

U.S. COMMISSION ON CIVIL RIGHTS

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MEETING

UNEDITED/UNOFFICIAL

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FRIDAY, FEBRUARY 24, 2017

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The Commission convened in Suite 1150 at 1331 Pennsylvania Avenue, Northwest, Washington, D.C., at 10:00 a.m., Catherine E. Lhamon, Chairman, presiding.

PRESENT:

CATHERINE E. LHAMON, Chairman
PATRICIA TIMMONS-GOODSON, Vice Chair
DEBO P. ADEGBILE, Commissioner*
GAIL HERIOT, Commissioner
PETER N. KIRSANOW, Commissioner*
DAVID KLADNEY, Commissioner*
KAREN K. NARASAKI, Commissioner
MICHAEL YAKI, Commissioner

MAURO MORALES, Staff Director
MAUREEN RUDOLPH, General Counsel

*Present via telephone

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STAFF PRESENT:

ROBERT AMARTEY
LASHONDRA BRENSON
PAMELA DUNSTON, Chief, ASCD
LATRICE FOSHEE
ALFREDA GREENE
JOHN RADCLIFFE
SARALE SEWELL
JUANDA SMITH
BRIAN WALCH
MARIK XAVIER-BRIER

COMMISSIONER ASSISTANTS PRESENT:

SHERYL COZART
ALEC DEULL*
JASON LAGRIA
CARISSA MULDER
AMY ROYCE
RUKU SINGLA
ALISON SOMIN
IRENA VIDULOVIC

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*Present via telephone

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

(10:00 a.m.)

CHAIR LHAMON: Good morning. This meeting of the United States Commission on Civil Rights comes to order at 10:00 a.m. on February 24, 2017.

The meeting takes place at the Commission's headquarters at 1331 Pennsylvania Avenue, Northwest, Washington, D.C.

I'm Chair Catherine Lhamon.

Commissioners who are present, in addition to me, at this meeting are Vice Chair Timmons-Goodson, Commissioner Heriot, Commissioner Narasaki, Commissioner Yaki, and on the telephone I believe are Commissioners Kirsanow, Adegbile, and Kladney. Is each of you on the telephone?

COMMISSIONER KIRSANOW: Kirsanow here.

COMMISSIONER KLADNEY: Kladney here.

COMMISSIONER ADEGBILE: Adegbile here.

CHAIR LHAMON: Terrific. Thank you.

And a reminder to each of the Commissioners on the phone to, as you just did, state your name before speaking, so the Court Reporter knows who is speaking.

We have a quorum of the Commissioners present. Is the Court Reporter present? She is. Is the Staff Director present?

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1 MR. MORALES: Yes, I am.

2 CHAIR LHAMON: Terrific. So this meeting
3 now comes to order.

4 **I. APPROVAL OF AGENDA**

5 CHAIR LHAMON: Before moving to approve the
6 agenda, I move to amend the agenda to add a discussion
7 and a vote on the approval of a Commission statement
8 on voter suppression. Is there a second?

9 COMMISSIONER YAKI: Second.

10 CHAIR LHAMON: Thank you. And, in
11 addition, I move to amend the agenda to add a discussion
12 and vote on the approval of a Commission statement on
13 recent Executive Orders on immigration. Is there --

14 COMMISSIONER YAKI: Second.

15 CHAIR LHAMON: Thank you. Okay. If
16 there are no further amendments, let's vote to approve
17 the agenda, as amended. All those in favor, say aye?

18 (Chorus of ayes.)

19 CHAIR LHAMON: Any opposed?

20 COMMISSIONER KIRSANOW: Kirsanow.

21 CHAIR LHAMON: And any abstentions?
22 Okay. So the motion passes. Kirsanow -- Commissioner
23 Kirsanow opposed, and there were no abstentions, and
24 all others were in favor.

25 **II. BUSINESS MEETING**

Planning

CHAIR LHAMON: So turning to the agenda, for Program Planning we have four agenda items today. First, a discussion on the planning process for the 2018 to 2022 strategic plan; second, a discussion on the Office for Civil Rights Enforcement Planning for the 2018 Statutory Enforcement Report, concept papers, and briefing; third, a discussion and approval of a statement on voter suppression; and, fourth, a discussion and approval of a statement on executive actions on immigration.

Discussion on Planning Process for 2018-2022 Strategic Plan

CHAIR LHAMON: First, I'll invite the Staff Director to discuss the planning process for the 2018 to '22 strategic plan.

MR. MORALES: Thank you, Madam Chair and Commissioners. Good morning. I just wanted to bring this and put this on everybody's radar in terms of the 2018 to 2022 strategic plan. In your Commissioners' folders, I attached two of the most recent strategic plans, plus the governing statute, which requires us to create one. And even though 2018 seems a little bit away, I just wanted to make sure that we put you -- or I put you on notice that we need to begin the process

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1 for creating a strategic plan.

2 I was informed that the last one was done
3 and a lot of things were left out, unfortunately. I
4 wanted to make sure that we were engaged in a more
5 thoughtful, thorough process, and thought I wanted to
6 put this forward for all of you for your consideration.

7 My hope is that we can use this effort to
8 better align our goals and our mission into the future,
9 especially given our limited resources and potential
10 challenges in the coming years of restrictions on
11 hiring and potential budget shortfalls that may occur,
12 or budget changes I should say.

13 And so, again, I will communicate with the
14 Chair. My hope is that we can create some sort of a
15 working group. We've done that in a few occasions
16 during my tenure, and it has been very successful in
17 making sure that we have had everybody's views
18 represented.

19 And so, again, I will communicate with the
20 Chair in starting the process. I don't envision it
21 happening immediately, but over the next few months we
22 will start reaching out to you. My hope is that we will
23 work with Commissioners through your special
24 assistants and, of course, with career staff and
25 management staff that are charged with carrying out the

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1 mission of the Commission.

2 So I would appreciate any thoughts or
3 questions you might have at this point.

4 VICE CHAIR TIMMONS-GOODSON: I would like
5 to ask the Staff Director, how long does -- did it --
6 do you anticipate that it will take once we get our
7 working group together?

8 MR. MORALES: I'm hopeful that it wouldn't
9 take that long. Probably if we could, you know, be
10 thoughtful and meet maybe on an every-other-month or
11 whatever the process is, you know, adopted. My hope
12 would be by the end of this year, into early next year,
13 we would have a strategic plan in place that you all
14 could look at and vote on.

15 This is really your -- as Commissioners,
16 your road map, in a way, to the staff and to the public
17 as to the direction and how we're going to measure
18 ourselves as a Commission in our success. And so this
19 is I think -- I really want to, like I said, engage in
20 a thoughtful process.

21 I don't want to overwhelm. We have so much
22 work we're already doing, but I think it's important
23 enough. And I will work with the Chair in finding a
24 process, if it makes sense, that doesn't interfere with
25 the work that is already being done. But I think it's

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1 important enough that we should direct some time and
2 perhaps even some resources to making sure it's done
3 right.

4 VICE CHAIR TIMMONS-GOODSON: So what I
5 hear you saying is that we'll have a product by the end
6 of the year, and that you don't anticipate that it will
7 take very long to put it together once you have your
8 working group.

9 MR. MORALES: Yes. Yes, ma'am. I
10 believe that would be the case. That's my hope.

11 VICE CHAIR TIMMONS-GOODSON: All right.

12 COMMISSIONER HERIOT: I just want to make
13 sure, when you say "the end of the year," you mean the
14 end of the fiscal year?

15 MR. MORALES: No. I'm -- the calendar
16 year.

17 COMMISSIONER HERIOT: Okay.

18 MR. MORALES: 2018. It's not due until
19 2018, so we have a little bit of leeway, but I don't
20 want to jam up the staff towards the end of the fiscal
21 year, and all of you, as we are getting ready for --
22 getting the statutory report out, budget, all the
23 issues we have towards the end of fiscal year. So, no,
24 this will be the end of the calendar year.

25 COMMISSIONER HERIOT: Okay. Then I would

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1 just -- I think I've said this to you before, Mr. Staff
2 Director, I'm not a fan of this literary genre. I don't
3 think it works very well. I think it tends to suck up
4 time. I know we have to do it on the end, so, you know,
5 it's important.

6 Anything we have to do, we've got to do.
7 But I would urge that we not allow ourselves to get too
8 much in the weeds over this, and I would also urge that
9 we not promise that we will do something that we end
10 up then not being able to do, because that looks bad.

11 MR. MORALES: I couldn't agree with you
12 more. Again, I want to be -- I want this to be a
13 thoughtful process, and I want this to be something in
14 a document that is useful. So that's my hope, yes.
15 Thank you.

16 CHAIR LHAMON: Okay. Thank you. Any
17 more questions or discussion for the Staff Director on
18 this topic? Commissioner Yaki.

19 COMMISSIONER YAKI: Oh, yes. Thank you
20 very much. Having gone through this process twice
21 already on the Commission, I just want to echo what the
22 Staff Director said. This is really more -- this can
23 be time -- a little bit time-consuming, but it is not
24 entirely a very difficult process.

25 Once we get the various options before the

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1 Commission and can discuss them, it moves pretty
2 rapidly from there. So I think it's very doable that
3 we can complete this process before the end of the year.

4 CHAIR LHAMON: Thank you. Any further
5 discussions or questions? Great.

6 **Discussion on OCRE Planning for 2018**

7 **Statutory Enforcement Report, Concept**

8 **Papers and Briefings**

9 CHAIR LHAMON: So, we'll turn next, again,
10 Mr. Staff Director, to discuss the OCRE [Office of Civil
11 Rights Evaluation] planning for the 2018 Statutory
12 Enforcement Report and concept papers and briefings.

13 MR. MORALES: Thank you, Madam Chair, and
14 Commissioners. I want to -- I just want to have a brief
15 discussion. We've had some preliminary conversations
16 with you and your staff about planning for 2018
17 Statutory Enforcement Report and the concept papers.

18 And even though it's February and
19 generally we have these votes and discussions in June
20 and July, you know, the clock is moving quickly, and
21 I want to make sure that we get a good jump on it.

22 Again, we need to do some planning and work
23 with you all, because, you know, we're unsure what our
24 budget is going to look like next year. And so we want
25 to, again, be thoughtful about how we approach and carry

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1 out our mission.

2 So, Maureen [Rudolph] and I will get you
3 a timeline for submission of the Statutory Enforcement
4 Report and concept papers in the next week here or two
5 -- week or two, as soon as we can get to it, so that
6 you can start to think about it and start visualizing.

7 You know, my hope, again, is that we get
8 this to you quickly for your planning purposes as well
9 as for OCRE's planning purposes. And, again, I'm
10 hoping that we can work together to get through and look
11 through the jurisdiction -- subject matter
12 jurisdiction questions and any other questions that
13 might arise, so that, as a product, an end product, we
14 have something that we can work on and get done in a
15 timely manner.

16 So, again, a real brief discussion. I
17 want to put it on your radar. I want to put you on
18 notice that we're going to start this effort and that
19 if you have any questions, please, I'd like to know your
20 thoughts at this point as well.

21 CHAIR LHAMON: Thank you. Any questions?

22 COMMISSIONER HERIOT: I just want to say
23 the same thing I said yesterday in our meeting, and that
24 is I would very much like to see the Commission pick
25 not only the topic for this upcoming enforcement

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1 report, but also the one for the following year.

2 I think every year we have the problem of
3 we pick a topic, it tends to take us longer than we hope
4 it will -- you know, that happens -- and then a research
5 plan has to be developed. And by the time we see the
6 research plan, there are always going to be flaws in
7 any research plan, and -- but by the time we see it,
8 it's too late to really work hard on it because at that
9 point, you've got to go and do the research and then,
10 get everything ready and have that report done by the
11 end of the fiscal year.

12 If we pick a topic for -- if we pick two
13 topics, one for this upcoming year and one for the next
14 year, we could have a bang-up research project for the
15 one that we have taken a little longer on. And it may
16 turn out to be our best report ever, if we can do that.

17 CHAIR LHAMON: Certainly support that
18 ambition, so thank you for that. Any other discussion?
19 Questions? Those on the phone? Hearing none, thank
20 you very much.

21 MR. MORALES: Thank you.

22 CHAIR LHAMON: So we'll turn to the next
23 agenda item. That is a discussion and vote on the voter
24 suppression statement. I think to be clear about what
25 we are discussing and voting on, I will read the

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1 statement, so we all know what it is. And also, I noted
2 that I had a typo in the version that I circulated, so
3 I will correct that typo and add a title to it, so we
4 all know what we're talking about.

5 The proposed statement is "the U.S.
6 Commission Civil Rights reaffirms long-standing
7 commitment to safeguarding the right to vote." The
8 statement begins, "President Trump has announced his
9 intention to set up a Commission led by Vice President
10 Pence to investigate vote fraud during the 2016
11 election.

12 The President has frequently repeated this
13 claim but offered no evidence in support of it, nor has
14 any credible source offered any evidentiary support for
15 it. Creating a special commission in these
16 circumstances is misleading and an unnecessary
17 diversion of resources.

18 The U.S. Commission on Civil Rights is, and
19 for 60 years has been, congressionally charged with
20 investigating allegations relating to deprivations,
21 quote, 'as a result of any pattern or practice of fraud,
22 of the right of citizens of the United States to vote
23 and have votes counted,' end quote.

24 We have taken up this charge at many times
25 in our history when the facts and circumstances

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1 warranted. The real danger to our electoral system at
2 this time is the now-familiar effort to suppress the
3 right to vote.

4 According to the Brennan Center for
5 Justice, 46 bills to restrict access to registration
6 and voting have been introduced in 21 states as of
7 February 1. A recent study demonstrated that
8 restrictive voting laws significantly decrease voter
9 participation among racial and ethnic groups.

10 Studying unnecessary barriers to voting,
11 exploring effective ways to register voters and making
12 effective efforts to expand participation are key to
13 ensuring that all voters have a say in our elections.

14 Multiple State Advisory Committees to the
15 Commission are, therefore, investigating voter
16 suppression in their states. The Kansas State
17 Advisory Committee will release a report shortly after
18 conducting a hearing in 2016 regarding the impact on
19 participation of the state identification law and
20 whether it had a disproportionate impact on the basis
21 of race, color, age, religion, or disability.

22 And the Illinois State Advisory Committee
23 is holding a hearing in March to discuss possible
24 disparities regarding access to voting and
25 discrimination based upon the race, national origin,

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1 religion, sex, disability, and age of the electorate
2 in that state.

3 The Commission also recently released a
4 report on registering voters at public assistance
5 centers and new voter registration technologies. In
6 its 60th year, the Commission remains steadfast in our
7 commitment to enhance voter access as a core civil
8 rights issue that lies at the foundation of our
9 statutory charge.

10 Chair Catherine E. Lhamon reiterated this
11 commitment. Quote, 'The right to vote is fundamental
12 to American democracy, and the Commission will continue
13 to do all in its power to protect that right for all
14 citizens.'" End quote.

15 That is the text of the statement that we
16 would discuss and then vote on. Let's begin the
17 discussion. Commissioner.

18 COMMISSIONER NARASAKI: I'd like to
19 suggest one change in the third paragraph where it
20 refers to the Kansas State Advisory Committee. I think
21 I know what was intended, but it's a little confusing.
22 It says we will release a report shortly, after
23 conducting a hearing in 2016. You know, the hearing
24 -- do you see the problem?

25 CHAIR LHAMON: Yes.

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1 COMMISSIONER NARASAKI: I would just
2 delete the "shortly."

3 CHAIR LHAMON: Okay. Any other questions
4 or discussion? Commissioner Heriot?

5 COMMISSIONER HERIOT: First, I plan to
6 vote no on this statement. There is, in fact, evidence
7 of voter fraud. It may not be as extensive as Trump
8 believes it is, but there is evidence of it. There was
9 a Seventh Circuit opinion just about a week ago that
10 dealt with some voter fraud. There is evidence of
11 felons voting in some jurisdictions. There is such
12 evidence. There is not evidence of the extent that
13 Trump was talking about, but the evidence does exist.

14 There is also evidence that the American
15 people believe that there is a lot of voter fraud, and
16 that's reason enough to investigate that.

17 I do want to, however, make an editing
18 suggestion, even though I'm not going to be voting in
19 favor of this, and that is in the first two sentences.
20 The first sentence says, "Trump has announced his
21 intention to set up a commission led by Vice President
22 Pence to investigate voter fraud," blah, blah, blah.
23 And then the next sentence says, "The President has
24 frequently repeated this claim."

25 The trouble is, there isn't a claim in the

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1 first sentence. It is, in fact, true that he has
2 announced his intention to set up a commission, so
3 that's not the right claim. So I think you need to fix
4 the first two sentences to make it make more sense.

5 CHAIR LHAMON: Thank you.

6 COMMISSIONER HERIOT: Again, I'm going to
7 vote no.

8 CHAIR LHAMON: Thank you. So taking that
9 editorial suggestion, one fix could be, "The President
10 has frequently repeated a claim of voter fraud but
11 offered no evidence in support of it."

12 COMMISSIONER HERIOT: You'd want to use an
13 adjective like "massive voter fraud" because there is
14 plenty of evidence of voter fraud, not so much of the
15 extent, at least not that I'm aware of, although I can't
16 speak to that. But you're going to want to put
17 something in there to make it clear that his allegation
18 is that there are, what is it? I've forgotten the
19 number of votes, but it's quite -- many millions.

20 CHAIR LHAMON: He said three. I think he
21 has offered no evidence in support of it, but I -- but
22 I hear your point.

23 COMMISSIONER HERIOT: I mean, again, I'm
24 not signing it, so it doesn't need to be perfect for
25 me, but --

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1 CHAIR LHAMON: Thank you. Vice Chair?

2 VICE CHAIR TIMMONS-GOODSON: This isn't
3 necessarily an editing note. But upon Commissioner
4 Heriot talking about felons voting, what came to my mind
5 is that a lawsuit was filed in North Carolina on behalf
6 of a number of individuals where it had been alleged
7 that they had illegally voted. A number of them, or
8 at least one, but I believe it to be a number of them,
9 were alleged to have been felons and not eligible to
10 vote. It was investigated, and in North Carolina a
11 convicted felon, upon completing their debt to society,
12 their right to vote is automatically restored.

13 And here these poor folks went and did all
14 they were supposed to do and initially were denied the
15 right to vote. Of course, it was corrected because,
16 thank God, they had the nerve to stand up and to
17 complain.

18 And so, when you hear -- my modest point
19 is that when you hear and see stories like that, true
20 stories like that -- it does cast some doubt on this
21 assertion that there is this large number of felons
22 voting.

23 COMMISSIONER HERIOT: I'm sure there are
24 lots of cases like that, but my point is that, this says
25 that there is no fraud, and that's probably not true.

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1 CHAIR LHAMON: Commissioner Narasaki?

2 COMMISSIONER NARASAKI: I don't think
3 that the statement says there is no fraud. I think that
4 it -- but I agree with your point that that sentence
5 needs to be fixed and needs to refer to massive fraud
6 as opposed to no fraud at all. And I also want to note,
7 relative to what the Vice Chair just noted, is the
8 Secretaries of State of the various states that have
9 been involved have all noted with pride what good
10 elections they conducted and denied any concern over
11 the kind of fraud that the President has been talking
12 about.

13 And the National Association of
14 Secretaries of State have also stated that they feel
15 that the claim is without merit. And I think,
16 importantly, the Senate Majority Leader, who is
17 Republican, has said that he agreed -- he feels that,
18 in fact, such a commission would not be a good use of
19 taxpayers' money because he also believes that there
20 was not that level of fraud. So I think it's an
21 important statement for the commission to be making.

22 COMMISSIONER HERIOT: Yes. Let me just
23 add that I believe that the Majority Leader was also
24 concerned with the notion that voting is generally a
25 state issue. And it wasn't so much that he thinks that

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1 there is no voter fraud; what he thinks is that it's
2 something that should be handled at the state level.
3 That's a very different -- different thought.

4 CHAIR LHAMON: Commissioner Yaki?

5 COMMISSIONER YAKI: Well, I would like to
6 offer that the President did actually offer evidence
7 of voter fraud by citing busloads of people from
8 Massachusetts to New Hampshire, approximately 16,000,
9 who apparently were able to blend in with the residents
10 of New Hampshire, figure out where the polling places
11 were so they could go in without being caught, and then
12 cast their ballots and deprive him of the votes of the
13 Granite State.

14 But in all seriousness, this is an issue
15 that comes up time and again and is a -- is a smokescreen
16 for a greater -- a greater tragedy of the American
17 voting system, and that is what the statement intends
18 to point out, and that is the efforts among many states
19 and many jurisdictions to continue to suppress the
20 votes of the poor, of minorities, of the disabled, of
21 seniors, of the disenfranchised.

22 The fact is that we had a briefing on this
23 issue in 2008. This was -- there were many people who
24 came to this -- came to this briefing. There were many
25 statements and examples given about how both -- Elvis

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1 Presley had apparently risen from the dead to register
2 to vote, and Mickey Mouse had transformed himself from
3 a two-dimensional to a three-dimensional character to
4 register to vote -- all in a way to confuse the issue
5 of voter registration with the actual act of voting
6 illegally in a way that could transform an election.

7 And there simply continues to be
8 absolutely no evidence that anything like that occurs,
9 that there is no significant illegal voting, that there
10 is no widespread illegal voting, that if we are to,
11 instead, look at the voter registration issue as an
12 issue of grave concern that requires the vast
13 allocation of resources of the American government,
14 then we should start looking at the fact that members
15 of the President's family are registered in multiple
16 states as well. And no one is claiming that any of them
17 are engaging in voter -- in illegal voting, although
18 perhaps we should investigate that as well.

19 This is something that -- that continues
20 to come up over and over again -- is brought up by people
21 who are -- whose only goal is to ensure that the
22 electorate is not diverse, that the voices of the poor
23 are not heard, and that the ability of the -- of all
24 Americans to exercise that thing which people -- and
25 which we will talk about later today -- have fought and

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1 died for do -- are not able to access it as freely and
2 as openly and as easily as in other countries with far
3 less democratic values and far less cherished freedoms
4 than we protect here at home.

5 CHAIR LHAMON: Thank you. Just to
6 correct our record, I have the statement from Senator
7 Mitch McConnell related to voting, and what he said is,
8 quote, "There is no evidence that it occurred in such
9 a significant number that would have changed the
10 Presidential election. And I don't think we ought to
11 spend any federal money investigating that."

12 COMMISSIONER HERIOT: That's not
13 inconsistent with what I said.

14 CHAIR LHAMON: Okay. I just want it to be
15 clear about what --

16 COMMISSIONER HERIOT: I think it's true
17 that the President's -- the numbers the President was
18 alluding to seem rather large to me, too.

19 CHAIR LHAMON: Vice Chair.

20 VICE CHAIR TIMMONS-GOODSON: In an effort
21 maybe to move us along, Madam Chair, would it be okay
22 to -- for me to read that first paragraph --

23 CHAIR LHAMON: Yes.

24 VICE CHAIR TIMMONS-GOODSON: -- with --

25 CHAIR LHAMON: Thank you.

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1 VICE CHAIR TIMMONS-GOODSON: President
2 Donald Trump has announced his intention to set up a
3 commission led by Vice President Michael Pence to
4 investigate massive voter fraud during the 2016
5 election. The President has frequently asserted
6 widespread voter fraud but offered no evidence in
7 support of it.

8 And everything else would remain the same.

9 CHAIR LHAMON: Thank you. Commissioner
10 Yaki.

11 COMMISSIONER YAKI: Yes. I have an issue
12 with that first sentence. It says "to investigate
13 massive voter fraud." We must put the word "alleged."

14 VICE CHAIR TIMMONS-GOODSON: That's
15 reasonable.

16 CHAIR LHAMON: Okay. Thank you.
17 Commissioners who are on the phone, any discussion or
18 comments?

19 COMMISSIONER KIRSANOW: Madam Chair,
20 Kirsanow here.

21 CHAIR LHAMON: Go ahead.

22 COMMISSIONER KIRSANOW: Thank you, Madam
23 Chair. I intend to vote no also for many of the same
24 reasons that Commissioner Heriot mentioned. First of
25 all, with respect to the wordsmithing of this, I am not

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1 sure that the investigation that the President or the
2 Vice President was going to conduct was going to be
3 limited only to massive voter fraud.

4 That may have been the allegation, and I
5 concur that at this point we have no evidence of massive
6 voter fraud of the scale talked about immediately after
7 the election. But you don't have to have massive voter
8 fraud for people to be disenfranchised.

9 There are literally thousands of elections
10 across the country during the course of the
11 Presidential election cycle that are decided by just
12 a handful of votes, and it doesn't take a whole lot of
13 quote/unquote "voter fraud" or unintentional voting to
14 swing those elections.

15 As an example, my own Secretary of State
16 here in Ohio, Jon Husted, testified that in 2014 70
17 separate elections were decided by one vote. All you
18 need is one person to vote inadvertently, one person
19 to vote fraudulently, and you have a shift in the
20 elections. It may not be the Presidential election,
21 but it could be something of significant magnitude.

22 In addition, as we know here on the
23 Commission, because we investigated this, during the
24 2000 Presidential election, the Presidential election
25 was decided by 537 votes in Florida. That's all -- 537

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1 -- and you swing an election, and Al Gore could have
2 been President.

3 But there is a considerable amount of
4 evidence out there that voter fraud does occur,
5 inadvertent voting occurs, illegal voting occurs.
6 Commissioner Heriot mentioned the Seventh Circuit
7 decision. There are scores of cases where it -- for
8 example, 2008 Minnesota election for the Senate, 177
9 felons were convicted -- that doesn't mean -- that's
10 not the entire universe of people who may have been
11 engaged in voter fraud, but 177 felons were convicted
12 for illegally voting in an election only decided by
13 about 300 votes.

14 This has significant consequences, and I
15 might be persuaded to sign on to this if we can get an
16 agreement that every time some arm of the government
17 is going to engage in an unnecessary diversion of
18 resources, that we vote against that, hey, I may be able
19 to sign on to this.

20 But this may be the first time the
21 Commission has ever said let's not devote any resources
22 to something within our purview, or would be opposed
23 to an investigation. If there is voter fraud, or no
24 voter fraud whatsoever, then we should encourage this
25 type of investigation to completely debunk this myth

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1 in its entirety. But that's not what is going on here.

2 So I would encourage us to abandon this
3 statement because it's inconsistent with the facts, and
4 it's also inconsistent with our mission.

5 CHAIR LHAMON: Thank you, Commissioner
6 Kirsanow. To be clear, recognizing that you intend to
7 vote no on this statement, is it your recommendation
8 that the first paragraph not reference extensive voter
9 fraud?

10 COMMISSIONER KIRSANOW: I don't think
11 that that is accurate in terms of what they said the
12 Commission was going to do or this -- this Commission.
13 I think the President may have said there was massive
14 voter fraud, but I'm not sure that the Commission is
15 charged with investigating quote/unquote "massive
16 voter fraud" as opposed to voter fraud, period.

17 CHAIR LHAMON: Okay. Thank you. So I
18 hear that as a recommendation, just to reference voter
19 fraud. Hearing no disagreement.

20 Then, in addition, just to be clear, this
21 statement does not say that this Commission will not
22 investigate voter fraud. This statement reaffirms the
23 Commission's commitment to fulfill our statutory
24 charge and makes clear that there is not a need for a
25 separate commission because it is, in fact, our job to

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1 investigate that issue.

2 COMMISSIONER HERIOT: Are we going to do
3 it, then?

4 CHAIR LHAMON: Want to make sure that --

5 COMMISSIONER HERIOT: Voter fraud?

6 CHAIR LHAMON: Commissioner Narasaki.

7 COMMISSIONER NARASAKI: As I read the
8 statement, the point of the statement is to say that,
9 actually, there are far more serious problems around
10 voting than these spurious allegations of massive voter
11 fraud, and that is the fact that we are one of the most
12 advanced democratic countries, and yet we have poor
13 voter turnout, we have a lot of processes that in fact
14 work to suppress the vote of minorities and poor people
15 and people with disabilities, that the statement is
16 meant to say that in terms of what our charge is, to
17 make sure that minorities and other vulnerable people
18 are getting the full -- fully enfranchised to vote,
19 that's where we should, as a nation, be putting our
20 attention.

21 That is the point of this statement, not
22 that we don't think we would ever investigate this, but
23 that there are far more important things that are much
24 more in line with our mission that needs attention.

25 CHAIR LHAMON: So I just want to make sure

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1 that I have heard from all Commissioners who wish to
2 speak on this.

3 Having so heard, let's move on to vote. Do
4 I have a motion to approve the voter suppression
5 statement, as amended?

6 COMMISSIONER YAKI: So moved.

7 CHAIR LHAMON: And is --

8 COMMISSIONER KLADNEY: Kladney here.
9 I'll make the motion.

10 CHAIR LHAMON: I think you just followed
11 Commissioner Yaki, so will you be our second,
12 Commissioner Kladney?

13 COMMISSIONER KLADNEY: Sure.

14 CHAIR LHAMON: Terrific. Thank you.
15 Commissioner Kirsanow, how do you vote?

16 COMMISSIONER KIRSANOW: I'm sorry. No.

17 CHAIR LHAMON: Thank you. Commissioner
18 Heriot?

19 COMMISSIONER HERIOT: No.

20 CHAIR LHAMON: Thank you. Commissioner
21 Narasaki?

22 COMMISSIONER NARASAKI: Yes.

23 CHAIR LHAMON: Thank you. Commissioner
24 Kladney?

25 COMMISSIONER KLADNEY: Yes.

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1 CHAIR LHAMON: Thank you. Commissioner
2 Adegbile?

3 COMMISSIONER ADEGBILE: Yes.

4 CHAIR LHAMON: Thank you. Commissioner
5 Yaki?

6 COMMISSIONER YAKI: Aye.

7 CHAIR LHAMON: Thank you. Vice Chair
8 Timmons-Goodson?

9 VICE CHAIR TIMMONS-GOODSON: Yes.

10 CHAIR LHAMON: Thank you. And I vote yes.
11 So the motion passes, two Commissioners opposed, no
12 Commissioner abstained, and all others were in favor.

13 So now we will move on to discuss the
14 immigration executive order statement, and I will again
15 read that statement aloud, so that we are clear what
16 it is that we are voting on and discussing.

17 The statement title is the "U.S.
18 Commission on Civil Rights expresses concern over
19 Executive Orders promoting religious and national
20 origin discrimination." And it begins "the U.S.
21 Commission on Civil Rights expresses deep concern that
22 recently issued executive orders, particularly orders
23 13768 and 13769, promote and endorse religious and
24 national origin discrimination, in contravention of
25 our nation's core anti-discrimination principles.

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1 Executive Order 13769 sets out different
2 treatment for persons coming to the United States from
3 specified Muslim majority countries without any lawful
4 justification or basis for that different treatment.
5 By singling out seven overwhelmingly Muslim majority
6 countries for exclusion, the executive order itself
7 raises the specter of government endorsement of
8 religious discrimination.

9 This infirmity is compounded by the
10 executive order's prioritization of refugees who claim
11 religious persecution so long as they belong to, quote,
12 'a minority religion,' end quote, in their home
13 country.

14 Moreover, as courts have already
15 recognized, extrinsic evidence also suggests that the
16 executive order was motivated by prohibited bias,
17 inconsistent with the nation's anti-discrimination
18 principles.

19 Executive Order 13768 calls for denying
20 federal funding to any, quote, 'sanctuary
21 jurisdiction,' end quote, and, among other measures,
22 requires a public weekly report of criminal actions
23 alleged to have been committed by undocumented
24 immigrants.

25 Elevating mere allegations of criminality

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1 to a special federal reporting status, particularly
2 when directed at any persons alleged to lack
3 immigration status, raises national origin
4 discrimination concerns.

5 The White House has announced its
6 intention to supersede recently issued executive
7 orders, and the Commission encourages the
8 administration to use this new opportunity to carefully
9 assess the serious civil rights concerns that the
10 initial set of executive orders present, and to cure
11 any such infirmities prior to issuance.

12 Chair Catherine E. Ihamon expressed her
13 concerns, quote, 'Government action that communicates
14 animus rather than equity strikes against our core
15 national ideals. This Commission calls for adherence
16 to Constitutional principles in our national
17 interest.'"

18 And that's the end of the statement.

19 Let's begin discussion. Hearing none, we
20 can -- Commissioner Narasaki?

21 COMMISSIONER NARASAKI: I just want to
22 note with sadness that -- of what the results of these
23 kind of policies engender. Just recently, two Indian
24 Americans were shot after being told to go back to their
25 own country in what is an apparent hate crime and an

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1 apparent mistaken belief that they were Muslim, not
2 that that would have been okay.

3 And this -- these kinds of policies which
4 are playing to increase xenophobia and fears of people
5 both based on religion, color, and race, I think should
6 be disturbing to all of us.

7 And, you know, we, as a Commission, had
8 recently issued a statement about freedom of religion
9 and civil rights, and this is an area where clearly
10 religion is being targeted. And I am particularly
11 concerned about the tenor of these kinds of directions
12 that we are going in.

13 CHAIR LHAMON: Thank you. Commissioner
14 Yaki?

15 COMMISSIONER YAKI: Yes. I just wanted
16 to echo what Commissioner Narasaki said. I have -- the
17 history of my own family is one where the Chinese side
18 of my family was initially denied admission into this
19 country because of the Chinese Exclusion Act, which was
20 still in effect at the time.

21 Notwithstanding the fact that my
22 grandfather on my Chinese side was a diplomat for the
23 government of China, the fact that he was still Chinese
24 led people to think, well, we need to put him on the
25 first boat out of here as quickly as possible,

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1 notwithstanding the fact that he got stranded here
2 because of an event called World War II.

3 This is something where I would just urge
4 the President to make a statement, as did George W. Bush
5 in the dark days after 2001. We are not in those dark
6 days. We are in troubled times; we are in uncertain
7 times.

8 It does not help us for -- to have the
9 leader of the free world talk in ways to -- that
10 essentially scares Americans in this country, and in
11 a way that -- where I still have not, and if I am --
12 I am wrong, I will gladly be corrected -- any statement
13 that says the word that we also want to guard against
14 anti-Islam activity in this country as well.

15 I think the Southern Poverty Law Center
16 noted that the rise of anti-Islam groups has tripled
17 in the past year or so. And when the President finally
18 made a statement regarding anti-Semitism earlier this
19 week, a statement that people believed he should have
20 made the week before when asked about it, it would have
21 been nice, it would have been good, it would have been
22 I think a sign of true leadership to have included in
23 that statement at some point that we are all Americans
24 and that anti-Semitism cannot stand, and neither can
25 anti-Islam as well.

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1 I think it's interesting that when you have
2 -- that the -- no one has noted from the Administration
3 the work that the American Islamic community has done
4 in raising funds to restore the damaged, vandalized,
5 Jewish cemetery in Ohio. I mean, these are important
6 things that the leader of this country needs to do.

7 And this -- the executive order and the way
8 it was rolled out and the way it was described, all the
9 parol evidence that came out from people like Rudy
10 Giuliani and others in how it came into being, does not
11 reassure the American people that our borders are safe.

12 It only heightens fears and creates an
13 environment for unfortunate incidents like that just
14 the other day with the person who yelled, "Get out of
15 our country" while carrying a gun and killing one person
16 and seriously injuring another.

17 So I think that this -- this statement is
18 well -- this Commission is well-timed. It could go far
19 further. I think we are being tempered, rightfully so,
20 but I think that we should be prepared to move forward
21 stronger and harder on this issue, depending on what
22 happens in the days ahead.

23 CHAIR LHAMON: Thanks. Commissioners on
24 the telephone, two questions. One, do you have
25 anything you'd like to say? And, two, if you don't,

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1 could you please mute the phone, so that we don't have
2 background.

3 COMMISSIONER ADEGBILE: This is
4 Commissioner Adegbile. I have a proposed revision to
5 the statement in what I believe is the second paragraph.

6 CHAIR LHAMON: Okay.

7 COMMISSIONER ADEGBILE: After the second
8 occurrence of the word "religious," I would propose to
9 add the words "and possibly national origin" before the
10 word "discrimination."

11 CHAIR LHAMON: Okay. Thank you.
12 Commissioner Heriot?

13 COMMISSIONER HERIOT: First of all, I
14 agree with Commissioner Yaki that the United States
15 government should be careful not to fan the flames of
16 anti-immigrant sentiment and any anti-national origin
17 sentiment.

18 On the other hand, a couple of things going
19 on here. First of all, evidently, we are going to be
20 getting new executive orders on this topic very soon,
21 and I don't know how different it will be, but it will
22 be different from what was issued first.

23 And when I'm looking at this document, I'm
24 seeing that a number of the legal issues here -- and
25 I think even some factual issues -- really aren't sorted

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1 out in a useful way at this point, so I'm wondering,
2 why should we be issuing this when we don't even know
3 what the executive order is going to say? Why don't
4 we take a bit more time here?

5 For example, the statement, as it is
6 currently written, talks about the -- I can't remember
7 the number, but a number of -- seven -- seven countries
8 are singled out. It doesn't point out that these were
9 the same seven countries that were singled out by the
10 Obama administration as countries of concern with
11 regard to counterterrorism.

12 You know, I don't know exactly what that
13 Obama administration document was or what effect it
14 had, but I'm concerned that this makes it sound like
15 the Trump administration came up with this on its own,
16 and that's evidently not the case.

17 I am also concerned with how this dovetails
18 with what we know to be ordinary law, such as taking
19 religion into consideration. You know, we have
20 treaties that require us to give asylum to immigrants
21 under circumstances that require us to take into
22 consideration religion. If a particular religious
23 group is being persecuted in another country, we have
24 actually got treaties that I believe place some duty
25 on us to take that into consideration.

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1 And yet this just seems very
2 seat-of-the-pants the way it's written now, as if
3 taking religion into consideration, which by the way
4 it doesn't do. It simply points out that seven
5 countries are going to be singled out in some way. This
6 just doesn't seem to be sufficiently legally grounded
7 to where we should be willing to sign it. It's too
8 seat-of-the-pants.

9 CHAIR LHAMON: Commissioner Narasaki?

10 COMMISSIONER NARASAKI: There has been in
11 the debate over the -- these orders continuing
12 references to the Obama policy, and the Obama policy
13 was not about a complete ban based on national origin
14 and religion. It was much more measured, and it was
15 also not just these countries.

16 But the other thing that I want to point
17 out is -- Commissioner Heriot, is you expressed concern
18 because there is a new order that is being talked about,
19 and, in fact, the statement contemplates that and seeks
20 to influence what that order looks like, and that is
21 within the charge of the Commission, which is to advise
22 Congress and the President about our concerns. And so
23 I feel actually it's very timely.

24 COMMISSIONER HERIOT: Well, now we're
25 probably too late.

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1 COMMISSIONER NARASAKI: There is strong
2 belief that whatever is issued or about to be issued
3 will still raise significant constitutional and other
4 issues, so I don't think -- I think this debate is going
5 to be going on for a while, and we will not be too late.

6 COMMISSIONER HERIOT: That's why I think
7 we should put out something that is more measured and
8 much better researched than this.

9 CHAIR LHAMON: Any further discussion?

10 COMMISSIONER KIRSANOW: Madam Chair,
11 Kirsanow here.

12 CHAIR LHAMON: Yes?

13 COMMISSIONER KIRSANOW: Thanks, Madam
14 Chair. Of course, I concur with what Commissioner
15 Heriot had to say. I would note a couple of things.
16 One, that there have been some statements made here that
17 religion is being targeted. And if a religion is being
18 targeted, then whoever is doing the shooting has
19 egregiously poor aim because what we're talking about
20 are seven countries, and the largest Muslim majority
21 countries are not part of this list.

22 Indeed, 85 to 90 percent of the foreign
23 Muslim population is not affected whatsoever by the
24 existing executive order. I do agree that any
25 administration, any governmental official, should be

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1 celebrate and temperate in their remarks not to
2 unnecessarily cause alarm, fan any flames, but our
3 proposed statement criticizes the order for having
4 different treatment for persons coming to the United
5 States from specified Muslim majority countries
6 without any lawful justification.

7 Now, I understand that have been some
8 courts that contend there is no lawful justification,
9 but each one of those courts failed to even consider
10 the governing statute, 8 USC 1182f, which gives the
11 President plenary authority to make determinations
12 just as were made in this regard.

13 Now, those determinations might be more
14 circumspect. Maybe they're done in a different way
15 than many of us would hope. But it gives the President
16 authority, and it's quite clear. It says whenever the
17 President finds the entry of any class of aliens against
18 the United States would be detrimental to the interest
19 of the United States, he may by proclamation, until such
20 period as he may deem necessary, suspend the entry of
21 all aliens, or any class of aliens, as immigrants or
22 non-immigrants or impose on the entry of aliens any
23 restrictions he may deem appropriate.

24 Again, that was not even touched upon by
25 any of the court decisions, although it was raised.

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1 But when you talk about no lawful justification, the
2 reason why these seven countries were selected is
3 similar to, really, a famous bank robber's response to
4 "Why do you rob banks?" and he says, "That's where the
5 money is."

6 With these seven countries, terrorist acts
7 perpetrated throughout the world, there is a
8 disproportionate number of those acts occurring in
9 these countries or by individuals who come from these
10 countries, and it's extraordinary.

11 We have had a Senate Subcommittee on
12 Immigration report issued just in the last few months
13 that shows, of the individuals convicted of terrorist
14 attacks here in the United States, 72 came from these
15 seven countries. And of the 20 deadliest attacks,
16 terrorist attacks that occurred in 2015, just three of
17 these countries are responsible for 40 percent of them
18 -- Yemen, Iraq, and Syria.

19 In addition, 2,415 terrorist acts were
20 perpetrated in Iraq, 384 in Syria, 467 in Yemen, 241
21 in Somalia, 432 in Libya, and it goes on and on, far
22 exceeding the terrorist activities of any other
23 country. There is a rational basis why the Obama
24 administration selected these seven, and that the Trump
25 administration confined the orders to these seven.

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1 Maybe it should be expanded; maybe it should be slimmed
2 down. We can have an argument about that, but there
3 is a lawful justification for these seven, and there
4 is a lawful justification for the underlying authority.

5 CHAIR LHAMON: Thank you. Commissioner
6 Narasaki.

7 COMMISSIONER NARASAKI: I just want to
8 note that one of the most -- I think one of the most
9 civil -- important civil rights acts in the 1960s was
10 the Immigration and Naturalization Act, which ended the
11 bans and quotas on immigration based on race and
12 national origin, which had severely limited
13 immigration from places like Asia, for example, for
14 this reason, that in this country we do not ever take
15 the position that you are guilty because someone else
16 from your race or national origin did something wrong.

17 That is not who we are as Americans. That
18 is not what has built our country. That is fundamental
19 to our Constitution. And so I just take offense when
20 we talk about bans because a few people from a religion
21 or a few people from a country have done something
22 wrong. That does not mean -- that does not condemn
23 every single person from that country, and I just have
24 a problem with that.

25 I want to speak separately to the issue of

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1 executive orders, and with the indulgence of the Chair
2 just note I have an ongoing concern about the treatment
3 of Native Americans over the North Dakota access
4 pipeline. And I'm very alarmed --

5 CHAIR LHAMON: Can we deal with this issue
6 first?

7 COMMISSIONER NARASAKI: Can I just
8 finish? It will just take a second. I am alarmed by
9 the government actions that have been related to the
10 protests. I am alarmed by the decision to forego the
11 additional environmental studies which our earlier
12 statement urged them to do to ensure that Native
13 American water sources and ancestral lands are not
14 bearing a disproportionate share of the negative
15 environmental consequences of these risks.

16 And I note with pride that we sent
17 Commissioners to North Dakota, and that we have been
18 very vigilant on continuing to monitor this issue, that
19 we are planning to have a full report looking at the
20 federal obligations to the Native American community,
21 and I am just urging that the Commission staff and
22 Commissioners continue to remain vigilant on this
23 particular subject.

24 CHAIR LHAMON: Thank you. Commissioner
25 Heriot.

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1 COMMISSIONER HERIOT: I just want to say
2 that I agree with Commissioner Narasaki on what is not
3 our country, but I'd also add that that was not the
4 executive order either, simply an executive order that
5 was intended to be temporary while what Trump calls
6 extreme vetting can be put into place.

7 And what is extreme vetting for? It is
8 for, in fact, you know, being able to make decisions
9 based on individual bases rather than relying on
10 national origin stereotypes.

11 CHAIR LHAMON: Thank you. I think we have
12 now heard from all Commissioners on this topic. Unless
13 someone says they would like to speak who is on the
14 phone, why don't we move forward to vote. Do I have
15 a motion to approve the immigration executive order
16 statement, including the amendment proposed from
17 Commissioner Adegbile?

18 VICE CHAIR TIMMONS-GOODSON: So moved.

19 CHAIR LHAMON: Thank you. Do I have a
20 second?

21 COMMISSIONER YAKI: Second.

22 CHAIR LHAMON: Thank you. Commissioner
23 Kirsanow, how do you vote?

24 COMMISSIONER KIRSANOW: No.

25 CHAIR LHAMON: Commissioner Heriot?

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1 COMMISSIONER HERIOT: I vote no.

2 CHAIR LHAMON: Commissioner Narasaki?

3 COMMISSIONER NARASAKI: I vote yes.

4 CHAIR LHAMON: Commissioner Kladney?

5 COMMISSIONER KLADNEY: Yes.

6 CHAIR LHAMON: Commissioner Adegbile?

7 COMMISSIONER ADEGBILE: Aye.

8 CHAIR LHAMON: Commissioner Yaki?

9 COMMISSIONER YAKI: Aye.

10 CHAIR LHAMON: Vice Chair?

11 VICE CHAIR TIMMONS-GOODSON: Yes.

12 CHAIR LHAMON: And I vote yes. So two
13 Commissioners opposed, no Commissioner abstained, all
14 others were in favor. So the motion passes.

15 Next, we will hear from the Staff Director
16 for the monthly Staff Director's Report.

17 **B. Management and Operations**

18 **Staff Director's Report**

19 MR. MORALES: Thank you, Madam Chair. I
20 will be very brief. You have my Staff Director's
21 report. If you have any questions, please contact me
22 regarding anything in the report.

23 I just want to mention -- I always take a
24 moment to -- I want to thank staff for their hard work
25 putting this meeting together and putting the panel

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1 together as well and special assistants that were
2 involved in this, including Jason Lagria, so I really
3 thank everybody for that.

4 **Staff Changes**

5 MR. MORALES: Second, I just wanted to
6 mention welcome to staff to the Commission. One is
7 returning; it's Alec Deull, who has served in the past
8 as special assistant and will --

9 PARTICIPANT: Deull.

10 MR. MORALES: Deull. Did I say Duall?
11 Sorry. Deull. My mistake. Thank you very much,
12 Commissioner, for correcting me. He will be
13 Commissioner Yaki's special assistant and --

14 COMMISSIONER YAKI: He was Commissioner
15 Achtenberg's special assistant, too.

16 MR. MORALES: And he will be so again.
17 Thank you. And we also have Sarale Sewell, who will
18 -- is joining us. She will be social scientist. Go
19 ahead and maybe wave for the Commissioners. She is a
20 social scientist, civil rights background in housing
21 and administration of justice.

22 And we have two staff that have left. One
23 is Kimberly Tolhurst, who has left the Commission. We
24 wish her well in her future endeavors, as well as
25 Jennifer Hepler, who has served the Commission for many

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1 years as well, and we wish them well in their future
2 endeavors.

3 With that, I do not have anything else,
4 Madam Chair.

5 CHAIR LHAMON: Thanks very much.

6 So we are coming up on 11:00 a.m., but I
7 am told that it would be helpful for us to have a
8 five-minute recess. So we will come back at 11:02 and
9 begin the next part of our conversation. Thanks.

10 (Whereupon, the above-entitled matter went off the
11 record at 10:56 a.m. and resumed at 11:02 a.m.)

12 CHAIR LHAMON: It's 11:02, so I'll call us
13 back to order -- thanks, all -- for the second portion
14 of today's meeting.

15 Today we mark the 75th anniversary, last
16 Sunday, of President Roosevelt signing Executive Order
17 9066 authorizing the United States military forcibly
18 to remove more than 120,000 people, principally
19 Japanese Americans, to internment camps within the
20 United States.

21 That shameful period in the American past
22 has begun to have distressing echoes today. We in this
23 Commission this morning have called for immediate
24 recommitment to equal treatment for all, and on that
25 note I do ask the staff to issue the statements that

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1 we voted on today.

2 In the meantime, we are honored to have
3 join us by telephone today Karen Korematsu, daughter
4 of an American hero, who challenged in litigation all
5 the way to the United States Supreme Court, and many
6 years thereafter to a federal trial court in
7 California, to seek and secure redress for the ways the
8 United States wronged him and so many thousands of his
9 peers.

10 We are also honored to have with us Hogan
11 Lovells partner and Georgetown law professor Neal
12 Katyal, who, in his prior life as Acting Solicitor
13 General, issued the nation's apology for ethical error
14 during the Japanese internment cases.

15 We will now hear some short remarks from
16 Commissioners Narasaki and Yaki, whose families were
17 both interned during World War II. Commissioner
18 Narasaki?

19 COMMISSIONER NARASAKI: Thank you. Good
20 morning, everyone. I want to add my thanks to our two
21 very distinguished speakers for sharing their stories
22 and expertise, and particularly to Karen Korematsu,
23 because she is calling in from Hawaii. So I think it's
24 only 6:00 in the morning there.

25 This is a very personal topic to me because

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1 my commitment to civil rights is rooted in my family's
2 history. And in part this is in honor of my mother who
3 passed away in December.

4 They were teenagers, my parents, when
5 their families were forced to leave their homes by
6 President Franklin Roosevelt in his Executive Order
7 9066. Although they were both born in America, they
8 were both sent first to race tracks, one near Seattle,
9 the other near San Jose, and housed in horse stalls and
10 then sent at gunpoint in trains to hastily built
11 concentration camps in the barren regions of Idaho and
12 Utah for the sole crime of looking like the enemy.

13 To prove his loyalty, my father
14 volunteered for the U.S. Army and joined the famed 100th
15 Battalion 442 Regimental Combat Team, even though his
16 mother, also an American-born citizen, was still being
17 held behind barbed wire.

18 Their photos are on that screen. My mom
19 is standing in front of the barracks in Minidoka, Idaho,
20 and, as you can see, my father -- I think that was from
21 his training camp days.

22 Many people mistakenly think that the
23 Japanese internment was only in response to the bombing
24 of Pearl Harbor and our entrance into World War II
25 because they haven't really been taught the history of

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1 racism on the West Coast.

2 Racism resulted in alien land laws that
3 prevented immigrant Chinese, Indian, Japanese, and
4 Korean farmers from owning land, from testifying
5 against whites, and from becoming naturalized
6 citizens.

7 One of the largest mass lynchings in the
8 U.S. history occurred in California when approximately
9 20 Chinese immigrants were tortured and hung.
10 Neighborhoods were segregated by deeds that prevented
11 sales to Orientals, Mexicans, and blacks. And
12 schools, even in Seattle, were formally or informally
13 racially segregated.

14 Just a few months ago, we heard from Sylvia
15 Mendez, the 80-year-old plaintiff in *Mendez v.*
16 *Westminster*, the landmark 1946 case that desegregated
17 California's public schools. She and her family had
18 moved to Westminster, California, and ended up tending
19 the farm of the Munemitsus family, a Japanese American
20 family who had left their farm because they were
21 interned.

22 It was there that Ms. Mendez encountered
23 racially segregated schools, which in her case
24 ultimately led to the *Mendez* case. As it wound its way
25 through the court system, several organizations,

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1 including the NAACP and the Japanese American Citizens
2 League, filed legal briefs in support of her case.

3 And the Munemitsu family, who had
4 recently been released from internment and returned to
5 their farm, allowed the Mendez family to keep some of
6 the profits from the harvest that year in order to help
7 fund the appeal. That case eventually led to the basis
8 for the *Brown v. Board of Education* Supreme Court
9 decision that desegregated all schools nationally.

10 I think our history is important to
11 remember, both the mistakes that are made as Americans
12 as well as how we come together and how entwined our
13 fates are, and that we need to be vigilant in learning
14 from the mistakes of the past, and that is why I think
15 it's so important to be acknowledging the 75th
16 anniversary of Executive Order 9066. And I thank the
17 Commission for allowing us to do that.

18 CHAIR LHAMON: Thank you. Commissioner
19 Yaki?

20 COMMISSIONER YAKI: Thank you very much.
21 My family, at least my father's family's history, is
22 not too different from that of Commissioner Narasaki.
23 My father was in kindergarten essentially when he and
24 his family were given the order to relocate to Gila
25 River in the Arizona desert, a place that lives up to

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1 its name with the number of Gila monsters that used to
2 roam through the camp.

3 I remember this was a subject that my
4 father for many years just would not talk about, did
5 not talk about. I did -- I saw about it in the history
6 books, but there was -- he would never ever bring up
7 anything about it until one day, when he knew I had been
8 asking a lot of questions about it, a book appeared as
9 books would always do whenever I started getting
10 inquisitive about a subject, on my nightstand, about
11 the internment and many of the block wood prints that
12 were made by people who had been incarcerated and gave
13 a little bit about the story.

14 It wasn't until later when I was a teenager
15 that I understood a little bit more when I met my uncle,
16 Ben Murakami. And the only way it started is because
17 I noticed that he was missing his left arm. He had a
18 metal hook system on his left arm, and I asked him, "How
19 did this occur?" He said, "Well, I lost it at Anzio.
20 I lost it in World War II."

21 And I said, "Well, how did you do that?"
22 He said, "Well, I volunteered while I was in prison with
23 your father." Three members of my family were in the
24 442. Actually, there were five. Two did not make it.
25 Three retired and up until I think a few years ago all

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1 of them were still with us.

2 But it is -- it is a story that still, like
3 for Commissioner Narasaki, burns at me. And what burns
4 at me is I remember as a law student reading the
5 *Korematsu* decision, and reading the language and seeing
6 people who I held as legal icons and legal heroes all
7 essentially joining in on an opinion that basically
8 gave the President unfettered power in the national
9 interest to essentially remove an entire body of people
10 from this country, from their homes, from their
11 schools, from their loved ones in the case of Fred
12 *Korematsu*.

13 And what disturbs me to this day is that
14 this decision still stands. While the great work of
15 the *coram nobis* team took out the underlying
16 convictions of Fred *Korematsu* and Gordon *Hirabayashi*,
17 the fact remains is that you still occasionally --
18 occasionally, but you still see -- *Korematsu* cited in
19 briefs, in opinions, in Supreme Court cases, about the
20 President's unfettered right to act in the national
21 interest.

22 And people try and say, "Well, you can cite
23 *Korematsu* without dealing with the tragedy of the
24 Japanese internment." I just don't think so.

25 If the underlying internment was, in and

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1 of itself, illegal, unconstitutional, not American,
2 how can you still rest a decision of Presidential power
3 upon such a faulty and shaky foundation?

4 That's the horror and the continuing
5 horror to me of the *Korematsu* decision today, that we
6 have -- it has not been explicitly overturned and that
7 it still stands and is cited as an example of the
8 sweeping ability of the President to act in the
9 quote/unquote "national interest," even at the expense
10 of the constitutional rights of Americans.

11 So I just want to thank Commissioner
12 Narasaki for organizing this today. I want to join her
13 in commending the people who are here today, who have
14 done yeoman's work on behalf of the cause and our
15 community, and thank you very much.

16 CHAIR LHAMON: Thank you both for sharing
17 what your families went through.

18 **Presentation by Karen Korematsu and**
19 **Neal Katyal on Executive Order 9066**
20 **and the Internment of Japanese Americans**
21 **During World War II**

22 CHAIR LHAMON: It is now my pleasure to
23 introduce Karen Korematsu. Karen's father, Fred T.
24 Korematsu, was arrested and convicted of violating the
25 federal executive order. He took his case to court,

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1 ultimately losing in the United States Supreme Court
2 in a low point in our constitutional history.

3 Forty years later, he secured
4 extraordinary coram nobis relief, vacating his
5 original conviction. Judge Marilyn Hall Patel's
6 decision in that case recognized that the 1982
7 Commission on Wartime Relocation and Internment of
8 Civilians quote, "Found that military necessity did not
9 warrant the exclusion and detention of ethnic
10 Japanese," end quote.

11 She further found that the report quote,
12 "Concluded that race prejudice, war hysteria, and the
13 failure of political leadership shaped the decision to
14 intern Japanese Americans."

15 Judge Patel went on to remind us that the
16 Korematsu Supreme Court decision quote, "Stands as a
17 caution that in times of distress the shield of military
18 necessity and national security must not be used to
19 protect governmental actions from close scrutiny and
20 accountability."

21 It stands as a caution that in times of
22 international hostility and antagonisms our
23 institutions -- legislative, executive, and judicial
24 -- must be prepared to exercise their authority to
25 protect all citizens from the petty fears and

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1 prejudices that are so easily aroused.

2 Ms. Korematsu, we are grateful to you for
3 joining us today from your home in Hawaii so early, and
4 we look forward to what you have to say.

5 MS. KOREMATSU: Good morning, and thank
6 you, Commission, for giving me this opportunity to
7 share with you a little bit about my father and to really
8 bring focus to the importance of commemorating the 75th
9 anniversary of Executive Order 9066.

10 Just for the record, I do not live in
11 Honolulu. I live in San Francisco. I wish I lived
12 here, but I'm here, actually, at the invitation of the
13 University of Hawaii Richardson School of Law. We have
14 had a Day of Remembrance program here yesterday, and
15 focusing, you know, on the 75th anniversary and of the
16 significance of *Korematsu v. United States* and have
17 been here with actually three members of the coram nobis
18 legal team that helped to reopen my father's Supreme
19 Court case.

20 And then, also, I should add that I work
21 with several -- well, I work nationally with the
22 National Council for Social Studies and the Departments
23 of Education across this country through the Korematsu
24 Institute.

25 I am working with the Department of

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1 Education here in Hawaii and giving an all-island
2 teacher conference on Saturday that we're bringing in
3 teachers from the various islands and in -- continuing
4 the further education to help teachers to teach about
5 the lessons of the past but also bring relevancy to the
6 importance today.

7 So I'll just start off by saying that my
8 father was born in Oakland, California, so he was an
9 American citizen. And he grew up just like any other
10 American kid and loving to -- you know, hot dogs and
11 spaghetti and hanging out with his buddies.

12 But he learned about the Constitution in
13 high school at Castlemont in Oakland. And he thought
14 that he had civil rights as an American citizen.
15 That's what they -- what they learned. And so, after
16 the bombing of Pearl Harbor -- actually, that was on
17 Sunday, on December 7th -- he reported to work the next
18 day, on the Monday, and he -- even though he had tried
19 to enlist in the military, even before Pearl Harbor,
20 he was denied because of Japanese ancestry.

21 He wanted to help the war effort and
22 attended a welding school and worked in the shipyards
23 in Oakland and was basically fired the day after Pearl
24 Harbor because of his Japanese ancestry. So,
25 therefore, he never could work in that type of

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1 contribution to the war or any type of government job,
2 as a lot of the Japanese Americans were fired from their
3 jobs as well, I might add.

4 He thought, though, that as an American
5 citizen nothing would happen to him because of his
6 status, and he was really concerned about my
7 grandparents, his parents, who had immigrated from
8 Japan and were -- had started a flower business, a cut
9 flower, a nursery business in East Oakland, in the San
10 Francisco Bay area, and worked very hard raising four
11 boys and creating this business and were worried about
12 what was going to happen to them.

13 And then, of course, the executive order
14 came and the exclusion orders to forcibly remove anyone
15 of Japanese ancestry from the West Coast. But my
16 father didn't think this was right because all due
17 process of law was totally violated, and he had done
18 nothing wrong. Why should he go to a prison and be in
19 that type of situation and leave his life?

20 Yes, he had an Italian American girlfriend
21 at the time, which was not my mother, she would add,
22 because she would have never deserted my father. But
23 that's a story in itself because she was Italian, and
24 there was, obviously, a very -- a big rift at that time
25 as well regarding the Italians and the Germans.

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1 So he decided to change his draft card. I
2 mean, what burned him up, as he said, was to be
3 categorized as a non-alien. You know, he was an
4 American citizen.

5 So, it was about 30 days after everyone had
6 been sent to various horse trace tracks, mostly up and
7 down the West Coast, and, as my father said when his
8 Supreme Court case was reopened and at the coram nobis
9 hearing, horse stalls are for horses, not for people.

10 And but he moved around from jail to jail
11 and ended up in San Francisco, and it was Mr. Ernest
12 Besig who was then the Director -- Executive Director
13 -- of the Northern California affiliate of the ACLU,
14 noticed in the newspaper about my father's arrest. And
15 he had been looking for a test case and visited my father
16 and asked my father if he would be willing to fight his
17 case. And my father said yes, and Mr. Besig said,
18 "Well, if need be, we'll take it all the way to the
19 Supreme Court."

20 And my father had great hope because he
21 thought for sure by the time the case did reach the
22 Supreme Court they would see it was unconstitutional,
23 and so he was then sent -- after his bail hearing --
24 sent over to the Presidio -- we're not sure which jail
25 he was in in there, but then sent over to Tan Fran.

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1 Everyone had to live there about three or four months
2 before they were sent to the permanent Japanese
3 American incarceration camps across this country.

4 And when he was -- went there, the
5 community men got together, the Japanese community men,
6 to decide whether or not my father should continue
7 fighting his case. And they didn't invite him, but
8 they decided that he shouldn't.

9 So my father was really vilified from day
10 one. He -- no one wanted anything to do with him
11 because they thought that some harm might come to them
12 if they associated with my father, and then they told
13 him that they didn't think that my father should
14 continue fighting.

15 But my father was very determined, until
16 the -- throughout the entire war, even when they were
17 sent over to Topaz, Utah, which was the camp that the
18 Bay area people mostly went to, and no one wanted
19 anything to do with him. And, actually, we were
20 ostracized by the Japanese American community and
21 really were not part of it until my father's Supreme
22 Court case was reopened in 1983.

23 And but he -- my parents met and married
24 in Detroit, Michigan. My mother was born in South
25 Carolina and Caucasian, so I am identified to myself

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1 as HAPA, so I'm half Japanese and half Caucasian, so
2 finally I have an identity.

3 But I learned about my father's Supreme
4 Court case in high school. So as Commissioner Yaki
5 intimated, people really didn't talk about the Japanese
6 American incarceration, and that was not unusual. The
7 whole -- the entire community really didn't want to.
8 They -- it was too painful. They wanted to get on with
9 their lives and prove that they were good American
10 citizens.

11 And so, through a book report that my
12 friend gave in high school I learned about my father's
13 Supreme Court case, and I had never heard about that
14 before. I never even had heard about the Japanese
15 American incarceration. And I went home and
16 confronted my mother and she said yes, and I got the
17 standard answer, "Well, wait until your father gets
18 home and you can ask him."

19 And he worked long hours. Not only did he
20 have housing discrimination, but he had employment
21 discrimination. And by the time he got home, he simply
22 told me that it happened a long time ago, and what he
23 did he felt was right and the government was wrong. It
24 was that clear and simple.

25 He just really lived by his principles of

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1 right and wrong. And, actually, we never really talked
2 about his case, because I could see the pain in his eyes,
3 until it was reopened in 1983.

4 Now, during that time, he would get
5 telephone calls from law students mostly wanting to
6 have interviews, but he didn't want to do that. It was
7 just, as I said, too painful. And then Professor Peter
8 Irons had sent a letter to say that he was writing a
9 book, and my father thought, well, here we go again.

10 But Professor Irons was persistent and
11 called my father, and at that time everybody's
12 telephone was listed in the phone book, and arranged
13 a meeting. And so, Professor Irons met with my father
14 and had this big, huge, thick file. And,
15 unfortunately, I wasn't there -- quite home yet. I was
16 traveling, and my mother went to go pick me up from the
17 airport.

18 And so, when I walked -- we walked in the
19 door, my father had a tape recorder, Peter had a tape
20 recorder, and had almost finished their meeting, and
21 it was just amazing to find these documents that really
22 -- that proved that there was no military necessity for
23 the Japanese Americans to be forcibly removed from
24 their homes.

25 I should say that Professor Irons was doing

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1 research to write a book about actually the Supreme
2 Court cases during World War II. And because the
3 Freedom of Information Act had gone into effect in 1967,
4 he had started doing research.

5 But the file that he found, or the box I
6 should say, was in Immigration and Naturalization
7 Department, not in kind of your typical other
8 citizenship type of departments, and he hooked up with
9 Iko Hersick Yoshanaga, who was a researcher at the time
10 doing some work for the Wartime Relocation Authority
11 Commission. They were doing some hearings sanctioned
12 by President Carter.

13 And he -- and then he helped to create the
14 coram nobis legal team. Coram nobis is a little-known
15 procedure meaning in Latin -- or from the Latin "an
16 error has been made before us" or, as Judge Patel said,
17 "An error has been made before the court." And because
18 my father had served his probation sentence, as did
19 Gordon Hirabayashi and Min Yasui, these cases were
20 opened up and -- at the same time in three different
21 cities, San Francisco for my father, Gordon was in
22 Seattle, Washington, and Min was in Portland, Oregon.

23 And through this time when the coram nobis
24 case hearing was heard on November 10, 1983, and you
25 heard Judge Marilyn Hall Patel's decision, it --

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1 clearly, it was shown that there was government
2 misconduct that, at the time of my father's Supreme
3 Court case, and Mr. Katyal can probably better talk
4 about this, but the documents were found that by -- the
5 Department of Justice had basically destroyed
6 evidence, altered evidence, withheld evidence that was
7 to be presented to the Supreme Court.

8 And so after my father's conviction was
9 vacated, he could have very well said, "Well, you know,
10 Japanese American community, I don't want anything to
11 do with you because you didn't want anything to do with
12 me," but he wasn't like that. And he helped with the
13 redress and reparations movement, and my parents
14 lobbied in Washington, D.C., that ultimately resulted
15 in the Civil Liberties Act of 1988 that was signed by
16 President Reagan.

17 And I might -- I wanted to add in the
18 beginning that when President Roosevelt issued this
19 Executive Order 9066, he was a Democrat, and that's
20 something to be noted. And I've learned since then
21 that that was a hastily put together executive order.

22 But my father kept crisscrossing the
23 United States and educating because he didn't want
24 something like the Japanese American incarceration to
25 happen again. He was always worried because the

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1 Supreme Court records still -- still stands.

2 And I -- besides helping with the redress
3 and reparations movement, that is probably why he
4 received the Presidential Medal of Freedom from
5 President Clinton in 1998, and still continued to speak
6 out about six months before he passed away. And at that
7 time, he gave me that charge to carry on with education
8 and telling his story, and to make sure that these
9 lessons are learned. But, obviously, it seems that we
10 still have a long ways to go.

11 And through the Korematsu Institute, we --
12 that's what we really promote and people are seeking
13 our help. Teachers are just beside themselves trying
14 to figure out how to teach the relevancy of what is
15 happening now.

16 And, I don't know if all of you saw the
17 Google Doodle on January 30th of Fred Korematsu, but
18 we were very excited when we knew that was going to
19 happen, or my brother and I did. He worked to work make
20 sure that that was live on January 30th.

21 But my father also has days created in his
22 name. Fred Korematsu Day of Civil Liberties in the
23 Constitution was first created in California, signed
24 by Governor Schwarzenegger in 2010. The first day
25 officially was January 30, 2011.

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1 And the point being is to focus on our civil
2 liberties and the Constitution, and it's a day that is
3 in perpetuity. It's not a holiday. We're working on
4 it, and I thought originally that was okay. But then
5 people don't realize what the day and the significance
6 is, and we also in Hawaii have a day that's named after
7 him, as well as the Commonwealth of Virginia and
8 Florida, and several governors and legislatures have
9 recognized the day through legislation and -- or
10 through resolution, I should say, and proclamation.

11 So, my father represents all Asian
12 Americans -- the MASA community, the Muslim and Arab
13 and Sikh and South Asian communities, and all those that
14 are underserved that are still fighting for our civil
15 liberties and the Constitution in this country.

16 And if my father were here, he would say
17 to you to remember to stand up for what is right. And
18 when you see something wrong, protest but not with
19 violence. Otherwise, they won't listen to you. But
20 don't be afraid to give up.

21 Thank you.

22 CHAIR LHAMON: Ms. Korematsu, thank you so
23 much. I hope you will stay on the phone with us, so
24 that we can ask some questions and follow up after.

25 Next, I'd like to introduce Neal Katyal.

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1 Mr. Katyal is currently a partner at the law firm of
2 Hogan Lovells where he focuses on appellate and complex
3 litigation, and he is the former Acting Solicitor
4 General of the United States.

5 Mr. Katyal has argued 32 cases before the
6 United States Supreme Court, including 30 in the last
7 eight years, and he has more arguments scheduled for
8 this current term.

9 In 2011, as Acting Solicitor General, Mr.
10 Katyal issued the Department of Justice confession of
11 error regarding ethical mistakes made by the
12 then-Solicitor General during the Japanese internment
13 cases, including withholding evidence from the court
14 that undermined the rationale behind internment.

15 Mr. Katyal also is the Paul Sanders
16 Professor at Georgetown University where he focuses on
17 constitutional law, criminal law, and intellectual
18 property. He is a graduate of Dartmouth College, and
19 he was my classmate at Yale Law School.

20 Welcome, Mr. Katyal. We are grateful that
21 you are here with us in person.

22 MR. KATYAL: Thank you. It's a real
23 privilege to be here with all of you, and particularly
24 you, Chair. In law school, as you heard, we were
25 together.

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1 CHAIR LHAMON: No discussions.

2 (Laughter.)

3 MR. KATYAL: Most of it will remain off the
4 record, but I will say, if there were a vote as to not
5 just who would be most likely to succeed, but who would
6 be most likely to do well as a lawyer and good for the
7 world, it would have been you.

8 I am grateful to talk about this part of
9 our history, this sad part of our history. And, you
10 know, our history as a country, as a nation, begins with
11 the founding of the Constitution and James Madison and
12 Federalist 51 saying men aren't going to be angels,
13 using his anachronistic word at the time, and
14 government is necessary, and checks and balances are
15 necessary.

16 And so, the three branches of government
17 were created for that reason, and the courts, of course,
18 will always play a role in that, but so, too, will
19 commissions like this, something Madison couldn't have
20 anticipated, but are essential to providing also part
21 of that check and balance.

22 My story begins I think where Commissioner
23 Yaki was talking about. He said, how could our legal
24 heroes, great justices of the Supreme Court, do
25 something like this? Have these decisions that ratify

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1 the forced internment on the basis of nothing more than
2 the color of one's skin? How did that happen?

3 And I set out to try and figure that out
4 five years ago when I was running the Solicitor
5 General's Office. Solicitor General is the top
6 courtroom lawyer for the government. Most of the work
7 focuses on the Supreme Court and, as you may know, the
8 Supreme Court are in this respect like schoolchildren.
9 They have summers off, so they don't have any -- they
10 don't hear any cases. And, as a result, the Solicitor
11 General also has an easier time in the summer, so each
12 summer I would have a project.

13 And my project for that summer was to
14 answer Commissioner Yaki's question, try and
15 understand, what did the court do and why? And the
16 answer has a lot to do not with what the court thought
17 but, rather, what the court was told by the government's
18 top lawyer, by the Solicitor General. That's what I
19 found.

20 And so, you've heard a little bit about the
21 story of Karen -- that Karen Korematsu just told about
22 her hero dad, Fred Korematsu. Let me start the story
23 with a different person, Gordon Hirabayashi.

24 So Gordon is 18 years old. He is a student
25 at the University of Washington in Seattle, and he

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1 learns of this executive order and believes it's
2 unconstitutional. And so he goes out and violates it.
3 He violates the curfew and the movement restrictions
4 and goes and turns himself into the FBI.

5 And the FBI says, "You're -- it's a
6 first-time offense, don't worry about it, just go
7 home." And he says, "No, no, no. You don't
8 understand. I am" -- his version of religion was a
9 Japanese version of Quakerism -- and he said, "My duty
10 is to resist an unjust law. This is an unjust law.
11 Arrest me because I have broken the law."

12 The FBI says, "Okay. If you want to be
13 arrested, I'll arrest you." So he's arrested and goes
14 to trial, and he defends himself at trial saying this
15 is an unconstitutional law. He says, "Yes, I did it,
16 and it's unconstitutional." And he loses in the trial
17 court.

18 And he is being sentenced and the judge
19 says, "Well, Mr. Hirabayashi, I've got good news and
20 bad news." Okay. Mr. Hirabayashi says, "What's the
21 good news?" "Well, the good news is, basically, you've
22 -- I don't have any money to sentence you. You know,
23 the closest prison camp is 1,000 miles away." Or,
24 sorry, that's what he says was the bad news. The
25 closest prison camp is 1,000 miles away.

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1 And he says, "The good news is I don't have
2 any money to get you down there. We're fighting a war,
3 and this -- and we don't have the resources to spend
4 to -- for you to serve your 60-day sentence."

5 Gordon says, "Don't worry. I'll figure
6 out a way to get there." And he says, "No, you don't
7 understand. I can't get you there." He says, "I'll
8 get there myself." Gordon goes and hitchhikes the
9 1,000 miles to Tucson to serve his sentence.

10 He gets -- the camp is about 30 miles
11 outside of Tucson, and he gets there late at night after
12 hitchhiking, and he shows up and the warden -- goes to
13 the warden and says, "I'm Gordon Hirabayashi, here to
14 serve my sentence," and Gordon -- and the warden says,
15 "I don't know who you are. I've got no paperwork.
16 Just go home. Don't worry about it."

17 And then Gordon goes through the whole
18 thing again. "I'm a Quaker, you know, I have to serve
19 my sentence. It's my obligation." And so on. And
20 the warden says, "Well, come back tomorrow." He comes
21 back tomorrow and he figures out who he is and he serves
22 his sentence.

23 That's the kind of man that Gordon was, and
24 it reminded me so much of what Karen said about her dear
25 father, you know, not someone who said the way to change

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1 things is to take up revolution or arms or work outside
2 of the system, but try within the system, make your
3 case. That's what he did.

4 And so, Gordon's case gets to -- goes up
5 to the Supreme Court first before the *Korematsu* case.
6 And this is where the story gets remarkable and sad.

7 So the Solicitor General at the time is a
8 guy named Charles Fahy. He had a distinguished career.
9 He was Solicitor General for five years and then served
10 as a distinguished judge on the D.C. Circuit for 30
11 years, our nation's second-highest court. I don't
12 mean to judge him, but I do mean to tell you this story
13 because it is grave -- grave errors that were committed
14 by him and his office.

15 So then, like now, the Solicitor General
16 doesn't himself write the briefs, rather, you have an
17 assistant who is assigned to do the drafting. So the
18 assistant in this case is a guy named Edward Ennis who
19 is in the Alien Enemy Control Unit. He formerly was
20 in the Solicitor General's Office, but now he is there.

21 And he starts looking into it, and he
22 discovers that he is supposed to defend what happened
23 to Hirabayashi, but he learns about this report by the
24 Office of Naval Intelligence, by a guy named Kenneth
25 Ringle.

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1 Now, the Office of Naval Intelligence is
2 in charge of counterintelligence and operations on
3 soil, on U.S. soil, and who is our enemy, and so on.
4 And the Ringle report says that only a tiny percentage
5 at most of Japanese Americans are potentially disloyal,
6 and that those that were were almost all known to the
7 government, and anyone else could be treated --
8 detained on an individual basis instead of en masse
9 interning 120,000 or so Japanese Americans.

10 And this report, the Ringle report,
11 concludes, quote, "The entire Japanese problem has been
12 magnified out of its true proportions largely because
13 of the physical characteristics of the people. And J.
14 Edgar Hoover, who is no fan of civil liberties, agrees
15 with this, that we don't need to have the internment
16 of all of these people."

17 So Ringle reads the report and writes a
18 letter to Charles Fahy, and we have this now because
19 of Peter Irons' work. And the letter says to Solicitor
20 General Fahy, quote, "We must consider most carefully
21 what our obligation of the court is. I think we should
22 consider very carefully whether we do not have a duty
23 to advise the court of the existence of the Ringle memo
24 and the fact that this represents the view of the Office
25 of Naval Intelligence. It occurs to me that any other

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1 course of conduct might approximate the suppression of
2 evidence." The suppression of evidence.

3 What does Fahy do? Nothing. Nothing.
4 He doesn't tell the court about Ringle. Instead, he
5 tells his deputy, Deputy Rowe, to add more stuff to the
6 brief about how the Japanese Americans are disloyal.
7 There are 15 pages in the brief to the Supreme Court
8 -- the most solemn thing you do as Solicitor General
9 is write briefs to the Supreme Court, speak on behalf
10 of the United States -- and the United States' solemn
11 brief to the court says that Japanese Americans
12 couldn't be trusted, and the evidence was things like
13 they have schools to teach the Japanese language to
14 their children, which evidently the court -- the brief
15 argued were fronts for Japanese nationalist
16 indoctrination, and things like that.

17 And so, in 1943, in June, the court
18 unanimously upheld Hirabayashi's conviction, finding
19 the military, quote, "Had reasonable ground for
20 believing the threat is real." Reasonable ground for
21 believing the threat is real. And I understand we
22 blame our heroes for -- on the court for, how did they
23 do that? But they're generalist judges; they didn't
24 know. They weren't told what happened, what the true
25 motivations were for this policy.

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1 And then, of course, you have what Mr.
2 Irons -- Professor Irons -- discovered with respect to
3 Korematsu because that case comes up the next year, and
4 then it gets even worse. The main report to justify
5 this Japanese internment was written by General John
6 DeWitt, and the DeWitt report's big smoking gun --
7 evidently that the Japanese Americans couldn't be
8 trusted was this claim that Japanese Americans were
9 going and signaling -- they were going to the shoreline
10 off the Pacific coast and signaling to supposedly
11 Japanese subs off the coast all sorts of stuff about
12 troop movements and critical infrastructure, and the
13 like. And so that's the rationale of the final report
14 by DeWitt.

15 Only problem -- FBI and FCC had
16 investigated this for years and found zero evidence
17 that this was occurring. So there's another guy -- so
18 we've heard about Edward Ennis. There is another guy
19 named John Burling, and Burling comes from a legendary
20 family, Covington & Burling, the law firm here,
21 Burling, and that was his father. And Burling is
22 assigned to look into -- and write the draft of the
23 brief, and Burling realizes, hey, in light of the FBI
24 and FCC, we can't justify the Japanese internment on
25 the basis of this final report.

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1 So, Burling writes a letter to Fahy saying
2 the Justice Department had quote "substantially
3 incontrovertible evidence" that general
4 justifications for internment -- General DeWitt's
5 justifications for internment -- were wrong, and that
6 in all probability General DeWitt knew that when he
7 wrote the final report.

8 So, Burling, when drafting the brief, does
9 what any government lawyer should do, he repudiates the
10 final report, says, this isn't something we can rely
11 on. So, you know, that's your obligation, to tell the
12 court in a forthright way what is true and what isn't
13 true.

14 And, then like now, whenever you write a
15 draft brief, you have to circulate it around to all of
16 the impacted agencies, and so this was circulated. The
17 draft was circulated to the War Department, now the
18 Defense Department, and they hit the roof and said,
19 "We're in a war. How can you undermine our generals
20 and our Army, and so on. That is a terrible thing to
21 do."

22 And they get to Fahy, and Fahy says, "Yeah.
23 We can't repudiate the final report. We've got to
24 double down on this."

25 So what does Burling do? Well, Burling

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1 gets together with Ennis and does something remarkable.
2 I have never seen it in government. Normally, in
3 government, when you don't like something that a
4 superior makes of a decision, you go above their head
5 to their top person, the Attorney General or something.

6 Here they actually went down in the
7 Department. They went from the Solicitor General, the
8 number three person, to the head of the Criminal
9 Division, Herbert Wechsler, who was like the number
10 eight person or something of the Department.

11 But Wechsler was a towering figure,
12 Columbia law professor, who wrote the model penal code,
13 all sorts of stuff. They lay this out for him, and
14 Ennis -- excuse me, Wechsler says, "Yeah. We have an
15 ethical obligation. We can't write a brief to the
16 Supreme Court based on the final report. We have to
17 say something."

18 So, then there is a whole long compromise,
19 and here is what Wechsler finally says. "We are going
20 to write this footnote. The final report of General
21 DeWitt is relied on in this brief for statistics and
22 other details concerning the actual evacuation and the
23 events that took place thereto. We specifically
24 recited in this brief the facts relating to the
25 justification for the evacuation, of which we ask the

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1 court to take judicial notice, and we rely upon the
2 final report only to the extent it relates to such
3 facts."

4 I have just read to you this footnote. If
5 you know what it means, you're ahead of me. I have
6 read this now probably 400 times. I still don't know
7 what it means. Okay?

8 But this happens in government. So
9 whenever, whenever there is a conflict between agencies
10 and you're writing a brief, and the Commerce Department
11 wants one thing, and the EPA [Environmental Protection
12 Agency] wants something else, there is always someone
13 who says, "Oh, let's just paper over it. Let's just
14 write a footnote that kind of genuflects to both sides."

15 And that works in a lot of government
16 documents -- committee documents, or whatever. You
17 might have some experience with that. It does not work
18 in a brief to the U.S. Supreme Court. Why? Because
19 there is this pesky thing called an oral argument
20 afterwards. And if you write something like that in
21 a brief, you can be sure that some Justice is going to
22 ask you about that.

23 And this is when I really blame Fahy,
24 because he goes and stands up to argue the *Korematsu*
25 case, and one of the Justices says, "What are you

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1 talking -- what does this footnote mean? Are you
2 backing off on the final report?"

3 Here is the quote from Fahy at oral
4 argument to the Supreme Court: "There is nothing in
5 the brief of the government which is any different in
6 this respect from the position it has always maintained
7 since the Hirabayashi case, that not only the military
8 judgment of the general but the judgment of the
9 government of the United States has always been in
10 justification of the measures taken, and no person in
11 any responsible position has ever taken a contrary
12 position, and the government does not do so now.
13 Nothing in its brief can be validly used to the
14 contrary."

15 No one took this. No person. That's what
16 Fahy said. That's after Ennis, after Burling, after
17 the FCC, after Hoover, after the FBI. That's what --
18 after Ringle, that's what he told the Supreme Court.

19 And so, Commissioner Yaki, our hero, six
20 to three in that decision voted for the government,
21 again saying the military's rationale was substantial
22 and justified.

23 And there is, of course -- and I'll
24 conclude in a minute -- there is, of course, a happier
25 ending to this because Peter Irons -- relatively

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1 happier ending. Peter Irons does discover these
2 documents and these coram nobis petitions are filed,
3 and ultimately, they are -- these convictions are
4 overturned.

5 And I was thinking about that story as I
6 heard Commissioner Narasaki talk about her family.
7 Mother interned, father serving the military who is
8 interning her mother. And, Commissioner Yaki told a
9 similar story about the man with the hook.

10 And, Karen Korematsu right now is at the
11 University of Hawaii Richardson School of Law, which
12 is the first place I spoke about this after my service
13 as Solicitor General to a group of Japanese Americans,
14 a couple hundred people there, and I told this story.
15 It was a speech and I told the story of the confession
16 of error in more detail.

17 And, there was question and answer
18 session, and one of the most remarkable things happened
19 in that, and I hadn't understood this. Someone stood
20 up and said, "You know, my father served at the same
21 time as I was being interned. He served the country
22 that was interning me." And then all of a sudden, hands
23 went up all through the room. There were dozens of
24 people who had this exact story.

25 And I don't pretend our country is perfect,

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1 but in that room on that day it sure felt pretty perfect.
2 It was incredibly moving to see those families and still
3 revere this country after what had been done to them.

4 So the decisions, as Commissioner Yaki was
5 saying, still stand. They're anachronistic, but
6 they're still there. But there are also other stories
7 besides those decisions, the stories of brave people
8 like Ennis and Burling, who stood up and tried to do
9 what's right.

10 And those voices of dissent were right, and
11 the government was absolutely wrong. Thank you.

12 CHAIR LHAMON: Wow. Thank you for
13 sharing that history, the reasons for your apology,
14 your courage in pushing toward the apology, and thank
15 you for being here with us alongside Karen Korematsu
16 for this day.

17 I want to make space for my fellow
18 Commissioners for questions and for comments, both to
19 you and to Karen on the phone. Commissioner Yaki.

20 COMMISSIONER YAKI: I just wanted to add
21 one thing. I forgot to mention that my family members
22 -- it was not only Ben Morakami but Tom Okino and Hiro
23 Nishikubi who fought and came back with the 442.

24 But I also wanted to say that in the -- in
25 the area that you just talked about, sir, the -- my

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1 father, despite having grown up in the camps, despite
2 having -- when he was released, having to basically
3 engage in a fight every day at school from people who
4 believe that he was part of the people who were killing
5 their fathers in the Pacific theater, he ironically
6 joined the United States Foreign Service and became,
7 at the time, the highest-ranking Asian American career
8 Foreign Service Officer in the American government,
9 served his country faithfully and well for 30 years,
10 and still occasionally is called back in the duty,
11 whether he likes it or not, by various administrations
12 to serve his country again.

13 But I have always -- it has always been
14 remarkable to me, knowing what happened to him, that
15 he had the courage and the ability and almost in some
16 ways the amnesia, I call it, to be the voice and defend
17 this country's values and principles when they did not
18 defend his.

19 CHAIR LHAMON: Thank you. Commissioner
20 Narasaki?

21 COMMISSIONER ADEGBILE: Madam Chair, this
22 is Adegbile.

23 CHAIR LHAMON: Okay. Go ahead. Thank
24 you.

25 COMMISSIONER ADEGBILE: I have a quick

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1 question for Mr. Katyal. Mr. Katyal, could you explain
2 to us what step it is that you took in light of the
3 history that you have shared with us, just a succinct
4 version, of what you did to try and make things right,
5 to the extent that you could, in your service as Acting
6 Solicitor General?

7 MR. KATYAL: Yes. Well, nobody could
8 make this one right. We can only do a little bit, but
9 the little bit I could do was, I mean, the Solicitor
10 General has a practice called confessions of error when
11 there is a pending case before the U.S. Supreme Court,
12 and the Solicitor General believes that the position
13 that the government has taken before is wrong.

14 It's usually used in criminal cases in
15 which some U.S. Attorney somewhere is defending a
16 position that the Solicitor General thinks is wrong and
17 someone shouldn't be imprisoned on the basis of that
18 legal theory.

19 It only applies to pending cases, and so
20 there wasn't an opportunity to issue a true confession
21 of error in this case because these aren't cases
22 anymore. These are matters, really, of history, and
23 nothing else. And so -- but, nonetheless -- there was
24 a way to speak out and to use the same ethos of the Office
25 of the Solicitor General of a confession of error to

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1 try and say this was something that was gravely wrong.

2 And so that's what I did, is I used that
3 mechanism -- not formally -- because a formal mechanism
4 would trigger a filing to the U.S. Supreme Court, and
5 it has to be a real case in order to do that.

6 But the same kind of idea, the concepts,
7 the values behind that, which is that the Justice
8 Department doesn't have to win all of its cases, it's
9 supposed to do justice. Those are the words that are
10 inscribed in the Attorney General's Conference Room,
11 that the United States wins when its citizens win and
12 have their day in court, not when the government always
13 wins on one side of the versus line in a case caption.
14 And so that's what I did.

15 COMMISSIONER ADEGBILE: Thank you.

16 CHAIR LHAMON: Commissioner Narasaki?

17 COMMISSIONER NARASAKI: Thank you, Madam
18 Chair. I would like to ask both of our guests to talk
19 about how this history connects to what we are looking
20 at now. We just had a very vigorous debate over
21 adopting a statement on the President's recent
22 executive orders around refugees and other immigrants
23 coming from certain countries.

24 MR. KATYAL: Well, maybe -- I should just
25 disclose I represent the State of Hawaii in those

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1 challenges, so I have a certain perspective on this.
2 But I do think there are a couple of things that are
3 really important.

4 One is the same arguments that were made
5 in *Korematsu* and *Hirabayashi* by the government, that
6 the President, in the time of national security, can't
7 do wrong, that their actions are unreviewable, are the
8 same ones the Trump administration is making.

9 I mean, they have their spokesperson come
10 out and say the President's actions are, quote,
11 "unreviewable." What a terrible idea. It's so contrary
12 to what Madison thought in Federalist 51. I can't think
13 of a more dangerous idea. I can't think of a more
14 dangerous thing than to have a President who says --
15 who calls a judge who disagrees with him "so-called."
16 You know, this is not politics. You know, I would feel
17 exactly the same way if a Democrat did that.

18 That is not -- I don't know of any President
19 that I can think of in our lifetimes who has done
20 anything like this. That, to me, is a real threat to
21 national security. Our national security depends on
22 our soft power, our values, our checks and balances,
23 our ability to say nobody is perfect, no one in this
24 room is perfect. Madison -- men are not angels.
25 That's why we need checks and balances.

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1 So it hearkens back to that history, and
2 then there are elements to that executive order which
3 hearken back to the history about religious and racial
4 discrimination as well. And so I think the stories
5 need to be told.

6 You know, the Archives says "past" --
7 National Archives Building says, "Past is prologue."
8 And, I think, Justice Black, in his dissent in *Korematsu*
9 said, you know, we need -- this decision is terrible
10 because it's going to lie around like a loaded weapon
11 for some President to pick up some time.

12 And you already hear the calls of it. You
13 already hear people in the Trump Administration and
14 commentators, you know, talking about reviving this
15 stuff.

16 And, I was involved in the Guantanamo
17 litigation against President Bush a few years ago, and
18 I have a lot of debates with my Republican friends,
19 including public debates, and one of their most common
20 things they would say is, "Look, yeah, we've done stuff
21 at Guantanamo, we've done stuff about waterboarding,
22 whatever, but we never did what that Democratic
23 President did, FDR, interning 120,000 Japanese
24 Americans on the basis of their skin color."

25 And my answer was, "Yes, that's true. You

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1 know, it's a low bar, but, you know, it's true that you
2 cleared the low bar." That bar might be getting set
3 lower and lower now.

4 CHAIR LHAMON: Ms. Korematsu, did --

5 MS. KOREMATSU: As Mr. Katyal was talking
6 about the dissenting opinion of Jackson, and my
7 father's case as a loaded weapon, I mean, that is
8 certainly pretty evident now.

9 And also, to point out that Justice Murphy
10 as a -- in his decision said, racial discrimination in
11 any form and in any degree has no justifiable part
12 whatever in our democratic way of life.

13 And, I think that's -- and the point being
14 also that in my father's Supreme Court case, it wasn't
15 a unanimous decision, that the three dissenting
16 opinions are really relevant today; unfortunately, but
17 true, and why I encourage people to look at those
18 because, how -- I mean, they could all be -- almost be
19 said -- or it could be said now, and how did those three
20 Justices have that wisdom to see through all of that
21 evidence, even though a lot of it was false obviously
22 and come to those conclusions.

23 You know, even what struck me was when I
24 was looking at some of the citizenship's rights and
25 responsibilities on their -- U.S. citizenship rights

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1 and responsibilities on their website -- it says,
2 citizenship is the common thread that connects all
3 Americans. We are a nation bound not by race or
4 religion, but by the shared values of freedom, liberty,
5 and equality. And, I think that's what we all need to
6 remember and to remind ourselves and to remind other
7 people, because the demonization of a group of people
8 because of race or religion happened in 1942, and it
9 is happening now.

10 And, ultimately, the Executive Order 9066
11 was found to be -- to be wrong and what is -- what is
12 happening now. And, so, we all need to stand up for
13 our citizens and non-citizens, because that is what
14 America is about.

15 And, my father had never given up hope that
16 someday he would be able to reopen his Supreme Court
17 case. He waited for almost 40 years, and that says
18 something about how one person can make a difference.
19 And we all can do that by stepping up and being, you
20 know, civically engaged and also making sure that --
21 that our civil rights are not violated.

22 You know, being here in Honolulu, it
23 reminded me that Justice Antonin Scalia was here in --
24 well, in 2014, so almost, three years ago. And one of
25 the law students had asked about my father's Supreme

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1 Court case, and he says, well, of course, he thought
2 that Korematsu was wrong. But then he said, quote,
3 "And I think we have repudiated it in a later case. But
4 you are kidding yourself if you think the same thing
5 will not happen again regarding the Japanese American,
6 you know, internment or incarceration," since we are
7 trying to change those euphemisms.

8 And, so even a Supreme Court Justice of
9 recent pointed that out. So that's the caution that
10 *Korematsu v. United States* brings today. It's -- Mr.
11 Katyal can address this probably better than I can. I
12 mean, it's still on the Supreme Court record. It has
13 been discredited. You know, can it -- is it still
14 considered good laws, and people don't think so.

15 But, as was pointed out, I mean, my
16 father's Supreme Court case has been cited two or three
17 times a week in newspaper articles since Thanksgiving.
18 And so what does that mean? And, we all need to be
19 vigilant in making sure that civil rights for all is
20 really upheld.

21 CHAIR LHAMON: Thank you. I think that is
22 probably our ideal note for ending this conversation.
23 I know that Mr. Katyal has a hard stop two minutes ago,
24 so I thank both of you for coming to speak to us today,
25 for sharing your experiences and your thoughts, and for

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1 inspiring us to continue our commitment to civil rights
2 moving forward.

3 Also, thank Commissioner Narasaki and the
4 Staff Director for bringing refreshments for us. They
5 are behind you in the room. Mr. Katyal, if you have
6 time just before sneaking out, please join us.

7 **III. ADJOURN MEETING**

8 CHAIR LHAMON: And there is nothing
9 further. I hereby adjourn this meeting at 12:02.

10 Thank you.

11 (Applause.)

12 (Whereupon, the above-entitled matter
13 went off the record at 12:02 p.m.)

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