COMMISSIONER KIRSANOW: Yes.

25 CHAIRPERSON BERRY: Let me just make two

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1 final comments. It's time to go here after thanking
2 you. And then, if they're not final because
3 Commissioners feel like they want to say something
4 else, that happens here. I may think it's final, but
5 it's not.

6 (Laughter.)

7 So let me just say two things. First, on
8 the side bar discussion that we had earlier about
9 Commissioner Kirsanow, to point out that my remarks
10 were not intended to say that Commissioner Kirsanow
11 supported detention or anything like that.

12 At the time that the remarks were made, I
13 was quoted in the press as saying I do not believe
14 that Commissioner Kirsanow is endorsing prison camps
15 for Arab-Americans or for anybody else, and that all
16 he was really saying was that if some more terrorist
17 incidents happened, that the public might start
18 talking about such camps.

19 So when I said that I had some problems
20 with his remarks, it was about the context in which
21 the remarks were made and how they came about and not
22 that I was saying that Commissioner Kirsanow wanted
23 all Arabs and Muslims to be put in a concentration
24 camp or an interment camp.

25 But the overall comment I want to make

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1 about the hearing is this -- this briefing is this.
2 We believe the Commission's policy has always been
3 that when civil liberties are violated, or it is
4 alleged that they are violated, and that the
5 violations go directly to particular people because of
6 their race, religion, national origin, or other
7 matters relating to civil rights issues, and that that
8 is the fault line that we draw. And in this case
9 since Arabs and Muslims and the like are so much
10 affected, it seemed that this was an issue that we
11 should consider.

12 And then, finally, to say that in teaching
13 my legal history course, this week we just happen to
14 be at the point where we're discussing the balance
15 between liberty and security throughout American
16 history. And in every war and every quasi-war, the
17 United States has tilted the balance towards security
18 issues, and there have been many invasions of the
19 liberty of particular people.

20 And at the time, those who cried out
21 against it were ignored, overcome, or even intimidated
22 themselves and had harmful things. And after every
23 single episode, the American people in time to come
24 were ashamed and embarrassed about what they did,
25 because they were afraid.

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1 And Benjamin Franklin, who founded the
2 University of Pennsylvania where I teach, said that
3 those who sacrifice liberty in the name of security
4 deserve neither. He wasn't right about a lot of
5 things. He was right about founding the university.

6 (Laughter.)

7 But I want to thank all of you for coming.

8 And this was very useful to us, and we will continue
9 to follow up on this.

10 Thank you.

11 MS. OAKAR: Thank you very much. Thank
12 you for having us.

13 (Whereupon, at 12:42 p.m., the proceedings
14 in the foregoing matter were adjourned.)

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