U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING

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THE FEDERAL CIVIL RIGHTS ENGAGEMENT WITH
ARAB AND MUSLIM AMERICAN COMMUNITIES POST 9/11

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FRIDAY, NOVEMBER 9, 2012

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The Commission convened in Suite 1150 at
1331 Pennsylvania Avenue, Northwest, Washington, D.C.
at 9:30 a.m., Martin R. Castro, Chairman, presiding.

PRESENT:

MARTIN R. CASTRO, Chairman
ABIGAIL THERNSTROM, Vice Chair
ROBERTA ACHTENBERG, Commissioner
TODD GAZIANO, Commissioner
GAIL L. HERIOT, Commissioner
PETER N. KIRSANOW, Commissioner
DAVID Kladney, Commissioner
MICHAEL YAKI, Commissioner*

VANESSA EISEMANN, Parliamentarian*

* Present via telephone
STAFF PRESENT:
TERESA BROOKS
MARGARET BUTLER, Director, OCRE
PAMELA DUNSTON, Chief, ASCD
YASMIN ELHADY
ALFREDA GREENE
JENNIFER CRON HEPLER, Solicitor
TINALOUISE MARTIN, Director, OM
LENORE OSTROWSKY, Acting Chief, PAU
ELOISE PLATER
EILEEN RUDERT
MICHELE YORKMAN
JOHN RACCLIFFE, Chief, BFD

COMMISSIONER ASSISTANTS PRESENT:
NICHOLAS COLTON
ALEC DEULL
JOHN MARTIN
CARISSA MULDER
ALISON SOMIN
MARLENE SALLO
AGENDA

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CHAIRMAN CASTRO: I'm calling the Briefing to order at 9:34 a.m. I'm Chairman Marty Castro, and I'm really happy to welcome all of you this morning to our briefing on the Federal Civil Rights Engagement with Arab and Muslim American Communities Post 9/11.

Today is November 9th, 2012. We have on the phone with us Commissioner Yaki, who for various reasons could not be with us personally today, but I want to thank and commend Commissioner Yaki on this briefing today. It is a briefing that he has been working on and advocating for for many years. And we know that this is an extremely important issue, and we want to thank him for his steadfast leadership and commitment to make today happen. We're sorry that he could not be with us physically, but I know that he will be very engaged in today's process via telephone.

Also, our Vice Chair is not currently here, but she will be here shortly, so we will have a full complement of Commissioners to engage in today's very, very important hearing.

I. INTRODUCTORY REMARKS BY CHAIRMAN

CHAIRMAN CASTRO: Since 9/11 this country has changed substantially, and it has changed in ways
that have affected in a detrimental fashion many Americans. Americans who are Muslim, Americans who are of Arab descent, other people who are mistaken for those communities whether they are Sikhs, whether they are South Asians, whether they are Latinos, and we also know that those communities that we're going to examine today are very, very diverse in and of themselves.

There are Asian and African American, and Latino Muslims, and none of the communities that we look at today are monolithic; yet, we see that many of them are being treated in a very monolithic way by government agencies, agencies which in many ways are doing good things to try to establish relationships and communication, but other agencies which could do better. And we'll hear today about some of those situations.

Yet, we also see that there has been a tremendous and continuing scourge of hate crimes and violence that is being committed. And this is not just something that happened right after 9/11, even just a few weeks ago, even in today's news we can open up the newspaper or log onto our websites and see that people who are Arab American and Muslim American, or those who are perceived to be that are still suffering from
discrimination, violence, and other forms of Un-American activities.

So, for us as the United States Commission on Civil Rights, it is extremely important to shine our historic light on this issue a decade after 9/11 to determine and insure that Americans of Arab and Muslim descent and others in this country have the same rights and protections that all Americans deserve.

So, with that I can see our first panel is already sitting here. I'd like to just give you a little bit about what we need to do today, some housekeeping.

The panels will be divided into three panels today. Our first panel is going to consist of individuals in the Arab and Muslim American communities who by virtue of their personal experience and/or organizational resources can speak to the attitudes and experiences of those communities, and those community members, and how they've been affected by government policies.

Our second panel is going to consist of scholars who have studied topics of community outreach, federal program planning, and techniques to measure and change biases that affect the Arab and
Muslim American communities.

The third panel is going to consist of presenters from federal agencies and components thereof which are engaged in outreach to the Arab and Muslim American communities.

During the briefing, each panelist is going to have eight minutes to speak. After all the panelists have made their presentations, Commissioners will then have an opportunity to ask questions within the allotted time period. And as I have in our past briefings, I will fairly identify Commissioners who want to have an opportunity to ask questions so that they can all at some point have an interchange with each of the panelists.

We're going to have to strictly enforce the time allotments because we have a lot to cover not only in today's briefing; but after this, we have a business meeting of the Commission. So, panelists are going to notice we have a system of warning lights that we've set up. When the light turns from green to yellow, that means there are two minutes remaining. So, just like when you're driving and you see that yellow light, you've got to start speeding up. Right? Well, speed up to try to finish your remarks for us.

When that light turns red, that means
stop, you have to conclude your statements. And be rest assured that even though you may not have finished your statement, you'll have an opportunity to engage with us in the Question and Answer to continue to fulfill the thought that you might have been mid-sentence on.

I ask my fellow Commissioners, as always, and as they've always done, they have been very considerate of the panelists. And another, keeping our questions and comments concise. Try to ask only one question at a time, although I understand sometimes there's a follow-up that's needed or a compound question, so I'll be lenient. But, if we all abide by this arrangement, we'll be able to have a very thoughtful and effective panel today.

So, with those housekeeping matters out of the way, let me briefly introduce members of the first panel.

COMMISSIONER YAKI: Hello.

CHAIRMAN CASTRO: Oh, I'm sorry. Commissioner Yaki, would you like to say a few words?

COMMISSIONER YAKI: Yes, thank you very much. And, again, thank you for your kind words. This is a briefing that I've been asking for and working on for I would say probably about five or six years,
almost since I was first appointed to the Commission. And thank you for your leadership in bringing this to the finish line, Mr. Chairman.

I'm sorry I couldn't be there. I have a personal family emergency I have to attend to that could not allow me to leave California, but I just wanted to say a couple of words.

First, this briefing has a very special meaning to me (as the son) of a Japanese American father who spent two years of his life as a child in an interment camp in World War II, simply because he was identified as an enemy simply by virtue of his ancestry.

There's always been something about the reaction that has occurred to the Muslim American community and the people who will be speaking, as you said, African Americans, Latinos, whoever by people of ill thought and ill intent.

This has always resonated in me very deeply, and while we're talking today about whether the federal government infringes on the civil rights of Arab and Muslim Americans. In some ways that's a little misleading, because part of what I hope to focus on is also what the federal government has been doing, and I think has been detrimental to these
communities. I'm speaking specifically about a lot of the so-called targeted covert programs involving surveillance, informants, what have you in a lot of Mosques and other centers in this country activated by the FBI, the CIA, and other federal groups.

So, as much as I want to commend, and we'll talk about what the federal government has done to protect these groups, there's also the flip side, the dark side that to me has never gone away from the legacy of my community, and in World War II that I hope we can generate some discussion on, as well.

The fact of the matter is, these types of surveillance programs such as the one in New York City and elsewhere haven't generated anything, and yet, we don't hear about that, as you said, you could pick up the newspaper and find people being asked to leave airplanes, or violence, or what have you.

So, this is an important briefing. I thank all the panelists who are here today. I want to especially thank two people who I personally know, one is Ken Marcus, our former Staff Director. Hi, Ken. And, also, Jim Zogby, who I've worked with in the past and worked on very closely in 2008 when I was the Platform Director for the Obama campaign. So, thank you very much, Mr. Chairman, and I look forward to
listening to what we hear today.

CHAIRMAN CASTRO: Thank you, Commissioner Yaki.

So, our first panelist this morning is Zainab al-Suwaij, Co-Founder and Executive Director of the American Islamic Congress. Our second panelist is James Zogby, Founder and President of the Arab American Institute. Our third panelists is Ken Marcus, President of the Louis B. Brandeis Center for Human Rights Under Law, and as Commissioner Yaki said, a former Staff Director whom I had the opportunity to work with when I was on the Illinois State Advisory Committee. Our fourth panelist is Haris Tarin, Director of the Washington, D.C., Office of the Muslim Public Affairs Council. And our fifth panelist is Asim Rehman, President of the Muslim Bar Association of New York.

I will now ask the panelists to swear or affirm that the information that you are about to provide to us is true and accurate to the best of your knowledge and belief. Is that correct?

(PANEL 1 SWORN.)

CHAIRMAN CASTRO: Okay, thank you. Please proceed.

II. PANEL 1

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MS. AL-SUWAIJ: Chairman Castro, members of the Commission, good morning, and thank you very much for giving us this opportunity to submit this statement on behalf of the American Islamic Congress on the importance of engagement of the Arab and the Muslim American communities.

As a Muslim and Arab who is an American citizen by choice, it's an honor to be invited to speak before you today. I grew up in Iraq under a dictatorship that deny my basic rights, and promoted ethnic and religious discrimination.

In 1991, I joined the uprising against Saddam Hussein, and I experienced brutal crackdown. After that, I had to flee my home and came to America. Drawn by our country's commitment to religious freedom and individual rights. After September 11 attacks, I co-founded the American Islamic Congress, a Civil Rights organization promoting tolerance and exchange of ideas among all people. We are founded domestically, to engage a broad cross section of the American Muslim community, and promote interfaith engagement with all religions.

The values driving AIC's work are embedded
in our Vision Statement. American Muslims must champion pluralism and condemn all forms of intolerance. We must be ambassadors who recognize and celebrate diversity, work to actively participate in the domestic process and embrace civic engagement.

Based on my eleven years conducting community engagement and interfaith outreach, I wanted to provide insight on how to conduct the best engagement of the American Muslim community.

First, let us consider the challenges. The U.S. Government has taken important steps to build bridges with the American Muslim community, yet despite this effort some American Muslims still find themselves pulled off planes, are reluctant to report civil rights and labor violations, and endure stereotyping and profiling.

The U.S. Government messaging at times inadvertently feeds this environment. For example, the U.S. Department of Justice developed a special training program meant to demystify the Sikh population for federal agencies. One key message was to distinguish Sikhs from Muslims. While reporting diversity training tool, the materials fed a narrative that foster a bias against Muslims by seeming to suggest don't mistake Sikhs, who are fine, for
Muslims, who might not be.

The U.S. Government sensitivity training at least in the past year regarding Muslims often present an essentialized image of the community. Materials suggest that all Muslims pray five times a day, wear a scarf or hijab, and conduct their prayers in one manner; yet, no two Muslims are the same. And, our diversity is not only ignored, but also poorly prepared government officials to engage effectively with the Muslim communities and individuals.

The essentializing of Muslim also extend to relate to ethnic outreach, consider the title of the briefing here, why is a qualifier of Arabs only used when they are only 18 percent of the American Muslim community. We are 25 percent African American, 15 percent South Asian and so on, including a large population of Persian, Bosnian, Turks, West African and beyond. Yet, engaging the Muslim community as all to associate it with outreach to Arabs.

The overall problem is that U.S. Government outreach and messaging is often simplistic because it essentializes who Muslims are, and also who speaks for the American Muslim community, meaning meaningful engagements.

Let me suggest several concrete steps to
develop inclusive engagement with many segments of the American Muslim community. U.S. Government policy must be driven by common narrative shared by all agencies that recognize the enormous diversity of the American Muslim community. This policy should emphasize that Muslims come from many backgrounds and have many different kinds of religious practices, including people who are not religious at all.

Because of this enormous diversity, U.S. officials must understand that Muslims do not comprise one single unified community. Outreaching primarily to Imams and Mosques, for instance, is not sufficient for real dialogue. Federal officials should be encouraged to seek out a broad range of Muslim communities and need to engage, this include artists, entrepreneurs, leaders of ethnic communities. Also, it means engaging the many Muslim minorities communities flourishing in the U.S., including Bohra, Ismailis, and Ahmadiyyas.

The development of sensitive training materials for U.S. agencies should be done in consultation with a broad range of American Muslims. It's not enough to allow one or two token Muslim to be consulted in the development of training materials. An integrated team with various Muslim viewpoints must be engaged and materials produced should underline and
celebrate Muslim diversity. U.S. Government agencies should prioritize recruiting Muslim Americans including a broad range of American Muslims.

This Commission should continue to monitor civil rights discrimination against American Muslims including discrimination driven by simplistic assumptions of who American Muslims are, and how they express their identity.

I should note that my organization is not waiting for the U.S. officials to make these kind of changes, but we are proactively trying to educate government officials by inviting them to our events that showcase diversity of Muslims who come from many different backgrounds. Let me share with you one of these events.

As we are running -- as AIC runs a cultural center in Boston which hosted multi-cultural events, we tried to include everyone in our -- all Muslim -- all different backgrounds. After that event, one of the officials expressed his shock at what he saw telling us that after this, I have to reevaluate all the notions that I have accumulated over years about the existence of Muslim communities and their backgrounds.

I am glad that through our --
CHAIRMAN CASTRO: Thank you. I'm sorry, but we're going to have to wrap up.

MS. AL-SUWAIJ: -- work, U.S. officials are beginning to see beyond stereotypes and simplistic assumption about American Muslims. It is important that this Commission do its part, as well. I urge you to insure U.S. agencies significantly reform their policies and training materials related to understanding and engaging with American Muslims.

We at the American Islamic Congress and our many community partners are eager to see progress and ready to assist this process. By working together, we can effectively address many issues and institutionalize discrimination and stereotyping even when driven by good intentions. Thank you very much.

CHAIRMAN CASTRO: Thank you. Mr. Zogby.

MR. ZOGBY: Will the entire statement I submitted be in the record?

CHAIRMAN CASTRO: Yes.

MR. ZOGBY: Then let's just make some -- it's a good read. You ought to take a look at it.

CHAIRMAN CASTRO: I did.

MR. ZOGBY: Commissioner Yaki actually said what -- much of the concerns I had expressed. I won't express them all but I just want to emphasize a few.
The period preceding 9/11 was a difficult one for my community's relationship with law enforcement from discovery motions filed in lawsuits to Freedom of Information Act requests that were submitted by press agencies and also by individuals in lawsuit actions against federal agencies. We discovered a range of activities that we knew were going on at the time but the extent of them was incredibly disturbing to us; spying on Palestinian student organizations for decades with letters from FBI agents saying please, can we stop this. It's a waste of resources. And then responding back "no," the director insists it continue, et cetera. Activities of FBI cooperating with other organizations on the west coast to maintain enormous files of Arab Americans, of Arab activists, and of friends, even former Congressman Pete McKlosky got swept up in this with big files on statements he'd made and activities he'd undertaken.

These activities were destructive of trust between the relationship of my community and law enforcement, and also created enormous fear in my community.

At the same time that this was going on, little was being done to defend our civil rights. I
remember going at one point to the FBI with 100 affidavits and saying these are affidavits from people in my community complaining about harassment by law enforcement. And I had 12 affidavits from individuals complaining of death threats, one of them from Alex Oda who was murdered a year later.

I said to them then, "Why do you spend so much resources harassing, and so little defending?"

They had no answer then, and I believe they have no answer now.

My office was fire bombed in 1980 here in Washington. We knew who the perpetrators were. I mean, the JDL actually issued a statement approving of the fire. Maier Kahan appeared at my office six months later. We burned you out, you got afraid, changed the name. I started a new group at the time, et cetera. Nothing was done. There was not a single arrest, there was not a single conviction.

We felt that we were actually the perpetrators, because the conversations with the FBI who came to see who you were, who do you know, what do you do, et cetera.

With the Clinton Administration we saw some change, and rather significant change. Then Deputy Attorney General Eric Holder and Assistant
Attorney General Bill Lanley began a series of meetings of outreach with my community that were very important in helping us deal with airport profiling, profiling, secret evidence issues, et cetera.

If it hadn't been for those gains, I don't think we would have survived after 9/11 in terms of the way we were able to interact with law enforcement, in particular because immediately after 9/11, then Assistant Attorney General Ralph Boyd convened an interagency meeting at our request, and it began a process that has continued now even into this administration where on a regular basis we meet with an interagency group at DOJ and actually solve problems, bring cases to them, demand in some cases a request resolution, and they actually act on them. It was very important. It built a relationship. The Civil Rights Division at Justice Department remains an oasis in the desert as far as my community is concerned.

At the same time that was taking place, though, under Ralph Boyd, other activities by the Department of Justice were moving in the opposite direction. The profiling guidelines of 2003 later on expanded by General McKazian in 2008, theNSEERS program, the silly call ups of 5,000, 3,000 made no
sense at all. It wasn't just that they were -- created fear in the community, they didn't contribute to anything. Nothing was learned about terrorism or about threats against our country from these activities. And they were done with a big flourish, so the danger was that it not only created fear in my community, but they created suspicion about the community contributing to the atmosphere that ultimately leads to hate crimes.

If the Attorney General is making allegations of this sort, then people in the public begin to suspect this is a community to be wary of. With the election of Barack Obama, we hoped that there would be significant change in all these areas. And, I must tell you we did not get the change in these areas that we wanted.

I just came back from a mission -- a series of meetings in Michigan. The activity of Customs and Border Patrol at the border is outrageous, absolutely outrageous. I mean, people have actually stopped visiting their families in Canada. People have stopped doing their work in Canada. People have lost business contracts in Canada, because they're afraid to cross the border because of the treatment they get. It is not the American way -- I understand the border
is a no man's land, but in that no man's land there ought to be rules and how we behave in treating American citizens, in particular, as they cross the border.

Similarly, the behavior of the NYPD is an outrage. The surveillance program as I've seen it -- I don't know if you've seen the booklets, the Locations of Interest Booklet. Type it in Google, Locations of Interest Egyptian, see what you get. Location of Interest Syria and see what you get. It's like the Mohabidat, the Secret Police in Syria. I mean, it's pictures of every restaurant, every store, every business in the Brooklyn area with who owns it, who goes to it, Caucasian youth have been seen smoking Hookah there, like that's of interest to law enforcement. They had Al-Jazeera television on all day, recommended flying Royal Jordanian Airlines. I don't know what that has to do with law enforcement, but what it did in my community is create a sense that they are being watched all the time. It broke trust, and the White House has apparently approved of the program. And it bothers us to no end.

We also know -- I mean, the relationship we have with the FBI has been broken on several other occasions. One is the release of these training
manuals. We knew about the training manuals, because I went to CNN and did a show on them. They denied that they existed. Then finally, they admit they exist and they say we're taking 800 pages out. We asked what 800 pages, and they won't tell us. They won't tell us what's still in them.

It cannot be a matter of national security and top secret clearance required to know how they're training their agents about my community. We ought to be able to see that, work with them about it. DHS, the Department of Homeland Security, has been great in bringing us into training programs and having us be a resource in that. FBI ought to do the same.

And while I'm at it, these community outreach programs that I willingly, gladly, eagerly helped start here in Washington between FBI and the community, we now learn from the ACLU that they've been using those meetings as intelligence gathering operations. That doesn't work. If community policing and building trust are key to making our country secure, we ought to be building trust with the community and not doing everything we can to break it down.

I long argued that my community has been the weak link in the civil liberties chain. If the
chain breaks with us, it breaks for everybody. We ought to be doing more to strengthen that chain, and we ought to be doing everything we can to fight against those who want to weaken it because what's at stake is not just my civil rights, but what's at stake is ultimately the civil rights of all Americans. I thank you.

CHAIRMAN CASTRO: Mr. Marcus, you have the floor.

MR. MARCUS: Thank you, Chairman Castro, members of the Commission. It is a pleasure to be here in this beautiful hearing room. If this beautiful room is any indication of how well you've been flourishing since I left, you should have gotten rid of me long, long before you did.

I come here as a representative not of an Arab or Muslim organization but rather of a Jewish Civil Rights organization, the Louis D. Brandeis Center for Human Rights Under Law. The mission of the Brandeis Center is to advance the civil and human rights of the Jewish people, but also to promote justice for everyone. As a Jewish civil rights organization, we welcome the opportunity to speak out against anti-Muslim and anti-Arab discrimination, and we do agree that as Mr. Zogby suggested,
discrimination against Arabs, and for that matter against Muslims is an issue of equal importance for all of us.

In my written remarks, I address religious discrimination against Muslim school children, discrimination against Muslim prisoners in American penal institutions, stereotypes of Arabs in Hollywood movies, and discrimination against persons who are incorrectly perceived to be Muslim or Arabs, and especially members of the Sikh community.

In my short oral remarks, I will focus on the first of those four, and if any time is remaining will try to touch briefly on the other three.

Now, last year I had the honor of testifying before this Commission although in a different location on the topic of harassment of Muslim school children and other religious minorities. In that testimony, I described in detail some of the serious harassment and bullying that many Muslim and Sikh children have faced in American schools since 9/11.

I gave examples of horrific situations in which students reported being punched, spat at, being called F'ing terrorist, F'ing Muslim, so on and so forth.
Since then, the Commission issued a report, I think an important report called "Peer to Peer Violence and Bullying: Examining the Federal Response." The Bullying report actually does effectively describe that testimony, and describe the extent of religious discrimination against religious minorities in American schools. It also describes the significant gap in American Civil Rights Law with respect to religious minorities in schools, which is to say the Commission has acknowledged that there is an unusual lacuna, an unusual gap by which federal civil rights law, at least in its statutory form, does not prohibit religious discrimination in the federally-assisted educational programs and activities as it does for students on the basis of race, color, national origin, sex, disability, and even membership in patriotic youth organizations like Little League Baseball and the Boy Scouts.

And, I think that the Commission actually effectively acknowledged that as a result, and I'm quoting from the report, "ED," meaning the Department of Education, "cannot protect students from the peculiar harms created by religious bigotry." Now, this is something affecting all sorts of religious minority students, but we know that for Muslims and
Sikhs this has been a particular problem in recent years.

The absence of legislation to protect religious minorities has had all kinds of effects. There's obviously this fact that federal funds are being used potentially to -- in a discriminatory manner. And, also there is the inequity that if someone is bigoted against, people who have both racial and religious characteristics, there's sort of the protection against the race and not against the religion, and there should never be an opportunity for someone to avoid protection of law because it was religious rather than racial discrimination, that issue.

Now, I think that there were important recommendations coming out of that report, but not the particular one on prohibition of religious discrimination in schools. Commissioner Achtenberg argued I think correctly that there was enough in the record that could have credibly supported even a recommendation that Congress prohibit all religious discrimination in the public schools. And that is something that I had advocated for several years, albeit with an exception for religious institutions, which is to say a Catholic school should be able to
say that priests could run the school, and that if they have to choose between Catholic and non-Catholic students for admission, they should be able to choose the Catholic. But it's easy to make that sort of exception.

The problem has been that while there's widespread agreement that there should be a prohibition on religious discrimination in schools, and there's widespread agreement that there should be an exception for religious institution, there's complete disagreement on the scope of that exception. Just as there's been widespread disagreements about the scope of similar exceptions in other areas of the law.

So, what I've argued is that as a more moderate position, sort of a middle way position, at least we should come out and at least Congress should prohibit religious harassment in the public schools, because I can't think of any argument against that. I can't think of any argument why religious harassment should not be treated in the same way by the federal civil rights apparatus as racial harassment, or gender harassment, or disability harassment, or things of that sort. So, I would urge the Commission to at least reconsider that aspect of harassment and bullying of
Muslims, Sikhs, and other religious minority students.

Now, I'm going to say just a word about the prisons. It's a topic that the Commission has looked at in depth fairly recently. It is a complex topic because it involves both allegations of discrimination, as well as countervailing considerations both with respect to prison security, and also with respect to Homeland Security. Although, I believe that in some cases the Homeland Security problems are exacerbated by some forms of religious discrimination.

The one thing that I would add that's new certainly since the Commission has looked at the issue is the empirical research published this month showing just how much disadvantage Muslim litigants face when they make religious liberties claims. And, I provide some of the statistics in my written remarks based on an Iowa Law Review article that's just coming out showing that when people face discrimination on the basis of religion, they are much less likely to prevail if they're Muslims. And, if they're Muslim prisoners, they have a tiny chance as compared to non-Muslim prisoners. And, I think that that's one more reason why as we consider the balance between prison security and Homeland Security on the one hand versus
the wide range of discrimination on the other, we should ask whether there are some reforms that are appropriate, and I've suggested a couple.

On Arab, anti-Arab stereotypes, this is a point that I discuss in my written remarks. The one thing I would say is that there is no reason why a federal official cannot speak out against this problem and so with a bully pulpit that's available here in a way that creates no problems for speech of any kind.

The last thing I want to say in my few remaining seconds is that while the focus here is on Muslim and Arab discrimination, I think it needs to be recognized that Sikh Americans often face discrimination based on the wrong perception, they're Arabic Muslims. That this is something worthy of consideration. And if there's one point to focus on here, it is that the Department of Justice should be keeping track of anti-Sikh discrimination to the same extent that it does with anti-Jewish and anti-Muslim discrimination, as well.

I think that's something that the Department of Justice is probably moving slowly towards. I think that there probably would be some agreement that it's needed within the Department of Justice, but they're not there yet. And, I can't think
of any reason why that wouldn't be added. Thank you very much.

CHAIRMAN CASTRO: All right, thank you.

MR. TARIN: Chairman Castro, members of the Commission, thank you for giving me the opportunity to testify before you on this very pertinent and timely topic. My name is Haris Tarin. I'm the Director of the Washington Office of the Muslim Public Affairs Council.

MPAC was established in 1988, years before the idea of engaging American Muslim communities was on government agencies' agendas. It has been our belief since then that engagement at all levels, federal, state, and local with government offices, law enforcement agencies, and public officials is integral to a healthy democratic process, and important in times of distress and crises so that the lines of communication are open and there's a level of trust, the key word trust built to address and solve difficult issues.

On 9/11 when America was attacked, there was no differentiation by the attackers as to the color, creed, or origin of the victims. On that day inside of those towers, in the Pentagon, and inside of the planes, there were Christians, Jews, Muslims, and
Americans of various other faiths. Our nation was attacked as a whole, and we all endured that tragedy together.

Today it is important to highlight the contributions American Muslims have made since then in protecting our nation, and engaging government and law enforcement agencies in partnering to address threats that might jeopardize its security.

The key word here is partnership. It is this partnership that yields results both in making us a safer society, and insuring that the civil liberties of our communities are preserved so that the foundation of our democracy remains strong.

This belief in partnership is not based on feel good conversations or wishes of better relationships for cameras, or news cameras. It has proven results in over five decades of American local community policing and partnership.

In the middle of the FBI headquarters just across the street is an outside open courtyard. On the wall is a bronze inscription, a quote by J. Edgar Hoover himself which reads, "The most effective weapon against crime is cooperation, the efforts of all law enforcement agencies with the support and understanding of the American people."
This partnership which is based on trust in the opinion of our organization is key to making our society stronger, safer, and more democratic.

Several studies have shown the critical role American Muslims have played in keeping our nation safe. One study completed by the prestigious Triangle Center on Terrorism and Homeland Security whose partners include the University of North Carolina and Duke University indicates that in one-third of the violent terror attacks thwarted since 9/11, law enforcement was first tipped off to the plot by American Muslim communities.

In a second study done by our institution, after reviewing and assessing all terrorist attempts through open source material, Muslims have been responsible in thwarting one out of three plots against the American homeland.

These numbers and our history as a nation prove that communities and citizens are our best assets in addressing challenges facing our country. Investing in these partnerships should be of utmost importance to both government agencies and communities themselves.

There is no question that when it comes to addressing some of our major civil rights and security
challenges there seems to be two varying trends promoted and used by experts and law enforcement agencies to engage communities which in turn have immensely different consequences on civil rights and liberties of these communities.

First is the suspect trend of engagement that encourages aggressive intelligence and surveillance activities in communities as these major components of American Muslim, Arab Americans, and South Asian Americans are suspects that must be watched.

There have been instances in places such as New York and New Jersey where innocuous activities by Muslim students such as white water rafting trips, local restaurants, Hookah bars have been surveyed by law enforcement agencies. I understand smoking might be hazardous to our health, but I didn't think it was a national security threat.

We've also seen instances where community engagement settings by federal law enforcement agencies, including the FBI, have been used to collect information and then categorized as intelligence by federal law enforcement agencies, in Northern California especially, as reported by the American Civil Liberties Union.
This trend has developed in the context of misinformation and fear that has dominated discourse around American Muslims. A 2011 report by the Center for American Progress has highlighted an industry of fear that has developed that works for marginalizing American Muslims.

Over the past decade, over $40 million have been spent on spreading misinformation about American Muslims, and a lot of that directed towards law enforcement training. This misinformation has normalized a climate of fear against American Muslims, where public officials, members of Congress have made false statements and accusations, and have not had any significant consequences to their words or actions.

This has had a chilling effect on American Muslims communities, and their rights to practice their faith and hold political viewpoints. On college campuses we regularly receive reports from students whose parents do not want them to engage in constitutionally protected activities due to fear of surveillance.

This climate of fear has also impacted political activities on college campuses especially in California where outside organizational groups have influenced, to a detrimental impact, the freedom of
expression of students.

The second trend is a partnership where local communities have developed strong relationships with law enforcement agencies and local government agencies. And, there exists a level of trust and communication which allows them to work through difficult issues.

Cities such as Houston, Los Angeles, Dallas, and Chicago, and other local communities have built strong and enduring partnerships with local advisory boards -- local advisory and multi-cultural boards that are made up of community members, local officials, and law enforcement agencies which provide policy recommendations and actually work through difficult issues together even though they may not agree at all times.

To continue to promote this type of partnership and to make sure that we marginalize the voices of suspect, we recommend that there must be more rigorous push back, and this is a recommendation that we hope the Commission would make, by public officials on the misinformation that exists about American Muslims.

To President Bush's credit, when he visited a Mosque after 9/11, there was a significant
drop in hate crimes reported by the Southern Poverty Law Center. We need that type of leadership from our public officials. That bully pulpit is extremely important.

Congress should allocate more funding to groups like DHS, the U.S. Attorney offices to increase outreach programs, especially for smaller law enforcement agencies at the local level whose budgets are already thinning and this is not a priority on their budgets.

Mechanisms for redress must be more robust at the federal level. DHS, DOJ, and other agencies should do more outreach at the local level to engage communities, inform them about the redress process, make sure that they have access to the redress process, and continue to engage them on those issues.

Thank you so much.

CHAIRMAN CASTRO: Mr. Rehman.

MR. REHMAN: Chairman Castro, members of the Commission, good morning. My name is Asim Rehman. I'd like to thank you for the opportunity to testify today, and I'd also like to applaud the Commission for deciding to focus on this very important issue.

Today I'm speaking in my capacity as President of the Muslim Bar Association of New York.
We're one of the nation's most active Bar Associations for Muslim lawyers. In addition to providing traditional Bar services, we work very closely with New York mosques and community organizations on civil rights issues.

Through this work, we have direct exposure to members of the Muslim community whose civil rights have been violated. We've also participated in government engagement efforts regarding civil rights, and we speak to local Muslim leaders about those efforts. So, this morning I'd like to share some of those impressions.

If we're going to understand how the government is addressing a problem, let's first identify the problem. Let's identify some of the civil rights challenges that American Muslims have faced since 9/11. And if you will allow me, I'd like to start with a personal story.

In September of 2001, I was attending Friday prayers at a local mosque. A few days earlier, I was in downtown New York. I was watching the World Trade Center, and I had to run for dear life when the towers fell. I won't forget what I saw that day, and I did what so many Americans do when they need peace. I sought solace in prayer. But, when I emerged from the
mosque, there was a man across the street who started yelling at us, cursing, saying, "Go home."

Now, it was just one man, but it was a harbinger of things to come. Eleven years later, and where are we? We see an anti-Muslim sentiment that fueled that man's comments spreading across the nation. We hear it in our schools, we hear it in our local communities, in the media, and most disturbingly from government officials and political candidates. Eleven years later, and sadly it's now socially acceptable to harbor and vocalize anti-Muslim sentiment. And with such sentiment, we see a troubling rise in civil rights violations.

As outlined in my written testimony, Muslims in America have faced numerous civil rights challenges since 9/11. They include a rise in bullying, in anti-Muslim hate crimes, and in workplace discrimination complaints. They include public opposition to mosques where prayer sites are vandalized, and where the legitimate right of communities to build houses of worship is challenged in court. They include the recent rise and wave in so-called anti-Sharia laws, they include improper questioning by immigration officers at the border, and they include law enforcement policies and practices
that unfairly target and profile Muslim Americans.

As detailed in my written testimony and as commented on today, since 9/11, federal and local law enforcement agencies have subjected American Muslims to unwarranted and intrusive interviews, have sent informants into houses of worship, have monitored community centers and mosques, and have profiled and targeted American Muslims without proof of wrongdoing.

We heard about what's happening in New York with the NYPD. There was reference made to some of those documents. The mosque where I was married is listed in those documents. The mosque where I would regularly attend Friday sermons was quoted, which means it's very likely that someone who is sitting next to me in the mosque is from law enforcement taking notes.

Now, while federal and local law enforcement agencies have defended such tactics as legal, and based on legitimate leads, the civil rights impact of such profiling on American Muslims cannot be denied.

First, whether intended or not, profiling by government officials often fuels public suspicion of American Muslims and gives license to private actors to take matters into their own hands.
Second, the fear of government surveillance sends a chilling effect throughout congregations and campuses hampering the rights of free speech and free association.

Lastly and most critically, the security of our cities and our nations depends on a strong relationship of trust between law enforcement and local communities, and programs that cast suspicion on an entire community of faith threaten to damage that trust.

These are just some of the civil rights violations and challenges that the American Muslims are facing today. So, how is the federal government engaging with American Muslims on these issues? From my own work, and from my discussions with Muslim community leaders and advocates, I respectfully suggest that the federal government's track record on civil rights engagement has been mixed.

On some issues, the federal government has shown commendable leadership. On others, engagement has been less effective. For example, with respect to the opposition to mosques, the Civil Rights Division of the Department of Justice deserves credit. They have defended the rights of Muslim congregations to build mosques, and they've done this by appearing in
lawsuits, by filing their own federal lawsuits, and by leveraging the power of the federal government. In doing so, they have illustrated the administration's commitment to one of our most cherished rights as Americans, the right to freely worship.

By contrast, unfair and discriminatory federal law enforcement and immigration policies continue to impact our communities. And despite efforts of local community groups, and despite efforts of national advocacy groups, we've seen little change. Standing alone, these policies are troubling, but they're also detrimental to federal outreach efforts.

So, in New York, our Bar Association and our local partners receive invitations to attend government outreach meetings. The leaders of our mosque invite the federal government to come to their congregations for events and for Ramadan meals. All of these meetings serve the positive function of building relationships between communities and government. But, when citizens see the law enforcement practices continuing, troubling law enforcement practices without change, they question the utility of such meetings. And, as my colleagues have mentioned, when they learn that the FBI in San Francisco has been taking information gained from outreach meetings and
using it for investigative purposes, they become concerned about whether the same is happening in our own city.

To be clear, the gains achieved by outreach, by the defense of mosques, and by other engagement efforts are important developments, but they do not erase the fact that many American Muslims feel that their government is targeting them at the border, through law enforcement, with respect to charitable giving, and in other aspects of their daily lives. Put simply, engagement and outreach can only go so far when problematic policies persist.

As noted in my written testimony, there are ways that the federal government can improve civil rights engagement with the various American Muslim communities. They should continue to increase their outreach efforts, but should take measures to ensure that those efforts are not commingled with investigative work. They can take stronger steps to track and prosecute hate crimes. They can strengthen their own internal rules to ensure that agencies do not engage in ethnic and racial profiling, particularly with respect to immigration and law enforcement. And, they can put pressure on local law enforcement agencies to do the same.
Working together we can make the government's civil rights engagement efforts stronger and more effective. We have all come a long way since 9/11. The government has helped in situations, and the Muslim communities have been active participants in improving the situation for all Americans. There's more work to be done.

Thank you for your time today, and I look forward to your questions.

CHAIRMAN CASTRO: Thank you, Mr. Rehman. So, I'm going to now open it up to the Commissioners. Raise your hand if you want to ask a question. Commissioner Yaki on the phone, if you want to just shout out if you want to ask a question. Shall we get started? Commissioner Kirsanow.

COMMISSIONER KIRSANOW: Yes, Mr. Chairman. I also want to thank the guest witnesses here, and thank the staff for putting together another splendid briefing panel. Just a very simple question for all of you. Actually, a couple of questions, but they're all related.

With which federal agencies do you or your communities most often interact? And the same with respect to state agencies, and local agencies. And of those agencies with which you interact, if you might
be able to kind of rate them in terms of there have been several witnesses who testified about the degree of outreach that you've had, or on the other end of the spectrum, the degree of concern or trouble you face in interacting with those agencies.

MR. REHMAN: If I may, there is a different type of outreach that we've seen in New York. It's difficult to rate, but I will give you maybe some descriptions of what type of outreach there's been to illustrate the point.

Customs and Border Patrol, for example, is very important to members of our community. We're in New York, we're at JFK, got lots of people living in New York who travel on a regular basis for business and personal reasons. We have had productive meetings with local Customs and Border Patrol heads of office who have come, listened to concerns, seemed visibly surprised at what they were hearing is happening at the Customs and Border inspections, and have given out their phone numbers and said, "Give my number to members of the community. If anything comes up, have them call us."

Anecdotally, it was a good development. The problem is it's local. It does not change the tone at the top, it does not change the policies. It
doesn't change the national training for these inspection officers. Local solutions are good, but they're temporary. When he moves out of his position, his phone number is no longer going to work. What we need are national solutions.

With respect to the FBI, it's stickier because, it's law enforcement. People are very skeptical to attend these meetings, and when they do, there's often always a new face. The meetings come and go in fits and starts. The consistency is not there. DHS more consistent, and we've seen some new efforts -- next week, for example, the Office of Civil Rights and Civil Liberties is going to be in New York meeting with community leaders. A first meeting was held some time ago, and this is the second meeting, and we've heard positive noises. But, again, sometimes these come and go in fits and starts, and sometimes they're local which is important, but what people want is they want systemic change.

MR. TARIN: I think I'll just make two points related to that. I think post 9/11 there was an influx of engagement that happened especially with the law enforcement agencies, at the local level, the state level, and the federal level, so you had groups like that. Yes, you had local law enforcement
agencies, you had DHS, and this was important, because I think that engagement is important. But, we also need to consider that that relationship between our governments and our communities cannot be securitized only. If it's a relationship only based on security, then you don't promote the positive integration and engagement, and positive civic identity of a community.

So, if you've got the FBI which is the only group that comes to a mosque, or local law enforcement agency, if you don't have the Department of Education, if you don't have Commerce, and to the credit of this administration there's been more of that type of engagement that's been tried, but that needs to be stepped up. That's the first point.

The second point is that -- going back to sort of Asim's point, is the first level of meetings are with civil rights -- so we need that. We need to talk about the redress processes. We need to talk about the issues that impact local communities, whether it's on the border, whether it's within a mosque. But when we need to also get beyond just the civil rights issues and start talking about policy issues. And, I think that's where a lot of the frustration remains in the communities. We're not
having the conversations with folks at the higher levels who are able to then actually work policy changes that take place. So, I think those two are the main challenges as it relates to engaging the federal and local agencies.

COMMISSIONER KIRSANOW: Before anyone else responds, is there a particular number of states that are troublesome to you in terms of the state agencies' reactions to you, and are there some that may be more exemplary?

MR. TARIN: I think New York, although I'm not familiar -- I think New York is one of those states when it comes to a lot of these issues that's been quite troubling, specifically, with NYPD engagement. I think what you'll hear from communities is that that engagement is extremely troubling.

There is not even a willingness to listen. I think some agencies that have problematic policies, there's a willingness to engage, but there's a complete shut out of conversation and engagement on the real issues.

I think to a large extent, Texas has been exemplary in a lot, especially with the local law enforcement agencies. California has been quite good, especially in Los Angeles. There's been a lot more
conversation. The relationship is a lot more productive. But, I would say New York is one troubling place.

COMMISSIONER KIRSANOW: Mr. Zogby.

MR. ZOGBY: You asked to rate the agencies. I'd start with the Civil Rights Division at Justice, and rate them very high. The outreach has been exemplary, and extraordinary. And, as they've assembled staff from all of the agencies, we actually become friends and find a responsiveness to the concerns that get raised. These monthly outreach meetings have been very important.

I give the FBI, you know, I'd want to give them a zero, but I can't, because what I can never forget is after 9/11, three people went to jail for threatening my life. The death threats were frightening, and I'm going to talk about that in a minute, the kind of threats they were. But the role of the FBI in their investigation, and the support they gave to me and my family, and the trial lawyers at the Department of Justice Civil Rights Division, and the attention they paid to me personally, to my office, to my family is just amazing. And I can never forget that.

I think you mentioned sort of the problem
of it all being in one department, it's difficult when
the guy is following you around to different events to
make sure you're okay, and that you -- when the
threats are ongoing that you're safe and secure, and
the guy is doing the investigating and reporting on a
regular basis. The fact that he's FBI, but that the
FBI is also collecting intelligence, I know, I trust
those guys who worked with me because of the way they
related to me, but I also know that the FBI is a
problem. And somehow I'd like to separate those
functions so that we can be more secure in when we
report hate crimes that -- I have a public profile so
it's easy for me, but folks around the country when I
say, "Call the FBI," they say, "I can't do that. I'm
not going to talk to them."

That shouldn't be. They should never be
afraid to report a hate crime, as a woman should never
be afraid to report a rape, because she's afraid of
what other consequences might fall on her. So, the FBI
is a problem. And, the behavior of the FBI about the
stereotyping, I mean, everyone talked about
stereotyping, the damage that it does, but when the
FBI itself is training its people with just ridiculous
stereotypes and when it gets revealed and we see what
it is, and I say, you know -- when I look at an ugly
building in Washington I say, "Who the hell designed that, and who approved it, who paid for it, you know, and what construction company agreed to put it up?" You know, I mean it was a village effort to make it happen.

When I look at these training manuals, I say thousands of people worked with them, and somebody approved them. Somebody wrote it up, somebody approved it, somebody paid for it, and they went and did it. When they will not be responsive to us to be transparent about it, to hold anyone accountable for it, it's shocking. We can't get into that. Why? It's a -- you're teaching people about us. I can't understand their refusal to engage us in an effort to get to the bottom of where these manuals -- and it didn't stop with the FBI, because there have been federal funding of these training programs for local law enforcement agencies that were done. They're the very people who've been harassing us, and defaming us, and propagandizing against us, and they're getting government contracts to go and train people. I don't understand that. That's ridiculous.

So, the propagators of the hate are not sort of crazy people out on the street, but they're people who are getting government contracts and ready.
manuals, and training people in the FBI, training people at the Pentagon, training people in local law enforcement agencies around the country, so something's got to happen with that one.

And, finally, on the issue of reporting, we'd like to have a dog in the fight. When people threaten my life, they know I'm not a Muslim. It was, "Arab dog, you'll die, and we'll slit your throat, and murder your children." That was the threat I got, "Rag head. Rag head, you Arab dog. Arabs should all die. Arabs don't belong in America."

The issue of Arab and Palestinian, because Palestinians are targeted by law enforcement in a very special way. And, it goes to a longer history of problem that is ethnic-based, and national-based, and political-based. So, I think that as we're considering creating his new category of Sikh discrimination, which we ought to create, and I would add Hindu discrimination which we ought to create, I would not leave out the ethnic category of Arab as a special category to separate out the Arab hate crimes from the Muslim hate crimes as a special category. One is religious-based, the other is political-based, and unfortunately sometimes they get conflated, and they do get conflated. I mean, sometimes I'd be "you
Hezbollah murderer,” hard for a Maronite Catholic boy who goes to Blessed Sacrament Church to be a Hezbollah murderer, but I can't account for these guys.

But, there's a need to kind of separate it out, understand it, and know who the perpetrators are, and who the victims are, so that we get a better record of it. So, as we are considering now in DOJ adding the anti-Sikh hate crimes to the reporting issue, I would add the anti-Arab category, as well. I think it's important to do that.

And, I would, again, give DOJ, and in particular the Civil Rights Division, a very high grade. FBI a low grade, and Customs and Border Patrol, as I already said, I mean, I do not understand that behavior in Michigan. I deal with Michigan mainly, and that border is very important, because we have a family overflow. I mean, people who settle in Michigan, families moved to Windsor, it's the suburbs for them. And we have broken up families. People are afraid to cross the border because of the treatment.

CHAIRMAN CASTRO: I'm going to give the floor to Commissioner Kladney. I know he has some questions.

COMMISSIONER KLADNEY: Thank you, Mr. Chairman. I'm going to try and ask one question. Like
the Chairman said at the beginning, it's very
difficult for me, but three of you mentioned trust in
your statements. And, Mr. Marcus in his statement
mentioned a lot of numbers, basically saying that the
number of reporting of anti-Muslim crimes was
significantly lower than other areas. And I'm
wondering whether this is because of the fear of the
FBI, not to equate the '60s and '70s to the situation
today, but the FBI was very active in citizen groups.

So, my question is, is part of this low
number of reporting part of the fear of the FBI,
because I remember, I don't know how many months ago,
but I remember hearing a story on the radio about an
incident in Orange County where I think a Muslim
gentleman reported something to the FBI, and he's the
one who wound up, I think, going to prison. And, I'd
like to ask that really of the panel, what their
thoughts are in that regard. Perhaps you might want to
start, Mr. Marcus.

MR. MARCUS: Yes. Let me just clarify that
I did not intend to convey that the number of reported
incidents of hate crimes on Muslims were low. I
intended to indicate that it was unacceptably high. I
thought I said unacceptably high. I did indicate that
for other groups it's higher. So, this was in the
context of saying let's have context and perspective. But, even if there are other groups that have higher numbers, I don't think that that means in any respect that that's not an excuse to take very seriously the number of incidents of even reported hate crimes against Muslims, let alone the number of hate and bias incidents against Muslims that don't rise to the level of hate crimes.

MR. REHMAN: So, on the issue of statistics, I do -- we do have some figures. During the period from 2001 to 2009 according to FBI data, 1,552 incidents of anti-Islamic hate crimes were reported resulting in 1,785 offenses. And we also know that that number is likely low because of the way that hate crimes data is reported.

The Justice Department's own Bureau of Statistics found that hate crime statistics are probably low because only 44 percent of crimes are reported to the police. So, I hope that those figures illustrate with respect to hate crimes the types of issues we're facing.

MR. TARIN: I think you make an extremely important point. I think that there is a chilling effect. That's why I specifically mentioned the chilling effect on college campuses and in
communities, that there is a chilling effect. I think when you hear that the FBI has been using very intrusive methods of surveillance and that there's been a lot of plots as well that have come through informants. So, I think the community feels that if I expose myself to federal law enforcement agencies, and I think there's a difference between local and federal. I think people feel a lot more comfortable with local law enforcement agencies in certain cities. I don't think that's the case in New York City, but I think in places like Los Angeles, and Chicago, and Houston, and Dallas, local law enforcement agencies are the first line of defense. There's a more intimate relationship, there's engagement. And, those folks have to get the job done. They politicize their work much less. And, I think that there's something to say to the fact that American Muslims are hesitant, and there's a time -- there's an incident that's reported in California of a young American Muslim, by the ACLU of a young American Muslim who had gone to the FBI, who was being intimidated by others, and then the FBI turned around and kind of was looking into him and his activities, his political activities. So, I think there is something to say to that. And, I think the numbers also back that up.
MR. ZOGBY: This is a personal experience. I mentioned the death threats that I got all the way through the ‘70s and ‘80s, the office getting burned down in 1980, but in all of this, I reported the fire, obviously had to report the fire, but in all of this what I came to understand was that my reaction to it was not unlike the way I understand, or when I read about the way women react to rape; and that is, what did I do wrong? Is it me? It is my fault? Did I do anything here, did I send a false -- should I have not said this or that? Because, oftentimes, these things when they happen it's after you've been on a television, or after you've been involved in a public event and people have heard you, and they'll say you said -- many times, incidentally, when I'm on television and I get asked a question on CNN, I say to myself should I say anything to this? Should I duck the question, let it go, because if I say something am I going to bring this on me, my family, and my office? So, that does happen.

And I know when I've gone around the country and talked to people about it, I get the same reaction, that the oh, yes, I got that. Oh, yes. I said, "Did you report it? Oh, no, because I don't" -- they think it's the price of admission. You're going
to be an Arab, you're going to be involved, you're going to say things. This is going to happen to you. So, there is, simply out of a sense of fear, and sometimes a sense of guilt. And the reason why I became very intense about dealing with this was President Clinton invited me to be on a -- we had this hate crime panel, Commission, and asked me to be on it, and I spoke. And a person spoke about hate crimes against gays, and then about African Americans, and then about women. And I was listening to them and I was saying, "Wait, that's me. That happened to me, too." And at some point I was overcome with the sense of I let it go. I didn't want to admit that this was happening to me, and I was resolved then that the next time I was going to -- so right after 9/11 when Zachary Rohman called me up from Boston, didn't know who he was at the time, and said, "Rag head. You Arab, you're a rag head. All Arabs will die, and slit your throat and murder your children," kind of things, I said, "Damn it, I'm going to get to the bottom of this." And thank God the FBI stepped up and dealt with it. So, I've been reporting everything ever since then. One of the guys, State Department guy, 23-year person at the State Department, a regular series of really awful threats against me and my office, and
they wouldn't fire him at the State Department. We can't do it, because he hasn't been convicted. He got convicted. The day he got convicted they finally let him go on full pension. He's out, and now he's back right in my office again all the time. And he hasn't crossed the line, just Arabs are terrorists, Arabs don't belong in America, but never -- he's never said, you know, "I'll kill you," or "You should die," or something like that. But, these are things that sort of -- I can see the reaction when his emails come to my office. He sends them to everybody. The kids in the office -- I know when Patrick sent another email because people get this sense of huh, I got it again, and they don't know what to do with it.

COMMISSIONER KLADNEY: The real question, though, is how if you're talking about trust, if you're talking about how the communities, that is the law enforcement communities and the Muslim communities get along in America, what's your solution? I mean, you keep talking about outreach, you keep talking, you know, extending hands, I guess, out and things like that. But when on the same point like the FBI is investigating your antagonists, they are investigating, I assume, ongoing -- they have intelligence units, and they keep investigating people
in the American Muslim community, as well as my community, and the Chairman's community, and Mr. Gaziano's community. Not us, obviously, but --

CHAIRMAN CASTRO: We had background checks when we --

COMMISSIONER Kladney: But my question is, is how do you --

COMMISSIONER Yaki: Until after --

CHAIRMAN CASTRO: Was that something from you, Commissioner Yaki?

COMMISSIONER Yaki: No, no, no, I was just making -- I was just saying the members were investigated until probably after this hearing today.

CHAIRMAN CASTRO: Okay.

COMMISSIONER Kladney: But, no, my question is what is the solution? How do you make that balance? How do you strike that pose, so to say?

MR. TARIN: Oversight. I think that -- I mean, when we hear in public that there are policies that are problematic, and there is no one who's held accountable. Let's take the example of the training material that everybody is talking about at the FBI, the DOJ as an institution, DHS, DOD, every single one of these agencies found material that was absolutely problematic, absolutely is horrifying to have someone
look at my community and my children in that way. Not
one person was held accountable, not one person was
fired, not one person -- I mean, if that happened to
other communities, any other community, if that had
happened within the African American community, the
Hispanic American community, there would have been a
public price to pay for people who committed these
types of very intentional oversights. So, there is no
accountability, and unless there's accountability,
unless there's oversight from Congress, unless there's
oversight within these agencies at the higher level,
and people's jobs are at stake, that will not change.

MR. ZOGBY: I would also suggest a firewall
be set up, and it can be done. I mean, we will tell
people now if you've been raped, you can report it.
And, if there's drugs in your -- you won't be
prosecuted for that. There's this law being broken,
that law being broken, this takes precedence in this
incidence.

We asked Attorney General Ashcroft to do
that, to help us with these folks who hate crimes to
report but who were afraid to because they were -- you
know, their documentation might not have been in
order, et cetera. And, he said you want me to counsel
law breakers? I said no, sir, I want you to protect
people against law breakers. And, you have to make a judgment here. So, if people felt assured that there was this firewall either through legislation or through an Executive Order, that when you report a hate crime, the unit you report it to cannot conduct an investigation about you and other issues involving you. Their job is to get the hate crime. It might make it easier for people to do the reporting.

CHAIRMAN CASTRO: At this point, I'm going to give the floor to Commissioner Gaziano. He has a question, and we are getting close to the end time for this panel. So, Commissioner Yaki, I'll give you the last question after Commissioner Gaziano.

COMMISSIONER GAZIANO: I can yield to Commissioner Yaki if he wants to go first.

COMMISSIONER YAKI: No, I'll wait.

COMMISSIONER GAZIANO: Okay. I wanted to thank all of you for your testimony, and it's particularly helpful to hear where some of the problems are, and also to confirm where some of the encouraging signs are. I'm encouraged, for example, the Civil Rights Division does enter into the suits defending stings of mosques. I'm curious to learn more and disappointed that other claims seem to not to succeed as much based on who brings them. But, I
wanted to follow-up on one particular suggestion that Mr. Marcus made, and I tend to agree it might, which is to prohibit harassment under Title 6 based on religion, that it might lessen the complication of creating the exception, as opposed to prohibiting broader discrimination.

I think either maybe it’s worth pursuing, so C-- but the one question I was going to ask you, Mr. Marcus, is it certainly would, it seems to me, lessen the complications, but I wonder if it would illuminate them entirely depending on how broadly harassment is defined. And as I expressed in my statement with regard to the Bullying report, if harassment is understood in a certain context, then there's much fewer problems.

If a Catholic school is teaching that the Catholic Catechism is the one true catechism and the one true faith, and a non-Catholic student is permitted to bring a harassment claim because it's taught quite emphatically in the Catholic school, and I say this because I went to 12 years of Catholic school, quite emphatically that there's only one true catechism, do you see that as a way around that? But I should say I want to thank you for making your suggestion because maybe it would make it a little bit
easier to get religion into -- prohibition against
religion into Title 6, possibly into other areas.

MR. MARCUS: Yes, thank you, Commissioner
Gaziano. I agree that if Congress legislatively tries
to define harassment in this context it will create a
host of at least political problems, because there's
so much disagreement over what harassment is. And
because the way in which harassment is defined by the
courts in money damages cases is very different from
the way in which the Office for Civil Rights defines
harassment in its administrative cases. So, I would
think that any effort to provide a specific unique
definition of harassment in the religious context
would create all sorts of problems.

As a purely practical matter, my
suggestion would be just let the courts and OCR
continue to define harassment in the religious context
in the same way that they do it in the racial and
gender context, and not try to sort out the broader
philosophical question of what is harassment uniquely
to religion. Do it all together.

Now, you raise an example that's a little
bit different than what I've gone through, so I don't
know exactly how I would address that. But I would say
that if we are to get a final answer on the question
of what is harassment under Civil Rights law, the best
closest context for answering that is not necessarily in the
religion context. It should be defined across the
board, and it should be defined consistently.

CHAIRMAN CASTRO: Commissioner Yaki, you
have the last question of this panel.

COMMISSIONER YAKI: Thank you very much.
The question is one of a -- it's a sort of a survey
question which I want them to think about and then
answer after I ask my first question. So, the second
question comes first, which is we have -- I ask that -
- I especially want to thank Yasmin for putting this
briefing together. Yasmin did an incredible job. And I
wanted the panels done in a certain way to put
advocates up first, and then the government up last so
they could hear what was going on.

So, I'd like you to think about and then
give me a quick rating after I ask my second question,
but I want you to think about it first, which is why
we have representatives of the Department of Justice
and Department of Homeland Security who will be
testifying later in this hearing, I'd like for you
to, sir, on a scale of one to ten, ten being a lot of
-- ten being full trust, zero being no trust at all,
how you would describe to them your communities or the
people you represent and how these members of the federal government who are here to sort of help work with your communities on bias affecting their community. So, I'd like you to think about that for a second and then just give your numerical rating after I ask this question, which is more toward, I think, Mr. Zogby and to the member of the New York Bar, the Muslim Bar; which is, the one agency that hasn't come out much in our discussions today, and if others want to chip in, please do, and that's the CIA. And, the fact that -- and there's been a lot of media reports about the fact that CIA officers have been advising local law enforcement on the domestic surveillance information. If you can tell me what you know about it, what you've heard, and the propriety of it, I'd appreciate your thoughts on that. And then after that, if each of you could give your, you know, five, six, seven rating in terms of trust with the people who will be testifying later, I'd like to hear that, but first about the CIA. MR. ZOGBY: All we know about the CIA involvement is what we read in the Associated Press accounts which have been rather extensive, and is obviously very disturbing. And, the fine line of having an agent on leave working with the Department and then later on assuming a role with the Department,
and then being replaced by or complemented by another
CIA agent coming to set up this domestic surveillance
program seems to me to be well beyond the scope of
what the Central Intelligence Agency ought to be
doing. I mean, New York City cannot be a law unto
itself, and yet it is functioning as a law unto
itself, and with the support of the administration.

I mean, the comments by John Brennan I
would say from my Catholic background, sprinkling Holy
Water on this CIA-NYPD program have been distressing
to us. So, yes, it -- we ought not be talking about
them, because they ought not be involved in this, and
yet they are. And, the one place they are involved
that we know of is the New York City Police Department
situation.

MR. REHMAN: Sure, I'll start. And,
Commissioner Yaki, this is Asim Rehman from the Muslim
Bar Association. I'll echo what Mr. Zogby said, and
also add that beyond the fact that we don't know more
than what's in the press, it kind of underscores the
fact that there's a lot of public confusion of where
do you draw the line between federal and local
enforcement. And that also makes it more confusing to
Commissioner Kladney's question of how do you solve
the problem?
Even if you build local relationships, what if there is commingling between federal government and local law enforcement? What about all the fusion centers? If you took the CIA out of the question, it has a lot of cache to it, it would still be all this sense of well, I don't understand. Am I dealing with the NYPD or am I dealing with the FBI, or am I dealing when I talk to the cops about immigration issues? The lack of clarity, and the lack of transparency between federal and local law enforcement creates a lot of confusion that leads to that breakdown in trust.

As for rating, it’s a very difficult question. And, I apologize I can't be more clear, but my view is you need to parse out the enforcement side and the rights-based side. So, within DHS you have the enforcement side including immigration enforcement, and then you have the rights-based side like CRCL. Within DHS, Customs and Border Patrol is getting better, but I'd put them below a five. I'd put them maybe three or a four. CRCL has been making a lot of strides in outreach, so I'd put them above the five. I'd give them a six or a seven. Within the Department of Justice, again you've got the enforcement side and the rights-based side. On the enforcement side,
FBI and related agencies are trying, but they're not there yet. They still have all these troubling policies that they won't stand away from, so it's closer to a three. And on the civil rights side, making a lot of important strides in standing up for the community, it's closer to a seven or an eight. Again, those opinions are my own and they're off the cuff.

MR. TARIN: I would tend to agree. I think we have to parse it out, because these agencies are not monolithic. They're not one big agency. I think the rights-based side of DOJ, the Civil Rights Division, has done an amazing job of engaging, and also litigating so I would say close to an eight. The FBI still has a lot of work to do, a two or a three. DHS, CRCL has done a lot of work with outreach and engagement, and they've been trying. They've put a lot of programs into place, closer to a seven. And, the Customs and Border Patrol, yes, I think two or three there. So, these are rough numbers.

MR. ZOGBY: I'm going to echo Haris and Asim on the way they've parsed it out. The only concern we have is why the overall Department can't crack the whip on these agencies that are under -- supposedly under their control. I mean, the FBI
operates without anyone being able to -- stands powerless in the face of this training manual scandal. It's just beyond me.

MS. AL-SUWAIJ: I echo my colleagues here, but at the same time I understand the importance of keeping our country safe and secure, and keeping us as a community here in this country safe and secure, as well, from any attacks, or any terrorist act.

I also give -- I would say officially I would give them seven and DHS, they've been really engaged in the events with the community. I'll give them eight. TSA, I'll give them one. Personal experiences throughout, traveled a lot so I'm much more in touch with them on a weekly basis than any other agencies. DOJ I think they have been doing -- trying to do a tremendous amount of outreaching and programs to reach out to the communities.

CHAIRMAN CASTRO: Thank you all. This is a very, very informative panel. We appreciate your coming, and you're welcome to stay for the other panels. As you begin to step aside, we're going to ask the second panel to begin to move towards the front so we can begin that. Thank you all.

COMMISSIONER YAKI: Jim, sorry I couldn't be there.
CHAIRMAN CASTRO: Okay. If we can get the second panel. Thank you, appreciate it.

(Whereupon, the proceedings went off the record at 11:03 a.m., and went back on the record at 11:09 a.m.)

CHAIRMAN CASTRO: Kirsanow stepped out, but we will start the program, and he will join us as soon as he gets back in.

So, we're coming back to order now. It is the second panel. It's 11:09 a.m. I want to briefly introduce the members of the panel in the order that they are going to speak.

First of all, our first panelist is Dr. Jytte Klausen, Professor with Brandeis University. Our second panelist is Professor Sahar Aziz with Texas Wesleyan Law School. Our third panelist is Professor Eugene Volokh with UCLA School of Law. Our fourth panelist is Professor Sam Rascoff with the NYU School of Law. And, our fifth panelist is Dr. Peter Skerry, Professor with Boston College. I think you were all here earlier, and you know how the light system works, green you can go, yellow start wrapping up, red try to stop.

Now I'll ask you all to affirm and swear that the information you are about to provide us is
true and accurate to the best of your knowledge and belief. Is that correct?

(PANEL 2 SWORN.)

CHAIRMAN CASTRO: Thank you. Please proceed.

III. PANEL II:

ACADEMIC SCHOLAR PANEL

DR. KLAUSEN: How do I get a green light?

Oh, thank you for inviting me here to speak today. It's my first time, and it's an honor.

I am particularly concerned with the way that the federal government has dealt with threats made in the name of Islam, and how such threats and the response to the threat have rebounded on American Muslims. My concern is that the response quite too often reinforce Islamic stereotypes and overly restrict the room for expression and discussion of issues related to Islam.

In 2009, I'd like the first slide to come up. In 2009, Yale University removed several illustrations from a book I had written about the global controversy sparked by the publication in a Danish newspaper of 12 cartoons featuring Mohammed. The press had originally agreed to publish these illustrations because of their value for my argument,
but removed them on the grounds that the images would be considered offensive to Muslims, and lead to violence, including attacks on Yale and other American institutions.

Now, let me be clear, neither the University nor I received any threats; yet current and former officials, government officials were complicit in the censorship. They redacted illustrations, included a reproduction from the page in a Danish newspaper of the cartoons, but also a 16th century Ottoman illustration which is up here in front of you, as well as a 19th century engraving featuring Mohammad made by a Frenchman. May I have the next illustration, please, made by a Frenchman to illustrate an epic poem written by an Italian. And, this engraving was widely popular as home decorations in Victorian England.

The immediate injury from the censorship was to my readers who were deprived of access to important information, but more broadly, Yale's decision set precedent for regarding such pictures as dangerous and unpublishable. The charter of the University states that causing offense, and I quote, "shock, hurt, and anger are not sufficient grounds for compromising the free access to information." So, the
University was therefore compelled to defend the decision to censor my book on the grounds that they would cause violence. And to justify its decision, Yale assembled an advisory panel of diplomats, academics and British as well as American counter-terrorism officials, and developed a 15-page memorandum explaining how dangerous to national security and to the University's interest the publication of these illustrations would be.

I was not allowed to read the memorandum, but I was told by the University that the Department of Homeland Security even recommended that the University should refrain from publishing the book itself, as even discussing the topic was not in the national interest, and dangerous.

On my suggestion, Yale contacted Ambassador Daniel Benjamin of the Bureau of Counter-Terrorism. Ambassador Benjamin got in touch with me directly and told me to remove the illustrations, all three illustrations I should say, on the grounds that they would be dangerous to my safety, the safety of Yale, and not in the nation's interest.

Now, today art collections, college administrators widely believe that you cannot show such pictures without causing violence, because you
offend Muslims. As a result of this preemptive removal, Muslims and non-Muslim students and readers are deprived of the opportunity to become acquainted with an important aspect of the history that depicts Mohammad, and a prejudice about Muslim's closed mindedness are reaffirmed. And the U.S. government and federal-funded institutions are indirectly enforcing a blasphemy rule and taking sides in a disagreement among Muslims about the role of scripture in secular life.

Now, what should the public response be when real threats do happen? In 2010, Zachary Chesser, a 22-year old American posed on the website called Revolution Muslim, a threat against the creators of South Park, a cartoon show. Chesser, and may I have the next image, please. Chesser after his arrest confessed that he had hoped that his threat would -- against South Park would mobilize Muslims in the U.S. the same way as the 1989 Fatah issued by Ayatollah Hominy against Salman Rushdie and have galvanized British Muslims.

Now, there has been no evidence whatsoever that actually anybody was ready to act upon Zachary Chesser's suggestion. Nonetheless, all of the -- both of these cases, the censorship of my book, as well as
the case of Chesser, and what later happened to Molly Norris a cartoonist who had proposed the creation of a Facebook event called Draw Mohammed Day. She was told to disappear and cease to exist as a public person on the recommendation of the FBI.

I think we have to recognize that the ability of the internet to provide extremists with networks amplify their threats is something we will have to deal with. I wouldn't be surprised if in five years, we would have new legislation regarding the incitement of violence, but my primary concern immediately is that -- I would make a couple of suggestions.

One is that starting debate in order to evade a knowable or even perceived threat is simply insufficient grounds for censorship. We saw the Washington, D.C., Transit Authority's citing of risk from angry Muslims as the reason for censoring an ad paid for by Pamela Geller from Stop the Islamization of America on the grounds that it would be a risk to public safety. I think such justifications stereotype Muslims and rebound very negatively on American Muslims, and help create a White Supremacist or even very anti-Muslim rhetoric about Muslims as Un-American.
Secondly, when real and credible threats do exist, federal agencies should be obligated to provide specific information about the nature of the risk. And, the response should include a plan for how to restore free expression. Salman Rushdie has lived for 23 years with an active credible death threat. When his book came out, two American books stores and a community newspaper were firebombed. Rushdie's Italian and Japanese translators were killed. His Norwegian publisher was shot and wounded, and yet Viking kept the book in print. This should be the model for how we deal with intimidations and threats.

My third recommendation is that the FBI should be obligated to produce a transparency report. On the model of the transparency reports currently produced by Google when Google removes content from its online sites, this -- such a transparency report would list the instances when preventative censorship has occurred, when federal officials have been engaged in recommending that Americans refrain from engaging in certain artistic expressions, and also --

CHAIRMAN CASTRO: I'm sorry, I'm going to ask you to wrap up. You'll have an opportunity --

DR. KLAUSEN: -- specify the level of severity of the threat. The combined effect of these
recommendations I would hope would be to contribute to a more realistic sense of what the actual threat is. I think it has been widely exaggerated, but also aim to protect both American Muslims against the rebound effect and preserve free expression. Thank you.

CHAIRMAN CASTRO: Professor Aziz.

DR. AZIZ: Chairman Castro, Vice Chair Thernstrom, members of the Committee, my name is Sahar F. Aziz. Thank you for the opportunity to testify today in my capacity as a law professor whose research and scholarship focuses on the intersection of national security and civil rights as it relates to Arabs, Muslims, and South Asians in the 9/11 era, in the post 9/11 era.

I want to note at the outset of my testimony today regarding federal civil rights engagements with Arab and Muslim communities that my views, the views I present today are my own.

Prior to joining the Legal Academy, I spent over seven years representing individuals and working with non-profit organizations that were directly and often adversely impacted by post 9/11 national security laws, policies, and practices. I also had the privilege of coordinating federal engagement programs across the country as a government
employee. My testimony today reflects my experiences, observations, and academic research on the important, albeit imperfect project of government engagement with Arab and Muslim communities.

As discussed in detail in my written testimony, I want to highlight five key points that I believe are paramount to a successful civil rights federal engagement program. First, for federal engagement to be effective, community representatives must encompass the rich diversity of the Arab and Muslim communities, including but not limited to ethnicity, socio economic background, gender, youth, political viewpoint, and race.

Oftentimes, a limited number of individuals who are male, Arab or South Asian and over the age of 35 are repeatedly invited to government engagement meetings. As a result, discussions are constrained by the limited experiences and viewpoints of a select few purportedly representing tremendously diverse communities. So, thus, I recommend specifically that females should constitute 50 percent of the community attendees. Excuses by the government that Muslim and Arab communities do not have sufficient numbers of female leaders, or that Muslim women are hesitant to participate in public hearings
are not supported by the facts, and usually represent incompetency or gender bias by those assigned to conduct engagement meetings.

Second, youth and African American Muslims should be adequately represented in engagement meetings. Community leaders should not be limited only to regular mosque goers, persons that exemplify the different experiences of newer immigrants as well as those who have been here for multiple generations should be included in engagement meetings. Individuals with contrarian and dissenting viewpoints should not be excluded notwithstanding their representational perspectives. And, finally, attendees should be required to disclose conflicts of interest that may compromise their ability to represent community interests independent of their own personal interest. And within each of those recommendations, I have gone into more detail in my written testimony about why I'm making the recommendations.

I want to emphasize that the government should not entangle itself in determining who is or is not a leader within the Muslim communities, as that should be an internal organic community process. However, announcements of objective neutral criteria may produce the same bad outcome, a meeting of
individuals who do not fully and accurately represent
the diverse Muslim community.

The second point I want to highlight, the
defederal government and any participant local and state
entity should not use community engagement meetings in
furtherance of investigative and prosecutorial
objectives, but rather to develop trust and
constructive relations with their constituents towards
the common goal of protecting individual rights and
public safety for all Americans.

Unfortunately, recent news reports prompt
serious concerns that some government engagement
meetings are pretexts for gathering intelligence,
conducting investigations, and eventually pursuing
prosecution of meeting attendees or their families and
associates, as opposed to good faith efforts to build
relationships between government and constituents.

It goes without saying that information
discovered in engagement meetings that has a clear
nexus to criminal activity should be acted on by law
enforcement. However, that is not the nature of
information of concern to Muslim Americans and Arab
Americans who have a shared interest in promoting
public safety. Instead, communities worry their
personal information, their religious and political
activities and beliefs, and their immigration status are input into national intelligence databases that are used in an adversarial process when their participation and engagement makes them a target of counter-terrorism and immigration enforcement. And, if this is indeed the case, and community engagement is a misnomer, instead the process is more accurately described as a fishing expedition into Muslim communities' lives and private affairs that has a devastating chilling effect.

The third point I want to highlight is that a professionally trained law enforcement agency, agencies are necessary for a safe, fair, and just society. To the disservice of our law enforcement, unqualified and biased trainers have been hired to teach officers, first responders, and counter-terrorism expert analysts about Muslims and Islam in the United States and abroad. These trainings characterize Muslims and Islam as a necessarily violent and inherently terrorism prone identity. Our federal officers are left with a biased and highly inaccurate set of information and skill sets with which they approach counter-terrorism.

These unprofessional training programs are a threat to public safety for all Americans, because
misinformed officers risk making bad decisions that fail to prevent criminal activity, and they invite costly civil rights litigation arising from biased policing which we as tax payers ultimately have to pay for.

Thus, our government has a fiduciary responsibility to tax payers to reform counter-terrorism training programs by implementing a rigorous and transparent national process for selecting trainers and training materials based on peer reviewed professional standards.

The fourth point I want to make is that government engagement efforts with Arabs and Muslims must be holistically focused on the social, economic, and political factors that affect the vitality of Arab and Muslim communities across the nation. Like all other communities in the United States, Muslim and Arab communities are largely compromised of law abiding individuals who work, study, worship, and seek a healthy and prosperous life for their families. They have the same concerns as their compatriots, economic security, public safety, high-quality education, freedom from discrimination, and access to affordable health care. The vast majority have no interaction with terrorists or terrorism, such that it is no more
relevant to their lives than it is to the lives of any other American; and yet most federal engagement programs focus primarily on national security issues, thereby securitizing their relationship with Muslim communities.

This signals to the public that Muslims warrant extra scrutiny, which leads to increased suspicion and discrimination by private actors. Moreover, it makes engagement programs of little relevance to the vast majority of Muslims whose concern reflect those of mainstream Americans.

Finally, government civil rights engagement programs must be subject to independent citizen and Congressional oversight to insure stated objectives are, in fact, met. Notwithstanding the best of intentions the efficacy of government engagement programs should not be left to the discretion of government employees not accountable to independent oversight mechanisms. Indeed, one is hard-pressed to find evidence of a coherent implementation plan across the government that minimizes redundancy, adheres to Presidential directives, and provides metrics for which engagement efforts can be objectively evaluated; nor is detailed budgetary information available describing how and where money is spent on engagement.
within each federal agency. So, as a result, the U.S. Department of Justice Civil Rights Division and the Equal Employment Opportunity Commission's notable progress on civil rights is then undermined by discoveries that the Federal Bureau of Investigation and the Immigration and Custom Enforcement is exploiting engagement in furtherance of adversarial investigative objectives.

Similarly, outreach efforts result in minimal policy changes because the jurisdiction lies within other agencies that have little incentive to cooperate with a particular agency's engagement efforts. This leaves Muslim and Arab communities frustrated with the lack of coordination, double speak among agencies, and unfilled promises.

Whatever oversight model is developed which should be a product of collaboration between communities and government, there must be transparent monetary and programmatic oversight of engagement programs. The stakes are too high, and federal resources are too limited. It is time to transition federal engagement from a set of ad hoc disjointed and opaque meetings into a transparent, coherent, and accountable system whose goals can be objectively evaluated.
In closing, I acclaim this Commission for its wisdom in acknowledging the critical importance of federal civil rights engagement with America's richly diverse Arab and Muslim communities. Thank you for inviting me to share my thoughts with you today, and I look forward to your questions.

CHAIRMAN CASTRO: Thank you, Professor Aziz. Professor Volokh, you have the floor.

PROF. VOLOKH: Thank you. Thank you very much for having me. I entirely agree with the need to safeguard religious freedom rights and other rights of American Muslims alongside anal other Americans. I've commented about this publicly on various occasions online so I have no quarrel with that.

At the same time, I think it's important to recognize what I hope others will have no quarrel with, as well. Attempts to make adherents of minority religions feel welcome—which is an important thing both for its own sake and to maintain law enforcement cooperation with those communities—should not end up suppressing the free speech rights of others who seek to criticize those religions, something that is both a free speech and a free exercise right.

Islam, like other belief systems whether religious (Catholicism, Scientology) or secular
(libertarianism, feminism, environmentalism, what have you), merits evaluation and at times criticism. And under the First Amendment that's protected even if it's intemperate or wrong headed.

Unfortunately, there have been quite a few incidents, especially over the last 10 years, where there have been attempts -- including governmental attempts -- at suppression of criticism of Islam. We've seen that at universities. One example is at San Francisco State in my own state of California. There was a College Republicans Anti-Terrorism rally at which students stepped on homemade replicas of Hamas and Hezbollah flags. As best I could tell, they weren't actually trying to criticize Islam, though that would have been fully their right. They were trying to criticize Hamas and Hezbollah organizations that very much merit criticism. But, it turns out that the flags have the word Allah in Arabic written on them, which apparently- organizers of the rally were unaware of.

And, the fact that this was perceived as symbolic expression of contempt for Islam as well as for Hamas and Hezbollah actually led to other students filing charges of hostile educational environment. The university, in defending the process of investigating
the charges, talked about how the complaint was about "the desecration of Allah." And, finally, it took a federal lawsuit and an injunction by a federal judge to strike down as unconstitutional the speech code under which this happened.

Similar things have happened with regard to professors posting the Muhammad cartoons on their bulletin boards. For instance, a professor’s statements criticizing Muslims on his Facebook page were alleged to be harassment and discrimination and led to calls for his firing. It took several months for the university to clear the professor of those charges.

At UCSB, the student government engaged in unconstitutional viewpoint-based funding decisions against a group in what would otherwise be seen as a designated public forum program in which such discrimination is impermissible, apparently because of the group's proposal to bring out the noted conservative and critic of Islam, David Horowitz, was seen as a anti-Muslim.

At UC Berkeley, the student government likewise tried to limit a student newspaper’s funding based on the viewpoint of a cartoon that was perceived as anti-Muslim. At San Diego State University, there
was not university action, but organized action by
some Muslim students who seized and destroyed several
thousand copies of the student newspaper because they
perceived it as containing anti-Arab and anti-Muslim
sentiments.

At NYU, Tufts, and at Chicago, there were
similar restrictions on the display of Muhammad
cartoons and disciplinary action for an anti-Muslim
parody. These are private universities which are not
bound by the First Amendment, but the incidents still
involve troubling violations of academic freedom
principles. And to the extent that they were
rationalized as attempts to prevent hostile
educational environments based on religion created by
speech that criticizes the religion, that theory would
be equally applicable in government-run universities,
and I think equally inappropriate.

So, that's the universities, but it's gone
beyond universities as well. There is a case in which
a New Jersey Public Transit employee was fired for his
off-the-job burning of a Koran. It took an ACLU
lawsuit for the employee to be rehired, and he
actually got back pay and a $25,000 settlement.

Likewise, there have been government
actions -- quite a few of them -- in Dearborn,
Michigan, to suppress anti-Muslim speech, including attempts by Terry Jones, the anti-Muslim minister attempts to organize a demonstration outside a mosque, attempts by Christian missionaries to proselytize the Muslim by distributing leaflets and speaking at the Dearborn Arab International Festival, and the like.

In New Jersey, an atheist marcher in a Halloween parade dressed up as zombie Muhammad and saying things that were critical of Muhammad -- walking incidentally alongside another atheist who was dressed up as zombie Pope, speaking similarly about the Pope -- was physically attacked. But, when the attacker was prosecuted, the judge acquitted the attacker for a supposed lack of evidence (a hard call, though I’m skeptical about it in this case), but in the process berated the victim for the victim’s speech, talking about how “it's very offensive; it trashes the Muslim observers’ essence and their very being,” as if that matters to the question of whether attackers on this person are committing a crime (which, of course, it shouldn't). As a result, the judge was fortunately formally rebuked by the Pennsylvania Judicial Conduct Board.

In New York and D.C., transit agencies rejected an ad that read, "In any war between the
civilized man and the savage, support the civilized
man -- support Israel, defeat Jihad." The agencies
took the view that this ad labeled Muslims as savages,
which I don't think is consistent with the text of the
ad: Israel is fortunately not at war with all Muslims,
but only with terrorists who engage in what is
colloquially understood as Jihad (though I know
there's disagreement within Islam about the true
meaning of the word “Jihad”). Those attacks on Israel
are indeed, I think, savage, in the same sense that
Secretary of State Clinton described the Libyan
Consulate attackers as “a small and savage group.”

But in any event, even if this ad is seen
as generally condemning all Muslims, the First
Amendment law is clear: Speech cannot be excluded from
a designated public forum such as an advertising
program on city buses based on viewpoint, yet that's
exactly what happened.

Finally, in the wake of the "Innocence of
Muslims" anti-Islam video, there have been proposals
by several legal commentators -- including some very
prominent ones -- to criminalize speech that is
sufficiently hostile to Islam and that poses a risk of
violent retaliation at home or abroad. Fortunately,
this is just some law professor speaking -- and we
know what that amounts to -- but, I think it does pose a danger to the extent that these ideas are taken up.

Now, some of these actions have been motivated by a concern for protecting Muslims from offense, and others by concern about violent reactions by Muslim extremists. But either way, such actions are unconstitutional, or, in private universities, violation of academic freedom. Just as the government must never suppress Muslim speech and religious practice on the grounds that such speech and religious practice might offend people, or might lead to violent retaliation from a few bigoted extremists, so it must never suppress anti-Islam speech on the grounds that such speech might lead to similar violent retaliation.

So, let me close. I firmly support the free speech, religious freedom, and property rights of Muslims, and I've done that many times in my writings. My concern is simply that all speakers and religious observers must be protected, whether they're Muslim or non-Muslim, or pro-Islam or anti-Islam. And, this needn't be difficult. The government should just tell Muslims, as it routinely tells Christians and other groups that are offended, "we respect you and your rights, and will defend you from violence and from government oppression, but if you find certain kinds
of speech offensive, you should try to respond with speech of your own. We cannot respond by trying to suppress such speech.” Thank you very much.

CHAIRMAN CASTRO: Professor Rascoff.

DR. RASCOFF: Thank you very much, Mr. Chairman. Thank you to the Commissioners for this opportunity this afternoon. I'm delighted to be here to share my perspectives on the civil liberties implications of the United States Counter-Radicalization Efforts.

Counter-radicalization sometimes known as countering violent extremism is an open-ended and under-theorized concept, but the core intuition behind it is actually fairly straightforward. The idea is basically this; the government regards itself as required in order to satisfy the national security imperative to intervene into the ideational life of Muslims in the name of shaping the ideology or the theology of Islam with downstream implications the government holds for national security.

What I'd like to submit to you this afternoon is that this entire enterprise of the government becoming involved in the management of Islam, what I call the establishment of official Islam in the name of securing potential national security
benefits is doubly fraud. It's fraud on the one hand because it poses significant strategic risk. I think that programs of this sort are at a minimum likely to be unproductive and quite possibly might well be counterproductive.

At the same time, I'd like to say that these sorts of programs are also in some amount of tension with the guarantee of religious liberty embodied in the First Amendment. In particular, they threaten the establishment of a government sanctioned vanilla version of Islam that's palatable to American officials but that might actually be significantly out of line with the ideas, the theology, the practices of Muslims up to and including American Muslims.

I'd also like to suggest that these two concerns, on the one hand a strategic one, on the other hand a legal and a constitutional one, are mutually reinforcing.

Okay. Quickly, there are three types of counter-radicalization that the government is currently engaged in. One takes the form of engagement. This is essentially outreach to Muslim communities, and to institutions across the country in order to make official Islam a social reality. And the precise nature of this outreach takes many different
forms across many different agencies. The FBI participates in it, so does the Department of Homeland Security, so does the Department of Justice through the U.S. Attorney's offices, and so on and so forth, many organizations are engaged in this kind of outreach.

What I'd like to call attention to by way of making this larger point about the establishment of official Islam is that outreach necessarily entails choices on the part of the government. The government chooses who its interlocutors are going to be. Those choices entail individuals who are going to be part of the government process, and also entails a rejection of other individuals as not fitting within the boundaries, the theological, the ideological criteria that the government implicitly is establishing for who's in and for who's out of these kinds of conversations.

The second phenomenon, the second aspect of counter-radicalization to which I'd like to draw attention I call bureaucratic entrenchment. And, this speaks to the creation on the part of government offices whose function it is, or one of whose functions it is to go ahead and interact with Muslim communities through these countering violent extremism
programs. Now, some of them are relatively new. Take for example the Special Representative to Muslim communities, which is a post that was established in the last years in the State Department, a job that ostensibly has a foreign policy emphasis, but that also carries implications for domestic counter-radicalization. And then, there are other offices, for example the Office of Civil Rights and Civil Liberties in the Department of Homeland Security that are not officially tasked with doing CVE, but that have come to embrace this role over the years, as well. So, that's, I think, part of the bureaucratic entrenchment phenomena.

The third dimension of counter-radicalization is the aspect of expression. This is where officials across the government pronounce on the meaning of contested concepts within Islam. Now, I'm not here to say anything on behalf of who's right and who's wrong in respect to what Jihad means. It's obviously kind of an open-ended and very capacious term, and has been hotly contested within Islam for well over one thousand years. But, for American officials at the national level or at the state level to pronounce definitively on what Jihad does and doesn't mean is in my view to implicate American
officials, and specifically national security officials in the definitio
nal questions about what is Islam.

To my mind, this raises, as I said at the outset, two very broad types of concerns. Let me kind of get into the strategic ones. First of all, I'm not at all clear that the United States government, its officials, its national security officials in particular are competent and possess the requisite expertise to know how to draw these kinds of fine grain distinctions either within a concept within Islam, or who's in or who's out in terms of who is espousing a kind of Islam that might be appealing to American officials.

These are the kinds of issues that necessarily implicate enormous amounts of learning and judgment, and wisdom, and cultural intuition of the sort that in my experience national security officials do not typically possess. Even if we could imagine a counter-factual world in which expertise was there, I would submit that American officials by dint of being American officials and specifically by dint of being American national security officials are exactly the wrong people to be the flag bearers of a more kind of polite, mainstream concept of Islam. So, even if they
were to get the facts right, which I don't think they will, they're necessarily going to be regarded as having a mixed motive in espousing the particular concept of Islam.

These strategic worries have been observed overseas, the United Kingdom, and Continental European countries have recent and in some sense longstanding experience with countering violent extremism, and I would say to generalize from the European experience it's not gone well, and it's not gone well along these same two dimensions, the message and the messenger.

But then, there's another complicating factor that speaks directly to the American predicament, and that's the First Amendment, and specifically it's guarantee that Congress not endorse -- excuse me, establish religion. Now, famously, the Establishment Clause has been difficult for the Supreme Court to get its head wrapped around, and it's produced all manner of conflicting final standards. But, what I would submit to you this afternoon is that one of the core I would say essential meanings of the Establishment Clause, if not the core meaning is that the government has to remove itself from questions of defining what religion is, or specifically defining what criteria count for within a particular faith.
tradition.

The law knows no heresy, the Supreme Court said well over 100 years ago, and this really gets to the heart of what I call the anti-Erastian nature of the Establishment Clause. The Establishment Clause prohibits the government from expressing views about theology, and from becoming itself an arbiter of theological dispute. I would say that countering violent extremism through counter-radicalization programs implicates the government in these kinds of strategic worries, as well as these kinds of legal ones.

Now, I will also say in question and answer period that there are some hopeful trends along these dimensions, but these are some of the worries that I'd like to raise to your attention today. Thank you.

CHAIRMAN CASTRO: Okay, thank you.

DR. SKERRY: Chairman Castro, Vice Chair Thernstrom and your fellow Commissioners, it's a pleasure and honor to be here with you this morning.

Let me begin by emphasizing that safeguarding our civil rights in my opinion is critical not only to Muslim Americans but to all Americans; yet, we must also address this challenge
with realism. We must be mindful of the inevitable conflicts between civil rights and national security, so too must we be realistic about the persistence and virtual inevitability of prejudice in a free society. Yet, in an open and dynamic society such as ours, group conflict is not necessarily the result of irrational prejudice or racisms, but more typically the product of inevitable competition for material goods, recognition, and status.

At the same time, we have as a society made progress in avoiding some of the excesses and injustices of our past. Realism requires that these too be acknowledged. Surveying what he refers to as the rights scorecard in the aftermath of 9/11, legal scholar, Peter Spiro, cites concerns about controversial provisions of the Patriot Act, as well as military tribunals. Yet, he pointedly concludes whatever civil liberty concerns persist, they are a far cry from such historical anti-alien episodes with the Japanese interment or the Palmer raids often invoked in the early days after September 11.

Historian, Gary Gerstle, similarly observes that while many Americans have verbally abused and physically attacked individual Arabs and Muslims since September 11, 2001, the highest public
authorities have refused to condone such popular
prejudice and vigilantism. President George W. Bush
has made it clear in many ways that Woodrow Wilson and
Franklin Roosevelt never did, that it's simply not
acceptable to stigmatize an entire racial, cultural,
religious group because of the small number of
terrorist and enemies who reside in their ranks.

In like manner, Americans generally must
acknowledge and seek to remedy the unfair treatment
and abuse experienced by our Muslim neighbors,
colleagues, and fellow citizens. But, we must also
assess with realism the larger context within which
these events have unfolded, for not all the
misunderstanding and prejudice in America today
emanates from non-Muslims. Like many immigrants before
them, Muslims themselves are the source of a good deal
of misunderstanding and prejudice toward American
culture, institutions, and society.

Much of this reflects a now overlooked,
but not so long ago, history of Muslim leaders urging
their people to isolate themselves from the mainstream
of American society. Moreover, this history should
remind us of the lingering influence of Islamism on
Muslim leaders and organizations today.

To be sure since 9/11 Muslim American
leaders have seriously endeavored to get ordinary Muslims to engage with the broader society and its politics. Nevertheless, there remains strong counter currents that reflect decades of many of these same leaders urging their followers to avoid settling into the American mainstream.

I've been struck, for example, with meetings nominally devoted to Islamophobia or civil rights issues, where Muslim attendees frequently change the subject and ask leaders if it's permissible to befriend non-Muslims, or attend business functions where alcohol is served.

Now, like many other immigrants to America, Muslims who began arriving here late in the 1960s did not typically intend to permanently remain, but to a degree greater than among most other immigrants these newcomers were profoundly alienated from American culture and society. Not only do they regard Islam as superior to Judaism and Christianity, they also feared that their salvation was threatened by their very presence in America. This is certainly what their leaders were saying. One publication put out by the Muslims Students Association, and it was widely available at least until recently asserted, "Islam is a total system of life for man and society;
hence, it is infinitely superior to any system or ideology which man can devise." They went on, "We are actually living in an environment in which our Islamic standards of purity and modesty meet with a continual threat and can easily be destroyed all together."

Similar perspective came from a prominent Muslim American leader, Muzammil Siddiqi, a graduate of the Islamic University of Medina, and a long time member of the current -- member and current chairman of the Executive Council of the Fiqh Council of North America. In a 1986 article in a prominent Muslim publication, Siddiqi invokes the classic distinction between Darul-Islam, where Islamic law prevails and Darul-kufr where it does not, studying the teaching that a Muslim may reside in the latter to perform a specific task but "must return to Darul-Islam as soon as the task is finished." Siddiqi leaves no doubt that America is Darul-kufr, and that "we are in real danger of assimilation to a non-Islamic culture."

But then, surprisingly, Siddiqi concludes, "We do not suggest that Muslims should leave America or go back whence they came." And he reassures that his proposed course of action will not deprive you of your jobs or your professions. So, what is this leading Islamic jurist proposing? He's proposing
withdrawing from non-Islamic society, and Siddiqi urges Muslims in America to establish and support mosques, to build Islamic schools and colleges, read Islamic books, and ensure an Islamic system of marriage for their youth.

Now, Siddiqi was proposing a bargain that other immigrants have managed to pull off at least for a generation or so, but the stakes are different and higher for Muslims. Indeed, Siddiqi and other such leaders have left their people in a real dilemma, who have chosen to live in a corrupt and ungodly society where the fabric of daily life is completely at odds with your religion, but it's okay to stay here, pursue your careers in medicine and engineering, and send your children to American university, as long as you stick close to your mosque and schools, and make sure your children marry other Muslims.

In his article, Siddiqi did offer one way out of this bond which was da’wah, or which is the missionary work, conversion of non-Muslims to Islam, comparable to what Christians see. Now, Siddiqi presents a job as the only possible justification for permanent residence in America. Yet, what he and other leaders and many non-Muslim critics fail to consider is how da’wah is to be pursued by Muslims holed up in
their self-protective cocoons. These two scenarios obviously don't mesh. And it's no wonder that many Muslims have shunned their advice. If Muslim immigrants haven't assimilated to the mainstream American values, many of their children have.

And from another perspective, though, Siddiqi's formula has succeeded. Before 9/11, many Muslims did manage to pursue these careers while remaining aloof from the mainstream of American life. In the forays into the wider society, particularly in politics that they did make, they're largely defensive, and as many Muslims will tell you before 9/11 they were very much caught up in their cocoons, in their Islamic fortresses. It was 9/11 that forced them out of those cocoons.

Now that Muslim leaders are trying to counteract this tendency and urge their followers to join the American mainstream, we must be equally realistic about what they're trying to accomplish. We speak freely of Muslim Americans in a Muslim American community, yet this is a highly diverse community, fragmented by sectarian religious divides, ethnicity, race, language, and what we need to be mindful of is that faced with such a fragmented body, Muslim American leaders often resort to civil rights calls
partly on response to the reality of post 9/11 America, but partly because this is the way to unify their followers into mobilizing into the political kinds of action that they had urged them previously to try to stay out of.

CHAIRMAN CASTRO: Thank you.

DR. SKERRY: And to try to conclude here, I would stress that I don't mean here to put all the onus on Muslim American leaders. More than a decade after 9/11, Americans continue to fear their Muslim neighbors and fellow citizens, and stoking these fears are zealous investigative reporters who rehash and recycle a body of facts about the, indeed, Islamist origins of many of these leaders and their organizations. But the implications of these facts are far from clear, and what the critics fail to acknowledge is that individuals who once worked with Islamist organizations, with the Muslim Brotherhood do not necessarily remain committed to an Islamic agenda. People mature beyond --

CHAIRMAN CASTRO: Thank you.

DR. SKERRY: And we have to be mindful of that, and pay attention to these.

CHAIRMAN CASTRO: Thank you. We're going to open it up for questions now. Commissioner Achtenberg,
and Commissioner Kirsanow, actually, I will ask a question between the two of you.

COMMISSIONER ACHTENBERG: Thank you, Mr. Chairman. As myself, a member of the chosen people, I want to underscore how similar your recitation sounded to the recitations of my own parents and the community from which I came, but that's just my editorial observation.

I'd like -- actually, Professor Aziz, your presentation was extremely helpful to me in understanding how we might improve on establishing more constructive, transparent, and helpful relationships between governmental entities and the affected communities. I'm wondering if you might take a little bit of time to amplify your prior testimony, and if you have any critique of your colleagues on the panel, if you'd offer such critique, as well.

DR. AZIZ: Well, at the risk of engaging in an adversarial process which is certainly not my intent, but --

CHAIRMAN CASTRO: The First Amendment.

DR. AZIZ: Well, first, thank you very much for your kind words. And these are difficult issues to address, difficult issues to deal with.

I think one thing that I've seen is that
you have this contradiction among all of our testimony, which is on the one hand, we all should be free to say, speak, think, and live however we want. And, frankly, that's why my parents and many other immigrants who were also Muslims came to the United States, in addition for economic opportunity. But, at the same time, Muslims are somehow exempt from that because if they're too religious, if they're too orthodox, if they're too isolationist, if they don't speak English good enough, then they are not American enough.

So, I think one thing that we have to come to terms with is we need to be consistent. I agree that there is a transition process that happens with every immigrant community from another country that have different systems, different values, regardless of the majority -- whether it's a religious -- whether it's a Christian, Jewish, Muslim, Hindu, other religious background. But, when you come to the United States or immigrate to any other country, you're learning a new system. And one system, and I agree with Professor Volokh, is that -- I'm a formalist on the First Amendment in the sense that people should be able to say what they need to say, what they want to say. And if it's offensive, you counter it with
speech.

Now, one thing I want to point out is in university settings there's been a lot of concerns that there's viewpoint discrimination in providing free speech. And, this is something perhaps you could write more about if you haven't already, but there are concerns by Arabs and Muslims that Middle Eastern Studies departments are becoming essentially hijacked by Arabists and becoming anti-semitic. And, that's the counter to Professor Volokh's concern that anti- that those who express anti-Muslim rhetoric, or protests, or speech are being censored. So, I think the balance is give everybody enough space, the same amount of time, and let them use speech to interject into the marketplace some ideas, and let reasonable minds agree to what is reasonable and the bigots and extremists hopefully will be marginalized. That's just my observation from these contradictions.

But, I think that I would just leave with this one take away, I highly recommend that the Commission approaches this issue from a structuralist perspective. I really think that if you can have a structure that is solid you will have a product that is efficient and that is effective. So, by having the right representatives, by having a process that is
objective, and neutral, and transparent in deciding who's going to be the representative, by having oversight, making sure the money that's spent is actually spent where it's supposed to be. I couldn't find -- I did research and I couldn't find how much money they are going to spend on all this, and how do you know if it's being wisely used?

And, also, you've got to resolve this tension between the prosecutorial objectives and the civil rights objectives within these agencies. And at this point, I think that the rights-based work is being subsumed by the prosecutorial work, and that is essentially eviscerating the efficacy of these programs. And that needs to be resolved.

And, I just wanted to comment to Commissioner Kladney's comment about how do you -- you know, in the past there have been these issues where the FBI did infiltrate political dissidents. The Attorney General -- you had the Attorney General guidelines that essentially established you've got to have a predicate act of criminal activity. Don't go around engaging in fishing expeditions.

2002 and 2008, the Attorney General guidelines were amended and those safeguards were removed, so those are the types of structural fixes
that need to be made that will produce a system that
protects rights, and also protects security.

CHAIRMAN CASTRO: Professor Volokh, I just
wanted to understand and see if I could reconcile your
view on the First Amendment as it relates to this
issue. And I know you talked about this as well in our
Bullying briefing.

The issue -- one of the examples that you
raised is these students who had these flags that they
were trampling on, and they didn't know that it said
Allah on it; therefore, they were punished for that.
What if those students happened to be from another
religion, let's say Religion A, I don't want to pick
a certain religion, they had the American flag and
that flag had stitched on it "In God We Trust," and
they were trampling that flag for some political
reason, would you consider that from the religious
perspective a First Amendment right of them to trample
the word "God" as opposed to Allah?

PROF. VOLOKH: I can't imagine how it
wouldn't be. I think if that were the issue, I think
everybody would agree that of course it's
constitutionally protected speech. There's a
longstanding decision from the court about the right
to burn the flag that can't be punished. And, there
are longstanding decisions from the court saying that you can't punish blasphemy and anti-religious speech.

In fact, the Cantwell case, one of the earliest of the major free speech cases dating all the way back to 1940 -- less than 10 years after the first time the U.S. Supreme Court struck down a speech restriction on free speech grounds -- upheld the rights of Jehovah's Witnesses not only to say things that are blasphemous, but say things that are deliberately highly insulting towards Catholicism. So, I would say that's an easy case.

CHAIRMAN CASTRO: So, the second part of my question then relates to -- correct me if I'm wrong, I think in your blog, in a few entries you've criticized those folks who are committing a war on Christmas. Am I right? You've highlights some articles on the war on Christmas?

PROF. VOLOKH: I'm pretty skeptical of the critics of the supposed “war on Christmas.”

CHAIRMAN CASTRO: Okay. Tell me about that. Do you consider that to be something that is protected by the First Amendment then, the war on Christmas? Many conservatives raise that all the time.

DR. VOLOKH: I think when people complain about the so called war on Christmas, they complain
about several distinct things. One is attempts to use
the Establishment Clause to bar certain Christmas-
related displays from government property. That's not
a free speech issue, because the government doesn't
have free speech rights, as such. It's an
Establishment Clause issue.

If the government wants to speak
religiously, does the Establishment Clause bar it from
doing that? I think that's actually a difficult
question; the Supreme Court has settled on the notion
that certain kinds of sufficiently secularized
displays, Christmas trees being a classic example,
don't violate the Establishment Clause, but creches
do. It's not clear to me that's right, but that's one
set of criticisms.

Another set of criticisms is made when
private institutions – say, retailers -- tell people
to say, instead of Merry Christmas," “Happy Holidays.”
And, I think those criticisms aren't that this is
somehow a First Amendment violation by some private
retailer, or for that matter that there ought to be a
law mandating that they say Merry Christmas. That kind
of law would certainly be a First Amendment violation.

Rather, the criticisms are an attempt to
participate in the marketplace of ideas and say to
retailers, “you think you are actually winning customer good will by switching to a more secularized greeting, but we want to tell you you're losing customer good will, and we're trying to start a campaign to urge other people to, in fact, deny you their good will because of what you're saying.” So that aspect of it is just a private speech aimed at influencing private institution's behavior, and I think that's constitutionally protected. Whether it's wise or not, I'm not sure.

CHAIRMAN CASTRO: And then, I'll close and then, I'll pass it over to Commissioner Kirsanow. Where do we draw the line then between speech and when it crosses that line, because when we talked about bullying, I believe there's no constitutional right to be a bully. Where does that line happen? Does it have to be physical? So, in this case when we're dealing with the Muslim community, if someone is criticizing Islam, in your mind where does that First Amendment protection end?

PROF. VOLOKH: If all they're doing is criticizing Islam, it is protected. But the --

CHAIRMAN CASTRO: But, what if that leads to discrimination, or exclusion, or profiling? Where do you draw the line?
(Off record phone conferencing.)

CHAIRMAN CASTRO: Commissioner Yaki, are you back?

COMMISSIONER YAKI: Yes. What the heck happened?

CHAIRMAN CASTRO: The call was dropped, not on purpose. So, go ahead.

PROF. VOLOKH: First Amendment law is full of cases that tell us in various kinds of situations where the line is between protected speech and unprotected speech. As a general matter, if all somebody is doing is criticizing Islam, or Christianity, or all religion, or atheism, that speech is protected. And, if the consequence is somebody begins to discriminate against the targets of the criticism because that somebody listened to the criticism and was persuaded, that criticism remains protected. The discrimination may or may not be protected, but the criticism is protected.

Likewise, the Supreme Court has many times had to deal with the question: If criticism of some ideology or some government action leads to crime, when can the criticism be restricted? And, the answer is, in extraordinarily narrow circumstances. So, if somebody were to stand in front of a mosque saying
Islam is an evil religion and we should all burn down this mosque, to a mob assembled in front of a mosque, that would be an example of something that fits within the incitement exception, which covers intentional incitement of imminent illegal conduct that is likely to lead to such conduct.

Likewise, if somebody isn't just criticizing Islam but threatening a particular person and saying “you, Ahmed so and so, we will kill you for either being Muslim or being the wrong kind of Muslim,” that's an unprotected threat, quite apart from it being criticism of Islam. But, if all they're saying is “Islam is a horrible religion,” or for that matter, if a religious leader says Judaism is a “gutter religion,” he is free to do that. And, he remains free to do that even if a few of his followers are acting in a way that's illegally discriminatory. The same thing is true with regard to criticism of any religion or ideology.

CHAIRMAN CASTRO: Commissioner Kirsanow.

COMMISSIONER KIRSANOW: Thank you, Mr. Chairman. I want to thank all the panelists. It's been very informative. I've got two questions for Professor Volokh. First is, you cited a number of instances where there was tension between the First Amendment
and an attempted proscription by a state actor of certain speech. To the extent you know, and I don't know that you researched this, do you think that there is a greater amount of such type of tension in academia or in the public square generally?

PROF. VOLOKH: I'm always hesitant about trying to estimate these amounts, because we see just what's in the news. We thus don't even have a good count of the numerator of the frequency of these things, because there may be all sorts of things that have gone under the radar. And, we don't really know the denominator either. I've never seen a count of the number of all the actors in public universities versus governments that are doing these sorts of things.

I don't think this is extraordinarily prevalent in either place; I think you can go out there and demonstrate criticizing Islam, and in most places you wouldn't get into any legal trouble -- likewise in most universities. It, unfortunately, does indeed sometimes happen in both kinds of places, but, I'm not sure what the prevalence is. I just think the right prevalence ought to be zero. I'm sure we'll never accomplish that, but I think that's what we should be working to.

COMMISSIONER KIRSANOW: In at least
discrimination law, we've got a standard for prima facie case with respect to McDonald-Douglas versus Greene. If an adverse action is taken on the basis of protected class, someone in the protected class, the actor can say look, I've got a legitimate non-discriminatory reason for doing this. But, if that legitimate non-discriminatory reason is nonetheless a pretext, it still could result in a finding of discrimination.

Is there a similar type of concept in First Amendment such as if, for example, we have the incident just most recently of an individual who created a video. Okay? This individual is then arrested on a probation violation and my understanding is he's sentenced to jail for a year. Okay?

Now, the sentencing to jail for a year on the basis of a probation violation is legitimate, but there are hundreds of people, hundreds of thousands of people potentially with probation violations out there. Even though it's a legitimate reason to sentence this person to jail for a probation violation, could that nonetheless be a pretext given cause of action under suppression of First Amendment rights?

PROF. VOLOKH: The answer is yes. There's
a case called Waite, I believe, versus United States that holds that prosecution -- and I think the same thing would be true for probation revocation -- based on First Amendment protected conduct, is unconstitutional if it's really based on the First Amendment protected conduct even though it could have been based on something else.

There is no McDonnell-Douglas burden shifting, though. And, these cases are often very hard to prove especially against prosecutors, in part, because, the Supreme Court has been concerned that prosecutors would be routinely faced with these claims as to speech, as to race, and as to sex -- quite commonly as to sex where a lot of people suspect that prosecutors may sometimes go harder on male defendants than females. Whether that's true or not we don't know, but discriminatory prosecution claims are the kind of things that's very hard to get courts to pay attention to unless you've got a smoking gun. I think the same thing is generally true in the free speech context, when it comes to alleged selective prosecution.

When it comes to other government officials, it's just a more straightforward traditional attempt to figure out what was in the
person's head. So, if somebody is allegedly fired based on his speech, you can introduce evidence that this is what happened: Often there are memos floating around, emails, people willing to testify about conversations. So, in principle, it's just like any other kind of discrimination law without the *McDonnell-Douglas* framework: Even if it's okay to have taken action based on one criterion, it's not okay to take it based on another criterion, whether it's race, or sex, or religion, or political speech. But, when it comes to prosecutors, it's especially hard to get the kind of discovery necessary to prove that kind of case. And that, again, is true whether the claim is that the prosecutor discriminated against me based on my speech or based on my race, religion, or sex.

CHAIRMAN CASTRO: Commissioner Kladney.

COMMISSIONER KLANDNEY: Professor Aziz and Professor Rascoff, it seems to me that you both kind of agree as to an approach concerning outreach and investigative services that they should be separate, so I'm saying should there be a wall between the two where DOJ may be outreaching on one section, and then DOJ, FBI investigating one another, and the left hand not knowing what the right hand is doing, with the left hand, that would be say DOJ outreach not trying
to select who the leaders are but be all inclusive. Because, I assume that the American Muslim community is made up of just a raphe of groups that have all sorts of different thoughts and approaches to issues and problems. And, I would like you to address that because I think even with Congressional oversight, which you propose those Congress people have a whole lot of different ideas and free speech. So, I was wondering if you could address that together, individually, whatever.

DR. RASCOFF: Yes. I mean, the short answer to that for me is I think that would be a very good idea. The FBI is not any time soon going to divest itself of its more hard-edged role in national security. I don't expect that a new director of the FBI is going to depart too far from where the organization has come. But, I do think that the FBI could gain a lot in the way of trust and support from the community which are vital, and not just vital in the sense that they're hallmarks of good policing and protection of civil rights and civil liberties, but they're vital also, I think, to the co-production of good intelligence.

I think the FBI could come a long way if it were to enact a very sharp, and clear, and
inviolate boundary between these two parts of its mission in order to allow the people who are being talked to in an informal engagement environment to have the confidence that this isn't some form or kind of surreptitious intelligence gathering. And, at the same time to be able to speak confidently in these sorts of engagement settings about the other half of the house that does inevitably do this more hard-edged work. So, I think yes, absolutely, keeping those two parts of the house separate and distinct in an ironclad way would be terrific.

I also should say I can't anticipate any strategic law enforcement or national security related reason why that would be a bad thing. This is not the sort of thing that would tend, I think, to interfere with the mission. Quite the contrary, I think it would enhance the mission overall, so I think that's a terrific suggestion.

COMMISSIONER KLADNEY: Professor Aziz, before you answer, I want to say that I know you noted the Predicate Act, but that's even less than probable cause.

DR. AZIZ: So, first I want to highlight that there is -- I'm doing a lot of research on these issues, and what I discovered is there is a paradox in
the federal engagement effort as compared to community policing, which is the traditional model this engagement is being based on. Community policing was very -- took off in the 1990s and still exists in many cities. And, the paradox is that in the traditional community policing models, the members of the community go to engage with the police to protect themselves from criminals, to protect themselves from drug dealers, from violent crime from gangsters, from just dilapidated neighborhoods.

In the engagement process, the irony is that oftentimes when you ask Muslim leaders why are you going to these events, part of the reason is because we want to tell the government to stop persecuting us, to stop targeting us, to stop spying on us at our mosques in our community centers, and schools, et cetera. In other words, we're engaging with the government to protect ourselves from the government, which is highly paradoxical and very sad in many ways. So, I think you have to keep that in mind.

And then, they also are concerned that those acts then legitimize the private acts of bias, so there's a relationship between the two. And, I think that's where the First Amendment issues get
really complicated because, in a vacuum, we like to say government officials say they're completely out of religious rhetoric and any kind of comments which I agree with in the abstract. The problem is that the public hangs on to every word that these government officials say, and there are people in the private context that are expanding that or are creating an echo chamber every time there's a bias statement said by a government official or a political candidate, and then you run into these private acts of bias. So, how do you disconnect that?

But, to answer your question more directly, I think the first thing you have to do is you've got to solve the shortfalls in the prosecutorial context that lead to direct infringements on civil rights and civil liberties. You've got to make sure that the FBI is doing its job the right way that protects the civil rights and liberties of all Americans.

If you do that, you're going to have a significant number of grievances in the engagement context disappear because oftentimes that's the bulk of the complaint. But in terms of separating them, you know, I'm not sure if I'm comfortable saying having a complete separation, because I think that that may be
I suspect some government officials may say well, you know, if we have that information walled, that's what got us in trouble with 9/11, and we've got to have more information sharing. So, I certainly don't want to set myself up to be someone who doesn't understand the complexities of how bureaucracy operates. But, yes, think that what has to happen is engagement efforts should not be used for surveillance, for investigations, for gathering intelligence, or for prosecutorial purposes.

COMMISSIONER KLADNEY: So, that leads me to this fusion center question. We spend billions of dollars on that throughout the country. I mean we even have a fusion center in my town. And, how effective has that been? And, how does that interact with this situation of engagement and law enforcement? Does anybody --

DR. RASCOFF: My short answer to that is that fusion centers have not yet proved their worth. And, I'm skeptical whether they're in any danger of suddenly becoming highly useful. For one thing, you can fuse information that you don't possess. Fusion assumed a world in which the government was drowning in useful information and that the key problem was simply one of causing that information to travel to
the right people in the right agencies. It turns out, I think, that the problem has a lot more complexity to it, and that the issue was really not about lots of stakeholders at the local or the state level in possession of lots of valuable information that was somehow getting jammed up in the system and not being shared.

So, I think the idea of fusion was probably the wrong way to come at the problem conceptually. And then, I think in actual practice, you know, the fusion centers, each of which is essentially a law to itself has really -- the idea of the fusion center has never really been kind of fully worked out and developed, I think, in a productive way. So, I would say having been on the inside of the counter-terrorism establishment that fusion centers are not doing a whole lot to protect the United States of America in a national security sense.

Now, whether they've gone on to take other missions, I'm a New Yorker, weather's pretty important to us these days, or kind of natural disasters more generally, I don't know. And, I suspect that individual fusion centers have probably done more than others in enhancing particular missions driven off of particular leaders. But, I would say at the macro
level a disappointment for national security.

DR. AZIZ: The problem with fusion centers is there's no transparency. You don't know what they're doing. You don't know what they're up to. But then, you get these reports over the past few years, and I'm sure Professor Rascoff as well you have Missouri, Texas, Pennsylvania where there would be either investigative reports or leads, and you would discover that what they are gathering intelligence about, people's religious activities, people's First Amendment protected activities, speech activities. And oftentimes, it was of Muslims, because there is the conflation that if I'm going after the terrorists, I'm going after Muslims, but sometimes it wasn't even that.

They had that big special NPR about Mall of America, and how fusion centers had started to create this entire web of spies within the state and local level. And, then to add more complexity or frustration is that a lot of them are grant driven, so then you start to worry are fusion centers essentially just these money making machines that are -- let's build our fusion center, let's find something to do, because there's money out there to be made through grants. And that's fine if they are doing something
that's keeping us safe, and that is not infringing on our rights, but I think we can't answer these questions without more transparency.

CHAIRMAN CASTRO: Before I give the floor to Commissioner Gaziano, I have one more question we'll have time for. I just want to point out, Commissioner Kladney and others, there may be a model on the bifurcation. The INS, formerly the INS had the same issues. They had the enforcement and the naturalization all under one roof, and they've split it. They've got ICE now which is the enforcement arm, and you've got USCIS which is the naturalization. I'm not saying it works perfectly, but there is a template out there that's been tried in that area. Commissioner Gaziano.

COMMISSIONER GAZIANO: Thank you.

COMMISSIONER YAKI: And, Chairman, may I ask after Commissioner Gaziano?

CHAIRMAN CASTRO: Yes, you'll have the last question.

COMMISSIONER GAZIANO: Thank you all, and I have a question for almost all of you, but I idiosyncratically will ask Professor Rascoff to elaborate on the following. I found your discussion of the difficulties of counter-radicalization at the
domestic level very interesting, and I'd like you maybe to just reflect a little bit or explain to us how the United States' attempt in either foreign policy and actually military uses may -- whether you have the same concerns, and how there may be some overlapping. And, let me just throw out these three examples.

Certain statements the President makes are for public diplomacy purposes, maybe also for domestic purposes, but he can only speak in one voice, so when President Bush would say Islam is the religion of peace, I was always curious whether he thought that was the only possibility, he thought that was true, but I could understand either a public diplomacy purpose to that while we were engaging in war, and perhaps to encourage Americans who weren't Muslims to calm down and think that.

In our funding decisions, maybe foreign aid, we may or may not want to use foreign aid dollars to discourage a country who teaches their kids in government schools certain hateful things about Jews and Christians.

And then, on the battlefield, I understand we work with countries like Saudi Arabia, and these counter-radicalization center -- , I've been skeptical
whether they work. I've read different reports on that. Is that at least more appropriate? I mean, by the way, we have the same competency issues, maybe not. Maybe the competency issues with regard to terrorists are different. It's worth the risk or something. What are your thoughts on this?

DR. RASCOFF: Okay. My thought is that you've just put your finger on one of the knottiest issues in Establishment Clause jurisprudence which picks up on an even broader knotty issue in Constitutional Law which is the Extraterritorial Application of the Constitution, and the extent to which the whole constitution, parts of the constitution have force and bind the U.S. Government in its activities overseas. There is a debate that's raging. I don't know if a debate between law professors could be described as raging but --

(Laughter.)

DR. RASCOFF: -- about the degree to which the Establishment Clause binds the U.S. Government in its activities overseas. Now, I don't have a kind of fully worked out theory about that. I will say that my strong intuition is that such as it binds American foreign policy and military activities, it must do so in a very different way and to a different degree than
it binds the U.S. Government in its relation to its citizens here within the United States.

Having said that, there are a couple of things that our military officers have done, and our foreign policy types have done in the last decade or so that strike me as being probably over the line even if the line is going to be a little bit more forgiving. I'll give you a for instance.

We had a Marine General who was heading up our detention policy in Iraq for a while, and he thought that as part of his own counter-radicalization program that he would actually recraft Islamic scripture, and he would essentially edit Koran and edit kind of early statements of the prophet in such a way as to make the package one that he thought had a more kind of American friendly outlook, or an outlook that was less likely to produce kind of radical kind of ideation. Well, whether you call that a First Amendment problem, or whether you call that strategic folly, or whether you even call it both, I think you know where I'm going with that one.

At the same time, I agree with you, the boundary between foreign and domestic is also kind of permeable and complicated. It's not just Presidential rhetoric, it's cyber. So what happens when the U.S.
Government is doing work in that domain? Sites can be accessed here, but they might be principally intended to be accessed elsewhere. These are the sorts of knotty questions that need to be worked out. But, I would say kind of overall such as applies overseas it doesn't bind in sort of in its full majesty the way that the Establishment Clause obviously does domestically.

CHAIRMAN CASTRO: Commissioner Yaki, you have the last question of this panel. Are you there?

COMMISSIONER YAKI: Mr. Chairman?

CHAIRMAN CASTRO: Yes, proceed.

COMMISSIONER YAKI: Thank you very much. A quick question for Professor Aziz. Since you've sort of been in both worlds, you've been inside DHS and now you're on the outside, I just wanted to get your reaction to the ratings that the first panelists gave to sort of the federal government efforts, and get your reaction also to the question of appropriateness of potential CIA involvement at least with the New York Police Department surveillance efforts.

DR. AZIZ: Well, I -- well, with regard to the CIA, I facially do not find that comforting at all. I think without having researched, having been an expert in intelligence law, domestic intelligence law,
I think that when someone tells me the CIA is working with the NYPD, I think of Co-Intel Pro and I think of some dark days in the 1960s and '70s, and it concerns me that we are regressing back to a state of affairs that will ultimately harm a significant number of Americans, because it sets a very high precedent and puts us backwards. So, I think it warrants investigations, meaningful investigations, not just kind of rhetorical ones, but somebody needs to at least get to the bottom of whether this is even legal, and even if it is, is it good public policy, because it will spread. It's just a matter of time. We've seen it happen before. I don't know why we think it won't happen again, so I do feel very uncomfortable with that.

With regard to the rankings, I think the rankings should be kind of split into two. There's rankings for good effort, and then there's rankings for actually producing tangible results. And, I think that with regard to -- I must say that the two agencies I hold in the highest regard based on what I've seen them produce and the effort they put in is the Civil Rights Division of Justice and the Equal Employment Opportunity Commission. They have produced results. They litigate, they investigate civil rights
grievances, and I -- the only recommendation I usually have with them is you need more lawyers, because, unfortunately, the volume isn't decreasing.

And, I just want to interject that I, unfortunately, have also been the target of threats. And, oftentimes, it's because -- well, the times I was a target of threats where I did have to call the FBI, and I have three beautiful children, and I was extremely, extremely concerned about their safety, more so theirs than my own, was because I had given a public speech about how the civil rights of Muslims need to be protected. And, essentially, I was accused of being an anti-First Amendment bigot, because I said let's protect the civil rights of Muslims.

So, unfortunately, the privilege of being a professor does not in any way shield me from these types of experiences. But, as far as -- and I think CRCL which is where I used to work, you know, I would give them above a five for effort, but I have yet to see effective changes in policies particularly with regard to like the TRIP Program. I mean, as the other panelists had said in the previous panel that she has the lowest ranking for TSA. Well, that's because TRIP, the Travel Redress Inquiry Program doesn't seem to be meeting its promise. It takes too long to get redress,
and it is very opaque, and the letters that complainants get are these -- just there's not enough information for people to feel that they actually did something.

Same thing with I think CVP, that the questions keep being asked. Well, what do you think about the war in Iraq? Well, who do you -- what kind of religion do you pray every day? What mosque do you go to? So, as long as that keeps happening, I think that the engagement efforts are -- they're not producing a result. We have to be results oriented.

The FBI, I think, has a structural conflict of interest. I just haven't figured out -- unless it's only the Hate Crimes Section, I'm just not sure why the FBI is going to be in an engagement meeting beyond the purpose of recruiting informants and gathering intelligence. And, I haven't been persuaded of why you are here in light of the problematic practices that you continue to do in disregard of multiple grievances.

CHAIRMAN CASTRO: Well, I want to thank this panel. You all were excellent. We appreciate your time and thank you. You're welcome to stay and hear the last panel, which I will begin to invite to come up. Thank you.
(Whereupon, the proceedings went off the record at 12:30 p.m., and went back on the record at 12:36 p.m.)

CHAIRMAN CASTRO: We're back in session. It is 12:36, and we are now going to begin with our third and final panel. As you know, you were, I think, maybe here through most of the earlier day, but you will have eight minutes to speak. These lights will go on, green to go, yellow to get ready to wrap up, red to stop.

Our first panelist is Eric Treene, Special Counsel for Religious Discrimination at the Department of Justice Civil Rights Division. And, our second panelist is David Gersten, Director of Civil Rights and Civil Liberties Programs for the Department of Homeland Security.

And I'll now ask you to swear and affirm that the information that you are about to provide to us is true and accurate to the best of your knowledge and belief. Is that correct?

(PANEL 3 SWORN.)

CHAIRMAN CASTRO: Thank you. Mr. Treene, please proceed.

PANEL III - GOVERNMENT PANEL

MR. TREENE: Yes, thank you, and good
afternoon, Commissioner Castro, members of the Commissions. Thanks for providing the Civil Rights Division the opportunity to speak about the important issue of the engagement and enforcement of the civil rights of Muslim and Arab Americans.

Prior to the attacks of 9/11, the Department had relatively few cases involving Arab Americans and Muslims. This is not to say that we didn't have cases and important ones like the murder of Alex Oden, the head of ADC's western office, who was killed by a bomb and that's still under investigation, as well as in the late '80s and the late '90s we had two employment cases involving Muslim Americans trying to wear religious garb or beards while on the job. But, in general, these cases were few and far between.

Then, this all changed with the events of 9/11. After 9/11 we saw a dramatic rise in hate crimes and discrimination against Muslims, Arabs and people perceived as being members of these groups such as Sikhs and South Asians. We had in the three months after 9/11, we opened 300 investigations of hate crimes against these groups. The number of cases filed with the EEOC of discrimination for Muslims doubled from 2000 to 2002.
The Civil Rights Division moved very quickly to respond to these incidents, and the leadership on both engagement and enforcement came from the top. President Bush stood with Muslim Americans at the Islamic Center of Washington, D.C. a few days after the attack, declared that Muslims are Americans, they are fellow citizens and they should not face attack for what some people did on September 11th. Attorney General Ashcroft made similar statements.

And, we quickly moved into action. Civil Rights Division, Assistant Attorney General Ralph Boyd met daily with the FBI, and met very regularly with dozens and dozens of Arab, Muslim, Sikh, and South Asian leaders to find out what’s going on on the ground, how we can respond. During this period, we brought a number of prosecutions and got good sentences for these hate crimes.

Now, the spike receded after several months, but the level of hate crimes remained significantly higher than what we saw prior to 9/11. The same is true with employment cases. Today, discrimination cases against Muslims are up by a factor of four from the late `90s. But our enforcement and outreach in 9/11 remains a significant part of our
work. We have a sustained high level of hate crimes, employment cases as well as harassment cases of students in school. And, we've continued to have strong support from leadership.

Attorney General Holder has denounced the continued problem with 9/11 backlash, saying that we must counter "the twisted logic that an attack on innocents can somehow be avenged by another attack on innocents."

We stepped up our engagement efforts forming a Muslim-Arab Engagement Advisory Group within the Department, and Attorney General Holder - has given speeches, has had meetings with groups, and for example just two days before the 10th anniversary of 9/11, he called in an interfaith group of Catholic groups, Protestant groups, Jewish groups, a whole range of religious organizations, to talk about the increasing anti-Muslim animus that we were seeing in the lead-up to the 10th anniversary.

We also have had strong support from President Obama, who has again and again stressed that Islam is part of America, and I'll just read what he says. "Regardless of race, religion, or station in life all of us share common aspirations to live in peace and security, to get an education, and to work
with dignity, to love our families, our community, and our God."

Now, our activities at the Department at the Civil Rights Division are not as frenetic as in the days after 9/11, but we've developed a sustained program to address both through engagement and enforcement the challenges facing Muslims, Arabs, Sikhs, and South Asians. We have, as you heard about earlier from the panelists, interagency meetings where the idea is to bring together a host of different federal agencies so we can untangle complex issues that are facing the community. An airplane incident might involve Department of Transportation if the crew took certain actions, and then the plane landed, and CBP might be involved, it could have the FBI involved, it could have TSA involved, a whole number of factors. This is one-stop shopping. People can come in and we can sort out who is responsible for fixing a particular problem. We found this to be particularly beneficial activities.

My position, Special Counsel, is to coordinate these issues and work with diverse groups, but we're based in Washington and there's a limit to what we can do. I can travel, Tom Perez can travel. We even have in our Litigating Sections, some attorneys
who are specialists in employment law, fair housing law and they will travel and engage with communities. But, it's really critical that we leverage U.S. Attorneys offices and our resources on the ground.

The Community Relations Service, for example, has regional offices. They do great work with outreach and training law enforcement on cultural competence. But also the U.S. Attorneys: Attorney General Holder had the U.S. Attorneys come in, in 2010, about a third of them came in to talk about Muslim and Arab engagement, and how they can do a better job. Since then, other U.S. Attorneys have come as well.

Assistant Attorney General Perez has made a priority of leveraging the U.S. Attorneys offices in all of our work, so we've established many civil rights units with the U.S. Attorneys offices. Some that don't have formal units have Assistant U.S. Attorneys who have an interest and expertise in civil rights, and we've developed that so we can farm cases out to them.

And, we continue -- these are all critical tools, because we continue to face challenges. From 2009 to 2010, hate crimes against Muslims jumped 50 percent. In RLUIPA -- religious land use cases --
disputes involving churches, synagogues, and mosques, we have seen a sharp rise in cases against mosques. I've been doing this really since the start of the statute when it was passed in 2000, and as a Division we've opened 31 cases involving mosques in the last 11 years, 21 of those have been in the last -- I'm sorry the last 12 years, 21 of those have been in the last two years, so a huge number of cases we're seeing now involving land use.

Engagement is also a critical part of our work here, because there's only so much that we can do if we don't know about cases. Many of our cases come to us because of community contacts, because of community outreach, cases involving harassment in schools, where maybe people don't know where to turn, or didn't think it was a big enough deal for a federal matter, but they talked to us. We found a girl who'd been harassed so badly that her hair began to fall out. It was an elementary school girl and her -- she couldn't sleep. Well, we investigated it. We came to an agreement with -- it was an out of court settlement with the school board. Even just supplying information, sometimes -- I know I'm running out of time, I'll just finish with this thought, that we don't even need to bring a case. Sometimes by giving
folks materials on civil rights in their languages, we do it in 17 different languages, by educating them so they can tell the community about their rights, they'll download information from our website that they can use to take care of problems before they even rise to the level of the DOJ needing to get involved. And, that's why engagement with communities, with all communities and the statutes we enforce is a critical part of our enforcement efforts. Thank you.

MR. GERSTEN: Mr. Chairman, Commissioners, thank you for inviting me to brief you on the ongoing efforts to communicate in outreach with individuals and communities who may be affected by DHS policies. Your Concept Paper for this briefing includes several questions and a few assumptions that I hope to answer and clarify.

In particular, the Concept Paper claims that outreach to protect against discrimination and reduce Islamophobia may be subordinate, a mere limitation or hedge against more important security concerns. And later, the paper states, "For better or worse the example of Arab and Muslim American outreach is a model for what to do, and what not to do with communities."

I joined DHS in 2006, shortly after the
Office for Civil Rights and Civil Liberties, CRCL, established regular roundtable meetings with American Arab, Muslims, Sikh, and South Asian community leaders in six cities. I personally led scores of such meetings and believe strongly that our efforts have advanced the respect for rights and liberties of these communities, and also had tangible benefits to countering violent extremism.

From its start, the office has sought to insure that protection of civil rights and civil liberties through direct engagement with communities affected by or perceived to be affected by the Department's policies and actions. Today, CRCL's community engagement section leads a wide variety of outreach endeavors with roundtables in 13 cities, and other events throughout the country. CRCL's engagement program aims to communicate and share reliable information about federal programs and policies, obtain information and feedback about community concerns and on the ground impacts of DHS activities, incorporate community ideas into policy making, and deepen the channels of communication between communities, regional DHS leadership and other federal officials.

In the early days of our efforts, most of
our roundtables brought together just American Arab, Muslim, South Asian and Sikh communities with government representatives. In recent years, we've expanded our approach to engagement to include many immigrant communities; yet, CRCL remains the federal office that conducts the most extensive outreach efforts involving Arab, Muslim, Sikh, and South Asian communities across the nation.

Roundtables are held quarterly in each city, and usually hosted by federal agencies and community organizations on an alternating basis. These open forums bring all the relevant DHS components to the table, as well as many other federal government agencies, and also state and local officials, as needed.

CRCL's engagement activities are not limited to these quarterly roundtables. We occasionally convene town hall meetings. We also have an incident community coordination team call to respond quickly to an incident of national significance.

So, as you see, the Department reaches a broad range of people on a number of issues. We learned from affected communities about their concerns and their ideas for solutions. CRCL has, for example,
coordinated meetings with religious leaders to hear their concerns about modesty prescriptions in airport screening, with communities of recent immigrants to discuss language access issues, and with disability groups to discuss accessibility issues at ports of entry. I could describe countless examples of our effectiveness resulting from our engagement, and many of these are actually published in our annual reports to Congress.

CRCL often works behind the scenes to improve the respect for civil rights in an incredible swathe of missions and activities fulfilled by DHS. As mentioned, these are described in great detail in our reports to Congress, but I'll just mention that we have essentially separated out our functions into two branches at the Office for Civil Rights and Civil Liberties. We have a branch dedicated to investigating complaints and issuing recommendations to Departmental leadership. And, in the branch that I direct, we promote rights and liberties, and policy creation and implementation by advising Department leadership and personnel, and also state and local partners.

Now, to address the specific concern described in the Commission Concept Paper, and also alluded to especially in our most recent panel that
you heard before this one, allow me to describe how our work relates to efforts to counter violent extremism.

Margo Schlanger, the CRCL former officer, gave testimony to Congress a few years back that captures the relationship very well. She stated that, "Although our activities do contribute to the Department's mission of countering violent extremism, the linkage is indirect. Although we can and should collaborate with community leaders to address this shared problem, countering violent extremism, CVE, is neither the principal reason we engage these communities, nor the lens through which we view this engagement."

CRCL has long aided the Department's CVE efforts by working with communities and state and local law enforcement. Maintaining strong partnerships between communities and law enforcement can reduce violent crime and inhibit ideologically motivated crime. CRCL has for several years offered cultural competency training for officials operating in fusion centers, and for law enforcement working to counter violent extremism.

In fact, we're hosting a conference next week in Nashville, a two-day conference with privacy
and civil liberties officers from all of the fusion centers around the country, and that conference will include training on cultural competency.

The current administration has made significant attempts to clarify its approach to countering violent extremism and the role communities can play in assisting government. In August of 2011, the White House released the National Strategy on Empowering Local Partners to Prevent Violent Extremism in the United States, or as we refer to it, the National CVE Strategy. This is the first U.S. strategy to address ideologically inspired radicalization to violence in the homeland focusing on community-based approaches. A strategic implementation plan referred to as the SIP, outlines how government will support and help empower American communities and their local partners in their grass root efforts to prevent violent extremism.

The first objective of the SIP is to enhance federal engagement with and support to local communities that may be targeted by violent extremists. There are two other objectives involving building government CVE expertise and countering violent extremism narratives that you can find details about in the actual SIP and National Strategy.
For our part at CRCL in implementing the first objective, CRCL represents DHS in co-chairing the National Task Force on CVE Engagement. The Task Force attempts to fulfill the first objective of the SIP by helping to coordinate federal community engagement efforts at the national level.

Additionally, CRCL has provided briefings on the SIP and the National CVE strategy to nearly all of its roundtable locations. Since CVE is one of the Homeland Security missions that CRCL feels responsible for educating community leaders about, just as we would for screening procedures, immigration enforcement, information sharing, disaster response, and cyber security, we've made ourselves available to discuss the SIP and received very positive feedback from community members.

Now, though the SIP and CRCL's efforts to support it could be perceived to directly tie the work of the Civil Rights office to a security mission, our engagement activities remain overwhelmingly focused on promoting civil rights for all people affected by the Department and its partners. As noted in the SIP, violent extremist narratives espouse a rigid division between us and them that argues for exclusion from the broader society and a hostile relationship with
government and other communities. Anwar al-Alawki, who many of you are familiar with, argued this in his recruitment videos. It's well documented that --

CHAIRMAN CASTRO: You have to wrap up, Mr. Gersten.

MR. GERSTEN: Sure, absolutely, one more point. So, I hope you'll agree that such an approach to CVE does not separate it from civil rights but, in fact, makes civil rights a useful part of CVE, and CVE a useful part of promoting civil rights.

CRCL roundtables and other engagement activities are the model of good governance programs called for expressly in the National CVE Strategy, "including those that promote immigrant integration and civil engagement, protect civil rights, and provide social services, and which may also help prevent radicalization that leads to violence."

I thank you for the opportunity to help the Commission explore this subject, and I welcome your comments and questions.

CHAIRMAN CASTRO: Commissioner Kladney, and then Commissioner Achtenberg.

COMMISSIONER KLADNEY: I'd like to thank you gentlemen for coming today. I think you both represent some great agencies that are obviously like
everyone else here today, wants you to protect America and protect everyone's civil rights.

You were here and you were able to hear everybody's testimony, so I guess my main question is, is what did you hear that you haven't heard before that you want to take back to your agencies and actually tell them? And, if there's any conclusion you may have drawn from the testimony that you think are correct or not correct?

COMMISSIONER GAZIANO: Just to clarify, I think -- I don't know when -- I think Mr. Gersten was here. Mr. Treene, I don't know if you were here.

MR. TREENE: No, but a colleague was here and briefed me out in the library about the first part.

COMMISSIONER GAZIANO: Your division got some thumbs up, and some other parts of the Department did not.

COMMISSIONER Kladney: Thank you, Commissioner Gaziano.

MR. GERSTEN: I'll be happy to go first.

COMMISSIONER Kladney: Why don't you lead because he got the thumbs up.

MR. GERSTEN: Well, that's right. And, I was here for the whole -- we had some thumbs up, as
well, I must say. And, I think there are a number of things I will take back. I did take extensive notes. I felt that it was very important to be here and hear especially from those who have viewed our engagement from the outside, but also in particular, Professor Sahar Aziz has a very unique perspective having been on the inside, worked as a -- with an NGO, worked on the inside helping to conduct engagement, and now studying just how engagement works. I think she offered some very interesting points.

I would say that one of the lessons learned is that we have to do a better job of promoting the success of our engagement. There are, as I mentioned in our annual reports, numerous examples of programs that have been improved, because we have taken back the concerns that we have heard in the field from our community partners and applied those concerns to policy formation.

We certainly understand that no program is perfect, and we certainly understand that there are programs that need a great deal of work. I was particularly interested in hearing about the concerns about the TRIP program, that's the Traveler Redress Inquiry Program. I was very involved in the formation of TRIP. One of my first assignments when I came to
DHS was to organize the working group that led to the creation of that program. And, we do hear very mixed messages about that program. We hear that overall it has certainly reduced the number of people who are misidentified and mismatched against traveler databases, but that the hard cases that remain, those cases that may involve people who do have derogatory information are not necessarily going to be solved by a redress program. They may have to be solved through the affordance of better due process to examine the derogatory information itself.

I'll also say that I must take back from Professor Rascoff's testimony and some of his writings a very interesting concern about the relationship between CVE and civil rights-based engagement. I would say that in his paper, he notes that should the community itself enter into an effort to combat violent extremism that may be emanating from that community, there is certainly no problem. I don't know if he says certainly, but he seems to suggest that there is not as much of a concern for that relationship. And, we have started to see that. In Minneapolis, and in Columbus, the Somali community in particular has hosted its own conferences on CVE and invited us to attend. It would be actually
irresponsible, I think, for us not to be there to
describe Department of Homeland Security procedures
and help them to solve that.

MR. TREENE: I would just say that I didn't
have the benefit to hear all the testimony, but I read
Sahar Aziz' testimony and heard some of her testimony
here. Her point about non-traditional partners that we
shouldn't go to the same folks is something that we've
focused on very much in the Civil Rights Division and
the Department at large. I mean, it goes into my point
that there's only so much you can do inside the
Beltway. Inside the Beltway you're going to meet the
same groups with repeat players, which is comfortable.
If you have a repeat player, someone you know, who
knows you, but they -- it can be an echo chamber.
Sometimes you can have someone with good funding and a
good staff, but they don't really have grass roots
support.

You know, it's important to engage within
Washington, don't get me wrong, but it's very
important to go outside the Beltway. And that's why
we've evolved down to the U.S. Attorneys who are
developing relationships in their districts. Someone
may not be part of a national civil rights group for
Muslims, but they are involved in their community, and
how do we reach them and hear what they have to say?
So, that's been a very important part of our effort.
It's something we can certainly do more of and do
better, but it's -- and we're very much aware of it,
and something we are working to implement.

Jim Zogby's points about training are very
apt. It's hard to do engagement and then have
something come out where people are saying, you know,
gross generalizations and falsehoods about the group.
It muddies the water. It's one of those things where
20 good things are erased by one stupid thing that
somebody does out in the field. You know, with
training, and this has come out in the media and the
FBI, of course, has removed the problematic training
materials. But, we certainly recognize how damaging
this is to engagement efforts. And, we continue to
work within the Department.

I mentioned the Attorney General's Arab-
Muslim Advisory Group. Spun off from that group is a
training working group that I chair in the Civil
Rights Division, and each component has done a review
of their internal materials to make sure that they are
accurate, and that they do not contain gratuitous
offensiveness. I don't say offensiveness because
materials might offend that are true, and sometimes
things need to be taught to people, but there's certainly no reason for the kind of gratuitous offense that we've seen in certain instances. So, we're working with that. We developed guiding principles on training that the Deputy Attorney General issued that set forth how the things to be taken in consideration in setting up training. So, we continue to work on that because we recognize how high the stakes are with regard to training.

COMMISSIONER Kladney: How is that -- I found it interesting that you said you're engaging the Attorney Generals in the different states.

MR. Treene: I'm sorry, the United States Attorneys.

COMMISSIONER Kladney: The U.S. --


COMMISSIONER Kladney: And is there like some network or feedback that you get, or is there certain reports you get every month. And what are you doing with those reports?

MR. TREENE: Yes, through two mechanisms. There's the Executive Office of U.S. Attorneys, an office in Justice that coordinates the work of the U.S. Attorneys offices, and they have people tasked who I work with on a regular basis who are
responsible, for tracking what they are you doing as far as engagement, and report back to our Arab-Muslim Engagement Advisory Group. So, they are tied in that way. They're also tied in through the AGAC, the Attorney Generals Advisory Council, which is composed of U.S. Attorneys who are chosen and chair different groups, like Steve Dettelbach from Cleveland chairs the Civil Rights Group. He's very active in engagement and encouraging engagement. Barbara McQuaid is also involved in that out of the Eastern District of Michigan, and is also very involved. They have regular meetings with U.S. Attorneys where they come together, they talk about a host of issues, and this is one of the issues that they address.

COMMISSIONER Kladney: But in the community, as well. I mean, they talk to the community, or they engage --

MR. Treen: They're engaging with the community all the time. Oh, yes, exactly. I mean, yes, holding regular meetings involved with DHS' meetings that they hold around the country. They're in partnership in a lot of places with the U.S. Attorney in that district.

MR. Gersten: And, I would also add that the National Task Force proceeding engagement that I
mentioned in my testimony is co-chaired. I'm one of the co-chairs. The other co-chair is with the Executive Office of U.S. Attorneys. And, the U.S. Attorneys, as Mr. Treene has mentioned, do partner with us in many of the cities that we hold roundtables in.

I did want to add one more thing that I remembered that I'll take away from this that we heard on one of the earlier panels. There was a mention of gender bias and youth bias against female participants and youth in our roundtables.

COMMISSIONER KLADNEY: Being included. Right?

MR. GERSTEN: Right. And, I just wanted to say that perhaps it’s just a lack of awareness of recent roundtables, but that certainly is not the case now. In fact, in the two of the roundtables that I'm most familiar with that I have some direct participation in, Los Angeles and Tampa, if we were to try and create a 50-50 quota, we would actually be eliminating quite a few women participants in the roundtable. Both of those instances there's significant participation, and it is very diverse in culture, as well.

COMMISSIONER KLADNEY: Thank you.
CHAIRMAN CASTRO: Commissioner Achtenberg.

COMMISSIONER ACHTENBERG: I have just two observations for Mr. Gersten, and then a good faith question for Mr. Treene.

I would commend to you Professor Rascoff's additional conclusion that perhaps retaining NGOs to do some of this more nuanced work, obviously it doesn't -- the government can still get in trouble with who it contracts with. On the other hand, it seems to -- he seems to suggest, and I think it's worth thinking about, that some of this work that is not as appropriate for the government to do directly might be more artfully addressed by community-based organizations that do have trust of the community. I thought that was an interesting observation on his part.

The other thing I wanted to commend to you was I didn't mean to trivialize Mr. Skerry's observations. They actually are quite interesting, and I thought complex and true to some extent. And, I just wanted to sort of clarify, I made a flip comment that was not flip in that it was also true that, you know, theirs is not the only group that has asserted its superiority in the face of isolation and discrimination from the majority. But, he goes on to
make a number of astute observations, so I would commend to you his work, as well. I think we'll see some of his observations, I would hope, appear in our own report.

My question to you, Mr. Treen, relates to the -- so the Community Relations Service in the Department of Justice is an institution of longstanding, and the Civil Rights Division of the Department of Justice is an institution of longstanding. And, both of those -- unlike your own work, Mr. Gersten -- and, first of all, the Department of Homeland Security itself is not an institution of longstanding, and to have your work be a separate but complementary part of that Department's work is a new experiment. And, I understand that you're the incumbent, but the reason I point this out is I'm wondering what virtues of there being these longstanding institutions within the Department of Justice can we delineate and pull out so that we can see how it is that others might be able to replicate your success.

Professor Aziz said that there's -- it's extremely important that there be perhaps bright lines between the various functions so that people will have faith and confidence in them. It seems to me you had a
structure already built in that has observed those
bright lines for many years, and I'm wondering if that
rings true to you. And, if so, if you could highlight
for our benefit those attributes so that we might be
able to observe how they might apply to other
institutions that are not similarly structured.

MR. TREENE: Sure. We have the virtue of
having been created during the Civil Rights movement.
And, when I talk to foreign delegations, governments,
they're just sort of amazed that we have such a
vibrant structure for enforcing civil rights. And had
it not been for the segregation and the unique history
of African Americans had such a structure in place
when 9/11 hit. But it did, and we're able to gear up,
and we had different sections specializing in
employment, and our criminal section doing hate crimes
and so forth. And so it was good that we had this sort
of ready made enforcement mechanism.

We do recognize our limitations in that,
as has been stressed several times, we are leveraging
the U.S. Attorneys offices. That's why Assistant
Attorney General Perez has sought to change the
culture within U.S. Attorneys offices, whether by --

COMMISSIONER ACHTENBERG: Yes, that's new,

isn't it?
MR. TREENE: Yes, by creating Civil Rights units, the Southern District of New York has long had a Civil Rights unit, so it's not completely new, but it is completely new in the sense of other districts adopting this, and really -- there's a different mindset. The government is the Plaintiff. The government goes out and brings affirmative suits to protect civil rights of individuals, or groups of individuals; whereas, usually the U.S. Attorney, you got prosecutors and you've got people who do defense, they defend the government in various ways, so that is a cultural change that we're trying to make around the country. But, because we have a tight budget environment in the Civil Rights Division like everybody else in Washington, this way we can leverage local experts. And often, you have an interest, if you have somebody who gets fired up about taking a break from defending a regulatory practice that they've been doing and get to bring a civil rights case you want to tap into that energy. And that's something that we've been working hard to do.

CRS is a unique institution in that they are completely without enforcement power by design. They go in, they don't take sides, they listen to communities, try to mediate conflict, bring people
together. That's their specialty. I don't know how --
I'm not an expert in the work they do, so how to
replicate it can be tricky. But, I do know that they
focus on train the trainer programs. They go out and
do Muslim and Arab cultural awareness, or Sikh
cultural awareness and one of their goals is train the
trainer. So, they get in people from sheriff's offices
and local law enforcement, all kinds of folks,
community members, and in the morning they do the
presentation, and in the afternoon they have another
presentation which is if you want to be a trainer. So,
we'll train you how to do what you just saw so you can
take out and do it. So, they're trying to leverage the
work that they do in that manner.

MR. GERSTEN: If I could also mention just
a few things about our office, so you have an
understanding of why we are somewhat unique. Unlike
most civil rights offices that are outward facing and
are essentially attempting to protect civil rights for
recipient agencies, for instance at the Department of
Education where I was before DHS, we're looking at
universities and school districts. DHS' Office for
Civil Rights and Civil Liberties is exploring whether
or not rights are being respected within its own
agency. And, its own agency is a very large agency,
and it has an enormous amount of contact with the public on a daily basis.

I don't know if there's been a study of such statistics, but I would imagine that only Veterans Affairs and the Postal Service has more human interaction. And, the difference between our human interaction and delivering the mail, and providing health services is that we're trying to screen people and adjudicate whether or not they have a right to become a U.S. citizen. I mean, these are very personal interactions, and they can be very tense, and they can be fraught with civil rights considerations.

The other thing that makes us unique is that we are the first civil liberties office in government. Now, after the 9/11 Act, there are now privacy and civil liberties offices throughout government, but we still remain the only one that couples civil rights and civil liberties. And that gives us a little bit of tension in examining whether or not there is a government interest in doing certain things based on civil liberties, and whether or not we are respecting rights under our various civil rights acts and codes.

CHAIRMAN CASTRO: I actually have a question, and then I don't know, Commissioner Yaki,
you want to end with a last question. But prior to --

COMMISSIONER YAKI: Yes, please, I do.

CHAIRMAN CASTRO: Okay. Prior to the
President appointing me last year to this Commission,
this Commission almost 10 years ago appointed me to
the Illinois State Advisory Committee to the
Commission, and on my first day there, that Commission
issued a report, actually May of 2003 called Arab and
Muslim Civil Rights Issues in the Chicago Metropolitan
Area Post September 11th. And, that's actually part of
our record. And, one of the observations that the
Committee, the Illinois State Advisory Committee, made
almost a decade ago is -- I'm going to quote here, "It
is also difficult to track changes in hate crimes
directed against Arab Americans or Muslims, or against
those who have come from Arab countries, because in
the past, crime record keeping whether dealing with
victims of hate crimes or otherwise, has not attempted
to separate out Arab Americans, or Muslims, or those
of Arab nationality. At least for the foreseeable
future that kind of categorization and record keeping
would appear to be useful in order to track changes in
discrimination and in the incidents of hate crimes
affecting these communities." And, I think we've heard
today from earlier panels that issue remains a decade
later. Are there any efforts underway within your agencies to better track and disaggregate this information, and also include other communities? We heard about the Sikh community. It would seem to me, at least on this side of the desk, that that should be relatively simple to do.

MR. TREENE: Yes, and there is something going on. It's in my written testimony. I didn't get to it in my oral testimony, but last month we held a town hall meeting. This issue came up particularly in the wake of the Oak Creek Massacre at the Gurdwara where six people were killed including a police officer. That raised the issue of why aren't Sikhs separately tallied. It's an issue that had been considered before by the Board that advises the FBI on what should be in the uniform crime reports. So, in response to this we decided to hold a town hall meeting of diverse religious groups. So, we had the U.S. Catholic Conference, we had Jewish groups, we had Hindu, Muslim, Sikh groups, many different groups at the table to talk about how are we coding religious based hate crimes and can we -- are there some changes that would be recommended by the group.

And, out of that meeting came the idea that Sikhs should be added because of the large
incidents of hate crimes, through anecdotal evidence through our enforcement experience, and through surveys that the Sikh community had done of members of how often they've been victims of hate crimes.

The Hindu groups also provided evidence about Hindu Americans facing rising hate crimes, and then Arab Americans. We certainly in our prosecutorial experience have seen a significant number of hate crimes, but they aren't coded in the statistics. So, we on October 18th presented to -- it's a complicated structure, but it's the Advisory Policy Board which has various subcommittees and working groups, and they finally in June meet as a full Board and then make recommendations of changes to -- it covers a wide range of information sharing among law enforcement, but the uniform crime reports are a piece of what they do. And, after all the deliberations, they will make recommendations to the FBI Director about changes to the uniform crime reports.

The Civil Rights Division and the Community Relations Service who co-sponsored this meeting made a formal recommendation to the Advisory Policy Board Subcommittee on the Uniform Crime Reports October 18th and said we believe that these three groups, Sikhs, Jews, and Arab Americans should be
separately tallied.

    Now, they're going to take it back. Because this is voluntary reporting, it's very important that the folks who are going to do the coding and the leg work out there in the field, the state, local, tribal law enforcement have a say and weigh in on their views on this. But, that's been our formal recommendation as we work through the process. There are various criminologists as well as state, local, and tribal law enforcement officials involved in the process, and they'll make a formal recommendation after their meeting in June. And, that's where things stand.

    CHAIRMAN CASTRO: Commissioner Yaki, you have the last question.

    COMMISSIONER YAKI: Thank you very much, Mr. Chairman, and thank you for your leadership in pulling this hearing together for me. I apologize for not being here.

    I guess I just -- I want to end with sort of a question that goes to the heart of my concern about what has happened to this country since 9/11. I want to thank both of these gentlemen for the great work and excellent work that they are doing, but you touched on something about -- that I care deeply
about, which is there is a sort of fish bowl aspect to
how we look at all this inside the Beltway, and were
it not for the fact that we have limited funds, I
wanted to have this hearing outside of Washington,
D.C. for the very reasons that -- many of the reasons
you discussed before, because when it comes right down
to it, people think of -- people don't look at the
nuances of what your program is doing at DHS, or what
the other program is doing at Civil Rights. They look
at us as the federal government, the outside world,
but the communities that are affected, the average
American just sees it's the federal government doing
this. And, in some ways, it's overbroad, and sometimes
the Congress really has their finger on something.
And, it comes down to this question.

We've heard today about programs that
you're doing and how people think about the programs
that you're doing, but in the back drop of all this
are our efforts that undermine a lot of what you are
doing, whether it's FBI investigations, whether it's
surveillance, whether it's the incidence of the young
man who reported that he had a lojack on his car and
it turns out the FBI put the lojack on his car because
they thought he was a potential terrorist. All of this
makes people undermine their faith in everything that
you're trying to do.

And, it comes to that classic question posed by a Roman poet, actually about 1,500 years ago, which is, "Who watches the watchers?" And, when it comes to the FBI, when it comes to the CIA, how do you -- how do your departments deal with the fact that what you are doing is consistently and constantly undermined by public perception about other programs going on that seem to be completely counter to what it is that you're trying to do. How do your departments deal with that, or are they dealing with it? Who is -- where is the ultimate call to be made on how these kinds of counter programs to your programs are dealt with, because it does -- I think it undermines what you're trying to do with communities, and it creates and continues to sow suspicion and mistrust in these very communities that you're trying to do these programs with.

MR. GERSTEN: Well, first off, Commissioner, thank you very much for pointing out that it is important to be out in the field. Our office is in the field an average of 70 times a year with roundtable events or other types of engagement activities.

We are certainly not responsible to the
FBI or for the FBI, or the CIA as DHS. We're a partner with those two agencies on numerous programs. And, I think that it's important, where we can, to invite FBI to the table and bring them out into the field. And, they join us at our roundtables and answer questions directly.

But, for what we can do within DHS for those law enforcement entities in the Department that may need to have a better understanding of why engagement and why respect for rights and liberties are important, we do the best that we can. And, some of the ways that we do that that I wasn't able to get to in our testimony is creating training, training directly for law enforcement, for instance.

DHS is not responsible for fusion centers, for instance. There was some discussion of fusion centers in the earlier panel, so I'll mention those. However, we do supply grant funding to fusion centers. We do deploy intelligence analysts to fusion centers that are DHS employees, so we do have some responsibility in addition under the 9/11 Act to directly train those fusion centers to respect rights and liberties. So, we actually do provide cultural competency training so that they understand --

COMMISSIONER YAKI: Well, what -- then how
-- sorry to interrupt, but how then did those New York Police Department training materials slip by everybody, I guess? That's certainly one of the stark glaring examples out there where the training materials and NYPD surveillance manuals that have been ousted and in public, how do --

MR. GERSTEN: Well, I -- sorry.

COMMISSIONER YAKI: No, go ahead.

MR. GERSTEN: Understand, Commissioner, that there are -- the state and localities are certainly able to do what they want to do depending on whether or not they're using federal dollars. So, there's very limited ability for us to clamp down on training that we might disagree with, so what our office --

COMMISSIONER YAKI: No, but what -- apparently -- I understand, but apparently that training -- I mean, this is my frustration and part of your frustration, as well, which is part of that training as I understand from those manuals came from the FBI. And, that's what I'm trying -- I'm not saying -- you can't possibly deal with what some guy with a Xerox machine in the NYPD department may or may not do, but if there are federal officials going -- advising them and helping them put these things
together, you know, isn't there some kind of check or anything that you or your division can do to say why would you be saying these kind of things? Why would you allow these kinds of materials to come out? I mean, is this basically a Secretary-level decision, or AG-level decision that has to be dealt with, or is it something that interagency working groups could deal with at some level?

MR. TREENE: Yes. This is Eric Treene here. It's important to remember that we are one division, one department at the Department of Justice. The FBI has a very strong brand and has its own building, but it is part of Department of Justice, and the Attorney General, and the Deputy Attorney General are ultimately in charge of and responsible for what the FBI does. And they have been -- FBI has been very much a part of our Arab-Muslim Engagement Working Group. They are very much a part of our review of training and training principles and putting together the document that sets forth what are the principles that must be in all DOJ-funded or conducted trainings, the basic principles. And, that is binding on them. So, yes, they are very much -- you know, we're involved in these discussions with them, and they are also a big contributor to the discussions. They've had a lot of
experience fixing the problems that they found with training in a comprehensive review, and implemented measures to prevent this from happening again in the future. But, certainly, we are one department and we are -- we all feel responsible for anything that goes out under the DOJ name.

V. ADJOURN BRIEFING

CHAIRMAN CASTRO: Well, this brings us to the end of today's program. I want to thank, obviously, both of you, as well as all the panelists who were here today. This was an extremely informative briefing, and we're looking forward to beginning to work on the report on this.

But, also, I just want to thank all my fellow Commissioners for their engagement today. Again, special thanks to Commissioner Yaki for his leadership on moving this forward. And, I want to give special thanks to our staff once again, Margaret Butler in the Office of Civil Rights Evaluation and her team who are responsible for this briefing today, and the materials. She did a wonderful job, as always, and we appreciate her effort. And, I also want to thank Yasmin Elhady from our Office of General Counsel who provided support, as well. And, of course, Pam Dunston who handles all of our logistics here.
I also want to let folks know that the record for this briefing will remain open for the next 30 days, and if panelists or members of the public would like to submit materials, they can do it one of two ways. They can either mail them to the U.S. Commission on Civil Rights, Office of Civil Rights Evaluation, 1331 Pennsylvania Avenue, N.W., Suite 1150, Washington, D.C. 20425, or you can send them via email to mbutler, M-B-U-T-L-E-R@USCCR.gov. And, that will get to us faster that way, because I think there's some kind of screening of our mail, so we don't always get it as quickly as we'd like to. So, thank you everyone. This briefing is adjourned.

(Whereupon, the proceedings went off the record at 1:28 p.m.)