

## 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*

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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 RATCLIFFE, Chief, BFD

## COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTON  
ALEC DEULL  
JOHN MARTIN  
CARISSA MULDER  
ALISON SOMIN  
MARLENE SALLO

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

(9:34 a.m.)

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 9<sup>th</sup>, 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

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1 that have affected in a detrimental fashion many  
2 Americans. Americans who are Muslim, Americans who are  
3 of Arab descent, other people who are mistaken for  
4 those communities whether they are Sikhs, whether they  
5 are South Asians, whether they are Latinos, and we  
6 also know that those communities that we're going to  
7 examine today are very, very diverse in and of  
8 themselves.

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

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

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1 discrimination, violence, and other forms of Un-  
2 American activities.

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

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

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

22 Our second panel is going to consist of  
23 scholars who have studied topics of community  
24 outreach, federal program planning, and techniques to  
25 measure and change biases that affect the Arab and

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1 Muslim American communities.

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

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

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

25 When that light turns red, that means

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1 stop, you have to conclude your statements. And be  
2 rest assured that even though you may not have  
3 finished your statement, you'll have an opportunity to  
4 engage with us in the Question and Answer to continue  
5 to fulfill the thought that you might have been mid-  
6 sentence on.

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

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

19 COMMISSIONER YAKI: Hello.

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

22 COMMISSIONER YAKI: Yes, thank you very  
23 much. And, again, thank you for your kind words. This  
24 is a briefing that I've been asking for and working on  
25 for I would say probably about five or six years,

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1 almost since I was first appointed to the Commission.  
2 And thank you for your leadership in bringing this to  
3 the finish line, Mr. Chairman.

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

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

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

19 This has always resonated in me very  
20 deeply, and while we're talking today about whether  
21 the federal government infringes on the civil rights  
22 of Arab and Muslim Americans. In some ways that's a  
23 little misleading, because part of what I hope to  
24 focus on is also what the federal government has been  
25 doing, and I think has been detrimental to these

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1 communities. I'm speaking specifically about a lot of  
2 the so-called targeted covert programs involving  
3 surveillance, informants, what have you in a lot of  
4 Mosques and other centers in this country activated by  
5 the FBI, the CIA, and other federal groups.

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

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

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

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1 listening to what we hear today.

2 CHAIRMAN CASTRO: Thank you, Commissioner  
3 Yaki.

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

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

22 (PANEL 1 SWORN.)

23 CHAIRMAN CASTRO: Okay, thank you. Please  
24 proceed.

25 **II. PANEL 1**

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**ARAB AND MUSLIM AMERICAN CIVIL****RIGHTS ORGANIZATIONS**

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

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1 in our Vision Statement. American Muslims must  
2 champion pluralism and condemn all forms of  
3 intolerance. We must be ambassadors who recognize and  
4 celebrate diversity, work to actively participate in  
5 the domestic process and embrace civic engagement.

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

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

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

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1 Muslims, who might not be.

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

11 The essentializing of Muslim also extend  
12 to relate to ethnic outreach, consider the title of  
13 the briefing here, why is a qualifier of Arabs only  
14 used when they are only 18 percent of the American  
15 Muslim community. We are 25 percent African American,  
16 15 percent South Asian and so on, including a large  
17 population of Persian, Bosnian, Turks, West African  
18 and beyond. Yet, engaging the Muslim community as all  
19 to associate it with outreach to Arabs.

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

25 Let me suggest several concrete steps to

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1 develop inclusive engagement with many segments of the  
2 American Muslim community. U.S. Government policy must  
3 be driven by common narrative shared by all agencies  
4 that recognize the enormous diversity of the American  
5 Muslim community. This policy should emphasize that  
6 Muslims come from many backgrounds and have many  
7 different kinds of religious practices, including  
8 people who are not religious at all.

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

19           The development of sensitive training  
20 materials for U.S. agencies should be done in  
21 consultation with a broad range of American Muslims.  
22 It's not enough to allow one or two token Muslim to be  
23 consulted in the development of training materials. An  
24 integrated team with various Muslim viewpoints must be  
25 engaged and materials produced should underline and

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1 celebrate Muslim diversity. U.S. Government agencies  
2 should prioritize recruiting Muslim Americans  
3 including a broad range of American Muslims.

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

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

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

25 I am glad that through our --

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1 CHAIRMAN CASTRO: Thank you. I'm sorry, but  
2 we're going to have to wrap up.

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

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

16 CHAIRMAN CASTRO: Thank you. Mr. Zogby.

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

19 CHAIRMAN CASTRO: Yes.

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

22 CHAIRMAN CASTRO: I did.

23 MR. ZOGBY: Commissioner Yaki actually said  
24 what -- much of the concerns I had expressed. I won't  
25 express them all but I just want to emphasize a few.

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1           The period preceding 9/11 was a difficult  
2           one for my community's relationship with law  
3           enforcement from discovery motions filed in lawsuits  
4           to Freedom of Information Act requests that were  
5           submitted by press agencies and also by individuals in  
6           lawsuit actions against federal agencies. We  
7           discovered a range of activities that we knew were  
8           going on at the time but the extent of them was  
9           incredibly disturbing to us; spying on Palestinian  
10          student organizations for decades with letters from  
11          FBI agents saying please, can we stop this. It's a  
12          waste of resources. And then responding back "no," the  
13          director insists it continue, et cetera. Activities of  
14          FBI cooperating with other organizations on the west  
15          coast to maintain enormous files of Arab Americans, of  
16          Arab activists, and of friends, even former  
17          Congressman Pete McKlosky got swept up in this with  
18          big files on statements he'd made and activities he'd  
19          undertaken.

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

24                 At the same time that this was going on,  
25                 little was being done to defend our civil rights. I

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1 remember going at one point to the FBI with 100  
2 affidavits and saying these are affidavits from people  
3 in my community complaining about harassment by law  
4 enforcement. And I had 12 affidavits from individuals  
5 complaining of death threats, one of them from Alex  
6 Oda who was murdered a year later.

7 I said to them then, "Why do you spend so  
8 much resources harassing, and so little defending?"  
9 They had no answer then, and I believe they have no  
10 answer now.

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

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

23 With the Clinton Administration we saw  
24 some change, and rather significant change. Then  
25 Deputy Attorney General Eric Holder and Assistant

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1 Attorney General Bill Lanley began a series of  
2 meetings of outreach with my community that were very  
3 important in helping us deal with airport profiling,  
4 profiling, secret evidence issues, et cetera.

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

20 At the same time that was taking place,  
21 though, under Ralph Boyd, other activities by the  
22 Department of Justice were moving in the opposite  
23 direction. The profiling guidelines of 2003 later on  
24 expanded by General McKazian in 2008, the NSEERS  
25 program, the silly call ups of 5,000, 3,000 made no

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1 sense at all. It wasn't just that they were -- created  
2 fear in the community, they didn't contribute to  
3 anything. Nothing was learned about terrorism or about  
4 threats against our country from these activities. And  
5 they were done with a big flourish, so the danger was  
6 that it not only created fear in my community, but  
7 they created suspicion about the community  
8 contributing to the atmosphere that ultimately leads  
9 to hate crimes.

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

17 I just came back from a mission -- a  
18 series of meetings in Michigan. The activity of  
19 Customs and Border Patrol at the border is outrageous,  
20 absolutely outrageous. I mean, people have actually  
21 stopped visiting their families in Canada. People have  
22 stopped doing their work in Canada. People have lost  
23 business contracts in Canada, because they're afraid  
24 to cross the border because of the treatment they get.  
25 It is not the American way -- I understand the border

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1 is a no man's land, but in that no man's land there  
2 ought to be rules and how we behave in treating  
3 American citizens, in particular, as they cross the  
4 border.

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

23 We also know -- I mean, the relationship  
24 we have with the FBI has been broken on several other  
25 occasions. One is the release of these training

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1 manuals. We knew about the training manuals, because I  
2 went to CNN and did a show on them. They denied that  
3 they existed. Then finally, they admit they exist and  
4 they say we're taking 800 pages out. We asked what 800  
5 pages, and they won't tell us. They won't tell us  
6 what's still in them.

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

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

24 I long argued that my community has been  
25 the weak link in the civil liberties chain. If the

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1 chain breaks with us, it breaks for everybody. We  
2 ought to be doing more to strengthen that chain, and  
3 we ought to be doing everything we can to fight  
4 against those who want to weaken it because what's at  
5 stake is not just my civil rights, but what's at stake  
6 is ultimately the civil rights of all Americans. I  
7 thank you.

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

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

16 I come here as a representative not of an  
17 Arab or Muslim organization but rather of a Jewish  
18 Civil Rights organization, the Louis D. Brandeis  
19 Center for Human Rights Under Law. The mission of the  
20 Brandeis Center is to advance the civil and human  
21 rights of the Jewish people, but also to promote  
22 justice for everyone. As a Jewish civil rights  
23 organization, we welcome the opportunity to speak out  
24 against anti-Muslim and anti-Arab discrimination, and  
25 we do agree that as Mr. Zogby suggested,

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1 discrimination against Arabs, and for that matter  
2 against Muslims is an issue of equal importance for  
3 all of us.

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

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

14 Now, last year I had the honor of  
15 testifying before this Commission although in a  
16 different location on the topic of harassment of  
17 Muslim school children and other religious minorities.  
18 In that testimony, I described in detail some of the  
19 serious harassment and bullying that many Muslim and  
20 Sikh children have faced in American schools since  
21 9/11.

22 I gave examples of horrific situations in  
23 which students reported being punched, spat at, being  
24 called F'ing terrorist, F'ing Muslim, so on and so  
25 forth.

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1           Since then, the Commission issued a  
2 report, I think an important report called "Peer to  
3 Peer Violence and Bullying: Examining the Federal  
4 Response." The Bullying report actually does  
5 effectively describe that testimony, and describe the  
6 extent of religious discrimination against religious  
7 minorities in American schools. It also describes the  
8 significant gap in American Civil Rights Law with  
9 respect to religious minorities in schools, which is  
10 to say the Commission has acknowledged that there is  
11 an unusual lacuna, an unusual gap by which federal  
12 civil rights law, at least in its statutory form, does  
13 not prohibit religious discrimination in the  
14 federally-assisted educational programs and activities  
15 as it does for students on the basis of race, color,  
16 national origin, sex, disability, and even membership  
17 in patriotic youth organizations like Little League  
18 Baseball and the Boy Scouts.

19           And, I think that the Commission actually  
20 effectively acknowledged that as a result, and I'm  
21 quoting from the report, "ED," meaning the Department  
22 of Education, "cannot protect students from the  
23 peculiar harms created by religious bigotry." Now,  
24 this is something affecting all sorts of religious  
25 minority students, but we know that for Muslims and

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1 Sikhs this has been a particular problem in recent  
2 years.

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

15 Now, I think that there were important  
16 recommendations coming out of that report, but not the  
17 particular one on prohibition of religious  
18 discrimination in schools. Commissioner Achtenberg  
19 argued I think correctly that there was enough in the  
20 record that could have credibly supported even a  
21 recommendation that Congress prohibit all religious  
22 discrimination in the public schools. And that is  
23 something that I had advocated for several years,  
24 albeit with an exception for religious institutions,  
25 which is to say a Catholic school should be able to

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1 say that priests could run the school, and that if  
2 they have to choose between Catholic and non-Catholic  
3 students for admission, they should be able to choose  
4 the Catholic. But it's easy to make that sort of  
5 exception.

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

15 So, what I've argued is that as a more  
16 moderate position, sort of a middle way position, at  
17 least we should come out and at least Congress should  
18 prohibit religious harassment in the public schools,  
19 because I can't think of any argument against that. I  
20 can't think of any argument why religious harassment  
21 should not be treated in the same way by the federal  
22 civil rights apparatus as racial harassment, or gender  
23 harassment, or disability harassment, or things of  
24 that sort. So, I would urge the Commission to at least  
25 reconsider that aspect of harassment and bullying of

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1 Muslims, Sikhs, and other religious minority students.

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

12 The one thing that I would add that's new  
13 certainly since the Commission has looked at the issue  
14 is the empirical research published this month showing  
15 just how much disadvantage Muslim litigants face when  
16 they make religious liberties claims. And, I provide  
17 some of the statistics in my written remarks based on  
18 an Iowa Law Review article that's just coming out  
19 showing that when people face discrimination on the  
20 basis of religion, they are much less likely to  
21 prevail if they're Muslims. And, if they're Muslim  
22 prisoners, they have a tiny chance as compared to non-  
23 Muslim prisoners. And, I think that that's one more  
24 reason why as we consider the balance between prison  
25 security and Homeland Security on the one hand versus

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1 the wide range of discrimination on the other, we  
2 should ask whether there are some reforms that are  
3 appropriate, and I've suggested a couple.

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

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

21 I think that's something that the  
22 Department of Justice is probably moving slowly  
23 towards. I think that there probably would be some  
24 agreement that it's needed within the Department of  
25 Justice, but they're not there yet. And, I can't think

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1 of any reason why that wouldn't be added. Thank you  
2 very much.

3 CHAIRMAN CASTRO: All right, thank you.

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

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

21 On 9/11 when America was attacked, there  
22 was no differentiation by the attackers as to the  
23 color, creed, or origin of the victims. On that day  
24 inside of those towers, in the Pentagon, and inside of  
25 the planes, there were Christians, Jews, Muslims, and

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1 Americans of various other faiths. Our nation was  
2 attacked as a whole, and we all endured that tragedy  
3 together.

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

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

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

19 In the middle of the FBI headquarters just  
20 across the street is an outside open courtyard. On the  
21 wall is a bronze inscription, a quote by J. Edgar  
22 Hoover himself which reads, "The most effective weapon  
23 against crime is cooperation, the efforts of all law  
24 enforcement agencies with the support and  
25 understanding of the American people."

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1           This partnership which is based on trust  
2           in the opinion of our organization is key to making  
3           our society stronger, safer, and more democratic.

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

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

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

24          There is no question that when it comes to  
25          addressing some of our major civil rights and security

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1 challenges there seems to be two varying trends  
2 promoted and used by experts and law enforcement  
3 agencies to engage communities which in turn have  
4 immensely different consequences on civil rights and  
5 liberties of these communities.

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

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

19 We've also seen instances where community  
20 engagement settings by federal law enforcement  
21 agencies, including the FBI, have been used to collect  
22 information and then categorized as intelligence by  
23 federal law enforcement agencies, in Northern  
24 California especially, as reported by the American  
25 Civil Liberties Union.

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1           This trend has developed in the context of  
2 misinformation and fear that has dominated discourse  
3 around American Muslims. A 2011 report by the Center  
4 for American Progress has highlighted an industry of  
5 fear that has developed that works for marginalizing  
6 American Muslims.

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

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

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

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1 expression of students.

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

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

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

24 To President Bush's credit, when he  
25 visited a Mosque after 9/11, there was a significant

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1 drop in hate crimes reported by the Southern Poverty  
2 Law Center. We need that type of leadership from our  
3 public officials. That bully pulpit is extremely  
4 important.

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

11 Mechanisms for redress must be more robust  
12 at the federal level. DHS, DOJ, and other agencies  
13 should do more outreach at the local level to engage  
14 communities, inform them about the redress process,  
15 make sure that they have access to the redress  
16 process, and continue to engage them on those issues.  
17 Thank you so much.

18 CHAIRMAN CASTRO: Mr. Rehman.

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

24 Today I'm speaking in my capacity as  
25 President of the Muslim Bar Association of New York.

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1 We're one of the nation's most active Bar Associations  
2 for Muslim lawyers. In addition to providing  
3 traditional Bar services, we work very closely with  
4 New York mosques and community organizations on civil  
5 rights issues.

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

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

19 In September of 2001, I was attending  
20 Friday prayers at a local mosque. A few days earlier,  
21 I was in downtown New York. I was watching the World  
22 Trade Center, and I had to run for dear life when the  
23 towers fell. I won't forget what I saw that day, and I  
24 did what so many Americans do when they need peace. I  
25 sought solace in prayer. But, when I emerged from the

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1 mosque, there was a man across the street who started  
2 yelling at us, cursing, saying, "Go home."

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

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

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1 that unfairly target and profile Muslim Americans.

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

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

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

22 First, whether intended or not, profiling  
23 by government officials often fuels public suspicion  
24 of American Muslims and gives license to private  
25 actors to take matters into their own hands.

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1                   Second, the fear of government  
2 surveillance sends a chilling effect throughout  
3 congregations and campuses hampering the rights of  
4 free speech and free association.

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

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

19                   On some issues, the federal government has  
20 shown commendable leadership. On others, engagement  
21 has been less effective. For example, with respect to  
22 the opposition to mosques, the Civil Rights Division  
23 of the Department of Justice deserves credit. They  
24 have defended the rights of Muslim congregations to  
25 build mosques, and they've done this by appearing in

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1 lawsuits, by filing their own federal lawsuits, and by  
2 leveraging the power of the federal government. In  
3 doing so, they have illustrated the administration's  
4 commitment to one of our most cherished rights as  
5 Americans, the right to freely worship.

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

13 So, in New York, our Bar Association and  
14 our local partners receive invitations to attend  
15 government outreach meetings. The leaders of our  
16 mosque invite the federal government to come to their  
17 congregations for events and for Ramadan meals. All of  
18 these meetings serve the positive function of building  
19 relationships between communities and government. But,  
20 when citizens see the law enforcement practices  
21 continuing, troubling law enforcement practices  
22 without change, they question the utility of such  
23 meetings. And, as my colleagues have mentioned, when  
24 they learn that the FBI in San Francisco has been  
25 taking information gained from outreach meetings and

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1 using it for investigative purposes, they become  
2 concerned about whether the same is happening in our  
3 own city.

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

13 As noted in my written testimony, there  
14 are ways that the federal government can improve civil  
15 rights engagement with the various American Muslim  
16 communities. They should continue to increase their  
17 outreach efforts, but should take measures to ensure  
18 that those efforts are not commingled with  
19 investigative work. They can take stronger steps to  
20 track and prosecute hate crimes. They can strengthen  
21 their own internal rules to ensure that agencies do  
22 not engage in ethnic and racial profiling,  
23 particularly with respect to immigration and law  
24 enforcement. And, they can put pressure on local law  
25 enforcement agencies to do the same.

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1 Working together we can make the  
2 government's civil rights engagement efforts stronger  
3 and more effective. We have all come a long way since  
4 9/11. The government has helped in situations, and the  
5 Muslim communities have been active participants in  
6 improving the situation for all Americans. There's  
7 more work to be done.

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

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

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

22 With which federal agencies do you or your  
23 communities most often interact? And the same with  
24 respect to state agencies, and local agencies. And of  
25 those agencies with which you interact, if you might

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1 be able to kind of rate them in terms of there have  
2 been several witnesses who testified about the degree  
3 of outreach that you've had, or on the other end of  
4 the spectrum, the degree of concern or trouble you  
5 face in interacting with those agencies.

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

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

23 Anecdotally, it was a good development.  
24 The problem is it's local. It does not change the tone  
25 at the top, it does not change the policies. It

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1 doesn't change the national training for these  
2 inspection officers. Local solutions are good, but  
3 they're temporary. When he moves out of his position,  
4 his phone number is no longer going to work. What we  
5 need are national solutions.

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

20 MR. TARIN: I think I'll just make two  
21 points related to that. I think post 9/11 there was an  
22 influx of engagement that happened especially with the  
23 law enforcement agencies, at the local level, the  
24 state level, and the federal level, so you had groups  
25 like that. Yes, you had local law enforcement

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1 agencies, you had DHS, and this was important, because  
2 I think that engagement is important. But, we also  
3 need to consider that that relationship between our  
4 governments and our communities cannot be securitized  
5 only. If it's a relationship only based on security,  
6 then you don't promote the positive integration and  
7 engagement, and positive civic identity of a  
8 community.

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

16 The second point is that -- going back to  
17 sort of Asim's point, is the first level of meetings  
18 are with civil rights -- so we need that. We need to  
19 talk about the redress processes. We need to talk  
20 about the issues that impact local communities,  
21 whether it's on the border, whether it's within a  
22 mosque. But when we need to also get beyond just the  
23 civil rights issues and start talking about policy  
24 issues. And, I think that's where a lot of the  
25 frustration remains in the communities. We're not

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1 having the conversations with folks at the higher  
2 levels who are able to then actually work policy  
3 changes that take place. So, I think those two are the  
4 main challenges as it relates to engaging the federal  
5 and local agencies.

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

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

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

22 I think to a large extent, Texas has been  
23 exemplary in a lot, especially with the local law  
24 enforcement agencies. California has been quite good,  
25 especially in Los Angeles. There's been a lot more

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1 conversation. The relationship is a lot more  
2 productive. But, I would say New York is one troubling  
3 place.

4 COMMISSIONER KIRSANOW: Mr. Zogby.

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

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

25 I think you mentioned sort of the problem

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

16 That shouldn't be. They should never be  
17 afraid to report a hate crime, as a woman should never  
18 be afraid to report a rape, because she's afraid of  
19 what other consequences might fall on her. So, the FBI  
20 is a problem. And, the behavior of the FBI about the  
21 stereotyping, I mean, everyone talked about  
22 stereotyping, the damage that it does, but when the  
23 FBI itself is training its people with just ridiculous  
24 stereotypes and when it gets revealed and we see what  
25 it is, and I say, you know -- when I look at an ugly

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1 building in Washington I say, "Who the hell designed  
2 that, and who approved it, who paid for it, you know,  
3 and what construction company agreed to put it up?"  
4 You know, I mean it was a village effort to make it  
5 happen.

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

23           So, the propagators of the hate are not  
24 sort of crazy people out on the street, but they're  
25 people who are getting government contracts and ready

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1 manuals, and training people in the FBI, training  
2 people at the Pentagon, training people in local law  
3 enforcement agencies around the country, so  
4 something's got to happen with that one.

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

12           The issue of Arab and Palestinian, because  
13 Palestinians are targeted by law enforcement in a very  
14 special way. And, it goes to a longer history of  
15 problem that is ethnic-based, and national-based, and  
16 political-based. So, I think that as we're considering  
17 creating his new category of Sikh discrimination,  
18 which we ought to create, and I would add Hindu  
19 discrimination which we ought to create, I would not  
20 leave out the ethnic category of Arab as a special  
21 category to separate out the Arab hate crimes from the  
22 Muslim hate crimes as a special category. One is  
23 religious-based, the other is political-based, and  
24 unfortunately sometimes they get conflated, and they  
25 do get conflated. I mean, sometimes I'd be "you

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1 Hezbollah murderer," hard for a Maronite Catholic boy  
2 who goes to Blessed Sacrament Church to be a Hezbollah  
3 murderer, but I can't account for these guys.

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

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

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

24 COMMISSIONER KLADNEY: Thank you, Mr.  
25 Chairman. I'm going to try and ask one question. Like

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1 the Chairman said at the beginning, it's very  
2 difficult for me, but three of you mentioned trust in  
3 your statements. And, Mr. Marcus in his statement  
4 mentioned a lot of numbers, basically saying that the  
5 number of reporting of anti-Muslim crimes was  
6 significantly lower than other areas. And I'm  
7 wondering whether this is because of the fear of the  
8 FBI, not to equate the '60s and '70s to the situation  
9 today, but the FBI was very active in citizen groups.

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

20 MR. MARCUS: Yes. Let me just clarify that  
21 I did not intend to convey that the number of reported  
22 incidents of hate crimes on Muslims were low. I  
23 intended to indicate that it was unacceptably high. I  
24 thought I said unacceptably high. I did indicate that  
25 for other groups it's higher. So, this was in the

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1 context of saying let's have context and perspective.  
2 But, even if there are other groups that have higher  
3 numbers, I don't think that that means in any respect  
4 that that's not an excuse to take very seriously the  
5 number of incidents of even reported hate crimes  
6 against Muslims, let alone the number of hate and bias  
7 incidents against Muslims that don't rise to the level  
8 of hate crimes.

9 MR. REHMAN: So, on the issue of  
10 statistics, I do -- we do have some figures. During  
11 the period from 2001 to 2009 according to FBI data,  
12 1,552 incidents of anti-Islamic hate crimes were  
13 reported resulting in 1,785 offenses. And we also know  
14 that that number is likely low because of the way that  
15 hate crimes data is reported.

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

22 MR. TARIN: I think you make an extremely  
23 important point. I think that there is a chilling  
24 effect. That's why I specifically mentioned the  
25 chilling effect on college campuses and in

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1 communities, that there is a chilling effect. I think  
2 when you hear that the FBI has been using very  
3 intrusive methods of surveillance and that there's  
4 been a lot of plots as well that have come through  
5 informants. So, I think the community feels that if I  
6 expose myself to federal law enforcement agencies, and  
7 I think there's a difference between local and  
8 federal. I think people feel a lot more comfortable  
9 with local law enforcement agencies in certain cities.  
10 I don't think that's the case in New York City, but I  
11 think in places like Los Angeles, and Chicago, and  
12 Houston, and Dallas, local law enforcement agencies  
13 are the first line of defense. There's a more intimate  
14 relationship, there's engagement. And, those folks  
15 have to get the job done. They politicize their work  
16 much less. And, I think that there's something to say  
17 to the fact that American Muslims are hesitant, and  
18 there's a time -- there's an incident that's reported  
19 in California of a young American Muslim, by the ACLU  
20 of a young American Muslim who had gone to the FBI,  
21 who was being intimidated by others, and then the FBI  
22 turned around and kind of was looking into him and his  
23 activities, his political activities. So, I think  
24 there is something to say to that. And, I think the  
25 numbers also back that up.

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1 MR. ZOGBY: This is a personal experience.  
2 I mentioned the death threats that I got all the way  
3 through the '70s and '80s, the office getting burned  
4 down in 1980, but in all of this, I reported the fire,  
5 obviously had to report the fire, but in all of this  
6 what I came to understand was that my reaction to it  
7 was not unlike the way I understand, or when I read  
8 about the way women react to rape; and that is, what  
9 did I do wrong? Is it me? It is my fault? Did I do  
10 anything here, did I send a false -- should I have not  
11 said this or that? Because, oftentimes, these things  
12 when they happen it's after you've been on a  
13 television, or after you've been involved in a public  
14 event and people have heard you, and they'll say you  
15 said -- many times, incidentally, when I'm on  
16 television and I get asked a question on CNN, I say to  
17 myself should I say anything to this? Should I duck  
18 the question, let it go, because if I say something am  
19 I going to bring this on me, my family, and my office?  
20 So, that does happen.

21 And I know when I've gone around the  
22 country and talked to people about it, I get the same  
23 reaction, that the oh, yes, I got that. Oh, yes. I  
24 said, "Did you report it? Oh, no, because I don't" --  
25 they think it's the price of admission. You're going

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1 to be an Arab, you're going to be involved, you're  
2 going to say things. This is going to happen to you.  
3 So, there is, simply out of a sense of fear, and  
4 sometimes a sense of guilt. And the reason why I  
5 became very intense about dealing with this was  
6 President Clinton invited me to be on a -- we had this  
7 hate crime panel, Commission, and asked me to be on  
8 it, and I spoke. And a person spoke about hate crimes  
9 against gays, and then about African Americans, and  
10 then about women. And I was listening to them and I  
11 was saying, "Wait, that's me. That happened to me,  
12 too." And at some point I was overcome with the sense  
13 of I let it go. I didn't want to admit that this was  
14 happening to me, and I was resolved then that the next  
15 time I was going to -- so right after 9/11 when  
16 Zachary Rohman called me up from Boston, didn't know  
17 who he was at the time, and said, "Rag head. You Arab,  
18 you're a rag head. All Arabs will die, and slit your  
19 throat and murder your children," kind of things, I  
20 said, "Damn it, I'm going to get to the bottom of  
21 this." And thank God the FBI stepped up and dealt with  
22 it. So, I've been reporting everything ever since  
23 then. One of the guys, State Department guy, 23-year  
24 person at the State Department, a regular series of  
25 really awful threats against me and my office, and

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1 they wouldn't fire him at the State Department. We  
2 can't do it, because he hasn't been convicted. He got  
3 convicted. The day he got convicted they finally let  
4 him go on full pension. He's out, and now he's back  
5 right in my office again all the time. And he hasn't  
6 crossed the line, just Arabs are terrorists, Arabs  
7 don't belong in America, but never -- he's never said,  
8 you know, "I'll kill you," or "You should die," or  
9 something like that. But, these are things that sort  
10 of -- I can see the reaction when his emails come to  
11 my office. He sends them to everybody. The kids in the  
12 office -- I know when Patrick sent another email  
13 because people get this sense of huh, I got it again,  
14 and they don't know what to do with it.

15 COMMISSIONER KLADNEY: The real question,  
16 though, is how if you're talking about trust, if  
17 you're talking about how the communities, that is the  
18 law enforcement communities and the Muslim communities  
19 get along in America, what's your solution? I mean,  
20 you keep talking about outreach, you keep talking, you  
21 know, extending hands, I guess, out and things like  
22 that. But when on the same point like the FBI is  
23 investigating your antagonists, they are  
24 investigating, I assume, ongoing -- they have  
25 intelligence units, and they keep investigating people

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1 in the American Muslim community, as well as my  
2 community, and the Chairman's community, and Mr.  
3 Gaziano's community. Not us, obviously, but --

4 CHAIRMAN CASTRO: We had background checks  
5 when we --

6 COMMISSIONER KLADNEY: But my question is,  
7 is how do you --

8 COMMISSIONER YAKI: Until after --

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

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

14 CHAIRMAN CASTRO: Okay.

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

18 MR. TARIN: Oversight. I think that -- I  
19 mean, when we hear in public that there are policies  
20 that are problematic, and there is no one who's held  
21 accountable. Let's take the example of the training  
22 material that everybody is talking about at the FBI,  
23 the DOJ as an institution, DHS, DOD, every single one  
24 of these agencies found material that was absolutely  
25 problematic, absolutely is horrifying to have someone

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1 look at my community and my children in that way. Not  
2 one person was held accountable, not one person was  
3 fired, not one person -- I mean, if that happened to  
4 other communities, any other community, if that had  
5 happened within the African American community, the  
6 Hispanic American community, there would have been a  
7 public price to pay for people who committed these  
8 types of very intentional oversights. So, there is no  
9 accountability, and unless there's accountability,  
10 unless there's oversight from Congress, unless there's  
11 oversight within these agencies at the higher level,  
12 and people's jobs are at stake, that will not change.

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

20 We asked Attorney General Ashcroft to do  
21 that, to help us with these folks who hate crimes to  
22 report but who were afraid to because they were -- you  
23 know, their documentation might not have been in  
24 order, et cetera. And, he said you want me to counsel  
25 law breakers? I said no, sir, I want you to protect

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1 people against law breakers. And, you have to make a  
2 judgment here. So, if people felt assured that there  
3 was this firewall either through legislation or  
4 through an Executive Order, that when you report a  
5 hate crime, the unit you report it to cannot conduct  
6 an investigation about you and other issues involving  
7 you. Their job is to get the hate crime. It might make  
8 it easier for people to do the reporting.

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

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

16 COMMISSIONER YAKI: No, I'll wait.

17 COMMISSIONER GAZIANO: Okay. I wanted to  
18 thank all of you for your testimony, and it's  
19 particularly helpful to hear where some of the  
20 problems are, and also to confirm where some of the  
21 encouraging signs are. I'm encouraged, for example,  
22 the Civil Rights Division does enter into the suits  
23 defending stings of mosques. I'm curious to learn more  
24 and disappointed that other claims seem to not to  
25 succeed as much based on who brings them. But, I

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1 wanted to follow-up on one particular suggestion that  
2 Mr. Marcus made, and I tend to agree it might, which  
3 is to prohibit harassment under Title 6 based on  
4 religion, that it might lessen the complication of  
5 creating the exception, as opposed to prohibiting  
6 broader discrimination.

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

16 If a Catholic school is teaching that the  
17 Catholic Catechism is the one true catechism and the  
18 one true faith, and a non-Catholic student is  
19 permitted to bring a harassment claim because it's  
20 taught quite emphatically in the Catholic school, and  
21 I say this because I went to 12 years of Catholic  
22 school, quite emphatically that there's only one true  
23 catechism, do you see that as a way around that? But  
24 I should say I want to thank you for making your  
25 suggestion because maybe it would make it a little bit

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1 easier to get religion into -- prohibition against  
2 religion into Title 6, possibly into other areas.

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

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

22 Now, you raise an example that's a little  
23 bit different than what I've gone through, so I don't  
24 know exactly how I would address that. But I would say  
25 that if we are to get a final answer on the question

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1 of what is harassment under Civil Rights law, the best  
2 context for answering that is not necessarily in the  
3 religion context. It should be defined across the  
4 board, and it should be defined consistently.

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

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

17 So, I'd like you to think about and then  
18 give me a quick rating after I ask my second question,  
19 but I want you to think about it first, which is why  
20 we have representatives of the Department of Justice  
21 and Department of Homeland Security who will be  
22 testifying later in this hearing, I'd like for you  
23 to, sir, on a scale of one to ten, ten being a lot of  
24 -- ten being full trust, zero being no trust at all,  
25 how you would describe to them your communities or the

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1 people you represent and how these members of the  
2 federal government who are here to sort of help work  
3 with your communities on bias affecting their  
4 community. So, I'd like you to think about that for a  
5 second and then just give your numerical rating after  
6 I ask this question, which is more toward, I think,  
7 Mr. Zogby and to the member of the New York Bar, the  
8 Muslim Bar; which is, the one agency that hasn't come  
9 out much in our discussions today, and if others want  
10 to chip in, please do, and that's the CIA. And, the  
11 fact that -- and there's been a lot of media reports  
12 about the fact that CIA officers have been advising  
13 local law enforcement on the domestic surveillance  
14 information. If you can tell me what you know about  
15 it, what you've heard, and the propriety of it, I'd  
16 appreciate your thoughts on that. And then after that,  
17 if each of you could give your, you know, five, six,  
18 seven rating in terms of trust with the people who  
19 will be testifying later, I'd like to hear that, but  
20 first about the CIA. MR. ZOGBY: All we know about  
21 the CIA involvement is what we read in the Associated  
22 Press accounts which have been rather extensive, and  
23 is obviously very disturbing. And, the fine line of  
24 having an agent on leave working with the Department  
25 and then later on assuming a role with the Department,

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1 and then being replaced by or complemented by another  
2 CIA agent coming to set up this domestic surveillance  
3 program seems to me to be well beyond the scope of  
4 what the Central Intelligence Agency ought to be  
5 doing. I mean, New York City cannot be a law unto  
6 itself, and yet it is functioning as a law unto  
7 itself, and with the support of the administration.

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

16 MR. REHMAN: Sure, I'll start. And,  
17 Commissioner Yaki, this is Asim Rehman from the Muslim  
18 Bar Association. I'll echo what Mr. Zogby said, and  
19 also add that beyond the fact that we don't know more  
20 than what's in the press, it kind of underscores the  
21 fact that there's a lot of public confusion of where  
22 do you draw the line between federal and local  
23 enforcement. And that also makes it more confusing to  
24 Commissioner Kladney's question of how do you solve  
25 the problem?

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1           Even if you build local relationships,  
2 what if there is commingling between federal  
3 government and local law enforcement? What about all  
4 the fusion centers? If you took the CIA out of the  
5 question, it has a lot of cache to it, it would still  
6 be all this sense of well, I don't understand. Am I  
7 dealing with the NYPD or am I dealing with the FBI, or  
8 am I dealing when I talk to the cops about immigration  
9 issues? The lack of clarity, and the lack of  
10 transparency between federal and local law enforcement  
11 creates a lot of confusion that leads to that  
12 breakdown in trust.

13           As for rating, it's a very difficult  
14 question. And, I apologize I can't be more clear, but  
15 my view is you need to parse out the enforcement side  
16 and the rights-based side. So, within DHS you have the  
17 enforcement side including immigration enforcement,  
18 and then you have the rights-based side like CRCL.  
19 Within DHS, Customs and Border Patrol is getting  
20 better, but I'd put them below a five. I'd put them  
21 maybe three or a four. CRCL has been making a lot of  
22 strides in outreach, so I'd put them above the five.  
23 I'd give them a six or a seven. Within the Department  
24 of Justice, again you've got the enforcement side and  
25 the rights-based side. On the enforcement side, the

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1 FBI and related agencies are trying, but they're not  
2 there yet. They still have all these troubling  
3 policies that they won't stand away from, so it's  
4 closer to a three. And on the civil rights side,  
5 making a lot of important strides in standing up for  
6 the community, it's closer to a seven or an eight.  
7 Again, those opinions are my own and they're off the  
8 cuff.

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

21 MR. ZOGBY: I'm going to echo Haris and  
22 Asim on the way they've parsed it out. The only  
23 concern we have is why the overall Department can't  
24 crack the whip on these agencies that are under --  
25 supposedly under their control. I mean, the FBI

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1 operates without anyone being able to -- stands  
2 powerless in the face of this training manual scandal.  
3 It's just beyond me.

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

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

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

24 COMMISSIONER YAKI: Jim, sorry I couldn't  
25 be there.

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1 CHAIRMAN CASTRO: Okay. If we can get the  
2 second panel. Thank you, appreciate it.

3 (Whereupon, the proceedings went off the  
4 record at 11:03 a.m., and went back on the record at  
5 11:09 a.m.)

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

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

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

24 Now I'll ask you all to affirm and swear  
25 that the information you are about to provide us is

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1 true and accurate to the best of your knowledge and  
2 belief. Is that correct?

3 (PANEL 2 SWORN.)

4 CHAIRMAN CASTRO: Thank you. Please  
5 proceed.

6 **III. PANEL II:**

7 **ACADEMIC SCHOLAR PANEL**

8 DR. KLAUSEN: How do I get a green light?  
9 Oh, thank you for inviting me here to speak today.  
10 It's my first time, and it's an honor.

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

19 In 2009, I'd like the first slide to come  
20 up. In 2009, Yale University removed several  
21 illustrations from a book I had written about the  
22 global controversy sparked by the publication in a  
23 Danish newspaper of 12 cartoons featuring Mohammad.  
24 The press had originally agreed to publish these  
25 illustrations because of their value for my argument,

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1 but removed them on the grounds that the images would  
2 be considered offensive to Muslims, and lead to  
3 violence, including attacks on Yale and other American  
4 institutions.

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

18 The immediate injury from the censorship  
19 was to my readers who were deprived of access to  
20 important information, but more broadly, Yale's  
21 decision set precedent for regarding such pictures as  
22 dangerous and unpublishable. The charter of the  
23 University states that causing offense, and I quote,  
24 "shock, hurt, and anger are not sufficient grounds for  
25 compromising the free access to information." So, the

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1 University was therefore compelled to defend the  
2 decision to censor my book on the grounds that they  
3 would cause violence. And to justify its decision,  
4 Yale assembled an advisory panel of diplomats,  
5 academics and British as well as American counter-  
6 terrorism officials, and developed a 15-page  
7 memorandum explaining how dangerous to national  
8 security and to the University's interest the  
9 publication of these illustrations would be.

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

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

23 Now, today art collections, college  
24 administrators widely believe that you cannot show  
25 such pictures without causing violence, because you

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1 offend Muslims. As a result of this preemptive  
2 removal, Muslims and non-Muslim students and readers  
3 are deprived of the opportunity to become acquainted  
4 with an important aspect of the history that depicts  
5 Mohammad, and a prejudice about Muslim's closed  
6 mindedness are reaffirmed. And the U.S. government and  
7 federal-funded institutions are indirectly enforcing a  
8 blasphemy rule and taking sides in a disagreement  
9 among Muslims about the role of scripture in secular  
10 life.

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

22 Now, there has been no evidence whatsoever  
23 that actually anybody was ready to act upon Zachary  
24 Chesser's suggestion. Nonetheless, all of the -- both  
25 of these cases, the censorship of my book, as well as

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1 the case of Chesser, and what later happened to Molly  
2 Norris a cartoonist who had proposed the creation of a  
3 Facebook event called Draw Mohammed Day. She was told  
4 to disappear and cease to exist as a public person on  
5 the recommendation of the FBI.

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

14 One is that starting debate in order to  
15 evade a knowable or even perceived threat is simply  
16 insufficient grounds for censorship. We saw the  
17 Washington, D.C., Transit Authority's citing of risk  
18 from angry Muslims as the reason for censoring an ad  
19 paid for by Pamela Geller from Stop the Islamization  
20 of America on the grounds that it would be a risk to  
21 public safety. I think such justifications stereotype  
22 Muslims and rebound very negatively on American  
23 Muslims, and help create a White Supremacist or even  
24 very anti-Muslim rhetoric about Muslims as Un-  
25 American.

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1           Secondly, when real and credible threats  
2 do exist, federal agencies should be obligated to  
3 provide specific information about the nature of the  
4 risk. And, the response should include a plan for how  
5 to restore free expression. Salman Rushdie has lived  
6 for 23 years with an active credible death threat.  
7 When his book came out, two American books stores and  
8 a community newspaper were firebombed. Rushdie's  
9 Italian and Japanese translators were killed. His  
10 Norwegian publisher was shot and wounded, and yet  
11 Viking kept the book in print. This should be the  
12 model for how we deal with intimidations and threats.

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

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

24           DR. KLAUSEN: -- specify the level of  
25 severity of the threat. The combined effect of these

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1 recommendations I would hope would be to contribute to  
2 a more realistic sense of what the actual threat is. I  
3 think it has been widely exaggerated, but also aim to  
4 protect both American Muslims against the rebound  
5 effect and preserve free expression. Thank you.

6 CHAIRMAN CASTRO: Professor Aziz.

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

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

19 Prior to joining the Legal Academy, I  
20 spent over seven years representing individuals and  
21 working with non-profit organizations that were  
22 directly and often adversely impacted by post 9/11  
23 national security laws, policies, and practices. I  
24 also had the privilege of coordinating federal  
25 engagement programs across the country as a government

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1 employee. My testimony today reflects my experiences,  
2 observations, and academic research on the important,  
3 albeit imperfect project of government engagement with  
4 Arab and Muslim communities.

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

14 Oftentimes, a limited number of  
15 individuals who are male, Arab or South Asian and over  
16 the age of 35 are repeatedly invited to government  
17 engagement meetings. As a result, discussions are  
18 constrained by the limited experiences and viewpoints  
19 of a select few purportedly representing tremendously  
20 diverse communities. So, thus, I recommend  
21 specifically that females should constitute 50 percent  
22 of the community attendees. Excuses by the government  
23 that Muslim and Arab communities do not have  
24 sufficient numbers of female leaders, or that Muslim  
25 women are hesitant to participate in public hearings

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1 are not supported by the facts, and usually represent  
2 incompetency or gender bias by those assigned to  
3 conduct engagement meetings.

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

20 I want to emphasize that the government  
21 should not entangle itself in determining who is or is  
22 not a leader within the Muslim communities, as that  
23 should be an internal organic community process.  
24 However, announcements of objective neutral criteria  
25 may produce the same bad outcome, a meeting of

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1 individuals who do not fully and accurately represent  
2 the diverse Muslim community.

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

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

18 It goes without saying that information  
19 discovered in engagement meetings that has a clear  
20 nexus to criminal activity should be acted on by law  
21 enforcement. However, that is not the nature of  
22 information of concern to Muslim Americans and Arab  
23 Americans who have a shared interest in promoting  
24 public safety. Instead, communities worry their  
25 personal information, their religious and political

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1 activities and beliefs, and their immigration status  
2 are input into national intelligence databases that  
3 are used in an adversarial process when their  
4 participation and engagement makes them a target of  
5 counter-terrorism and immigration enforcement. And, if  
6 this is indeed the case, and community engagement is a  
7 misnomer, instead the process is more accurately  
8 described as a fishing expedition into Muslim  
9 communities' lives and private affairs that has a  
10 devastating chilling effect.

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

24 These unprofessional training programs are  
25 a threat to public safety for all Americans, because

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1 misinformed officers risk making bad decisions that  
2 fail to prevent criminal activity, and they invite  
3 costly civil rights litigation arising from biased  
4 policing which we as tax payers ultimately have to pay  
5 for.

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

12 The fourth point I want to make is that  
13 government engagement efforts with Arabs and Muslims  
14 must be holistically focused on the social, economic,  
15 and political factors that affect the vitality of Arab  
16 and Muslim communities across the nation. Like all  
17 other communities in the United States, Muslim and  
18 Arab communities are largely comprised of law  
19 abiding individuals who work, study, worship, and seek  
20 a healthy and prosperous life for their families. They  
21 have the same concerns as their compatriots, economic  
22 security, public safety, high-quality education,  
23 freedom from discrimination, and access to affordable  
24 health care. The vast majority have no interaction  
25 with terrorists or terrorism, such that it is no more

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1 relevant to their lives than it is to the lives of any  
2 other American; and yet most federal engagement  
3 programs focus primarily on national security issues,  
4 thereby securitizing their relationship with Muslim  
5 communities.

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

12 Finally, government civil rights  
13 engagement programs must be subject to independent  
14 citizen and Congressional oversight to insure stated  
15 objectives are, in fact, met. Notwithstanding the best  
16 of intentions the efficacy of government engagement  
17 programs should not be left to the discretion of  
18 government employees not accountable to independent  
19 oversight mechanisms. Indeed, one is hard-pressed to  
20 find evidence of a coherent implementation plan across  
21 the government that minimizes redundancy, adheres to  
22 Presidential directives, and provides metrics for  
23 which engagement efforts can be objectively evaluated;  
24 nor is detailed budgetary information available  
25 describing how and where money is spent on engagement

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1 within each federal agency. So, as a result, the U.S.  
2 Department of Justice Civil Rights Division and the  
3 Equal Employment Opportunity Commission's notable  
4 progress on civil rights is then undermined by  
5 discoveries that the Federal Bureau of Investigation  
6 and the Immigration and Custom Enforcement is  
7 exploiting engagement in furtherance of adversarial  
8 investigative objectives.

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

16 Whatever oversight model is developed  
17 which should be a product of collaboration between  
18 communities and government, there must be transparent  
19 monetary and programmatic oversight of engagement  
20 programs. The stakes are too high, and federal  
21 resources are too limited. It is time to transition  
22 federal engagement from a set of ad hoc disjointed and  
23 opaque meetings into a transparent, coherent, and  
24 accountable system whose goals can be objectively  
25 evaluated.

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1           In closing, I acclaim this Commission for  
2 its wisdom in acknowledging the critical importance of  
3 federal civil rights engagement with America's richly  
4 diverse Arab and Muslim communities. Thank you for  
5 inviting me to share my thoughts with you today, and I  
6 look forward to your questions.

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

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

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

24           Islam, like other belief systems whether  
25 religious (Catholicism, Scientology) or secular

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1 (libertarianism, feminism, environmentalism, what have  
2 you), merits evaluation and at times criticism. And  
3 under the First Amendment that's protected even if  
4 it's intemperate or wrong headed.

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

21           And, the fact that this was perceived as  
22 symbolic expression of contempt for Islam as well as  
23 for Hamas and Hezbollah actually led to other students  
24 filing charges of hostile educational environment. The  
25 university, in defending the process of investigating

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1 the charges, talked about how the complaint was about  
2 "the desecration of Allah." And, finally, it took a  
3 federal lawsuit and an injunction by a federal judge  
4 to strike down as unconstitutional the speech code  
5 under which this happened.

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

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

22 At UC Berkeley, the student government  
23 likewise tried to limit a student newspaper's funding  
24 based on the viewpoint of a cartoon that was perceived  
25 as anti-Muslim. At San Diego State University, there

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1 was not university action, but organized action by  
2 some Muslim students who seized and destroyed several  
3 thousand copies of the student newspaper because they  
4 perceived it as containing anti-Arab and anti-Muslim  
5 sentiments.

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

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

24 Likewise, there have been government  
25 actions -- quite a few of them -- in Dearborn,

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1 Michigan, to suppress anti-Muslim speech, including  
2 attempts by Terry Jones, the anti-Muslim minister  
3 attempts to organize a demonstration outside a mosque,  
4 attempts by Christian missionaries to proselytize the  
5 Muslim by distributing leaflets and speaking at the  
6 Dearborn Arab International Festival, and the like.

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

24 In New York and D.C., transit agencies  
25 rejected an ad that read, "In any war between the

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1 civilized man and the savage, support the civilized  
2 man -- support Israel, defeat Jihad." The agencies  
3 took the view that this ad labeled Muslims as savages,  
4 which I don't think is consistent with the text of the  
5 ad: Israel is fortunately not at war with all Muslims,  
6 but only with terrorists who engage in what is  
7 colloquially understood as Jihad (though I know  
8 there's disagreement within Islam about the true  
9 meaning of the word "Jihad"). Those attacks on Israel  
10 are indeed, I think, savage, in the same sense that  
11 Secretary of State Clinton described the Libyan  
12 Consulate attackers as "a small and savage group."

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

19 Finally, in the wake of the "Innocence of  
20 Muslims" anti-Islam video, there have been proposals  
21 by several legal commentators -- including some very  
22 prominent ones -- to criminalize speech that is  
23 sufficiently hostile to Islam and that poses a risk of  
24 violent retaliation at home or abroad. Fortunately,  
25 this is just some law professor speaking -- and we

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1 know what that amounts to -- but, I think it does pose  
2 a danger to the extent that these ideas are taken up.

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

15 So, let me close. I firmly support the  
16 free speech, religious freedom, and property rights of  
17 Muslims, and I've done that many times in my writings.  
18 My concern is simply that all speakers and religious  
19 observers must be protected, whether they're Muslim or  
20 non-Muslim, or pro-Islam or anti-Islam. And, this  
21 needn't be difficult. The government should just tell  
22 Muslims, as it routinely tells Christians and other  
23 groups that are offended, "we respect you and your  
24 rights, and will defend you from violence and from  
25 government oppression, but if you find certain kinds

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1 of speech offensive, you should try to respond with  
2 speech of your own. We cannot respond by trying to  
3 suppress such speech." Thank you very much.

4 CHAIRMAN CASTRO: Professor Rascoff.

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

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

21 What I'd like to submit to you this  
22 afternoon is that this entire enterprise of the  
23 government becoming involved in the management of  
24 Islam, what I call the establishment of official Islam  
25 in the name of securing potential national security

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1 benefits is doubly fraud. It's fraud on the one hand  
2 because it poses significant strategic risk. I think  
3 that programs of this sort are at a minimum likely to  
4 be unproductive and quite possibly might well be  
5 counterproductive.

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

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

19 Okay. Quickly, there are three types of  
20 counter-radicalization that the government is  
21 currently engaged in. One takes the form of  
22 engagement. This is essentially outreach to Muslim  
23 communities, and to institutions across the country in  
24 order to make official Islam a social reality. And the  
25 precise nature of this outreach takes many different

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1 forms across many different agencies. The FBI  
2 participates in it, so does the Department of Homeland  
3 Security, so does the Department of Justice through  
4 the U.S. Attorney's offices, and so on and so forth,  
5 many organizations are engaged in this kind of  
6 outreach.

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

19           The second phenomenon, the second aspect  
20 of counter-radicalization to which I'd like to draw  
21 attention I call bureaucratic entrenchment. And, this  
22 speaks to the creation on the part of government  
23 offices whose function it is, or one of whose  
24 functions it is to go ahead and interact with Muslim  
25 communities through these countering violent extremism

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1 programs. Now, some of them are relatively new. Take  
2 for example the Special Representative to Muslim  
3 communities, which is a post that was established in  
4 the last years in the State Department, a job that  
5 ostensibly has a foreign policy emphasis, but that  
6 also carries implications for domestic counter-  
7 radicalization. And then, there are other offices, for  
8 example the Office of Civil Rights and Civil Liberties  
9 in the Department of Homeland Security that are not  
10 officially tasked with doing CVE, but that have come  
11 to embrace this role over the years, as well. So,  
12 that's, I think, part of the bureaucratic entrenchment  
13 phenomena.

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

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1 officials, and specifically national security  
2 officials in the definitional questions about what is  
3 Islam.

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

15 These are the kinds of issues that  
16 necessarily implicate enormous amounts of learning and  
17 judgment, and wisdom, and cultural intuition of the  
18 sort that in my experience national security officials  
19 do not typically possess. Even if we could imagine a  
20 counter-factual world in which expertise was there, I  
21 would submit that American officials by dint of being  
22 American officials and specifically by dint of being  
23 American national security officials are exactly the  
24 wrong people to be the flag bearers of a more kind of  
25 polite, mainstream concept of Islam. So, even if they

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1 were to get the facts right, which I don't think they  
2 will, they're necessarily going to be regarded as  
3 having a mixed motive in espousing the particular  
4 concept of Islam.

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

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

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1 tradition.

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

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

18 CHAIRMAN CASTRO: Okay, thank you.

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

22 Let me begin by emphasizing that  
23 safeguarding our civil rights in my opinion is  
24 critical not only to Muslim Americans but to all  
25 Americans; yet, we must also address this challenge

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1 with realism. We must be mindful of the inevitable  
2 conflicts between civil rights and national security,  
3 so too must we be realistic about the persistence and  
4 virtual inevitability of prejudice in a free society.  
5 Yet, in an open and dynamic society such as ours,  
6 group conflict is not necessarily the result of  
7 irrational prejudice or racisms, but more typically  
8 the product of inevitable competition for material  
9 goods, recognition, and status.

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

22 Historian, Gary Gerstle, similarly  
23 observes that while many Americans have verbally  
24 abused and physically attacked individual Arabs and  
25 Muslims since September 11, 2001, the highest public

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1 authorities have refused to condone such popular  
2 prejudice and vigilantism. President George W. Bush  
3 has made it clear in many ways that Woodrow Wilson and  
4 Franklin Roosevelt never did, that it's simply not  
5 acceptable to stigmatize an entire racial, cultural,  
6 religious group because of the small number of  
7 terrorist and enemies who reside in their ranks.

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

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

25 To be sure since 9/11 Muslim American

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1 leaders have seriously endeavored to get ordinary  
2 Muslims to engage with the broader society and its  
3 politics. Nevertheless, there remains strong counter  
4 currents that reflect decades of many of these same  
5 leaders urging their followers to avoid settling into  
6 the American mainstream.

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

13 Now, like many other immigrants to  
14 America, Muslims who began arriving here late in the  
15 1960s did not typically intend to permanently remain,  
16 but to a degree greater than among most other  
17 immigrants these newcomers were profoundly alienated  
18 from American culture and society. Not only do they  
19 regard Islam as superior to Judaism and Christianity,  
20 they also feared that their salvation was threatened  
21 by their very presence in America. This is certainly  
22 what their leaders were saying. One publication put  
23 out by the Muslims Students Association, and it was  
24 widely available at least until recently asserted,  
25 "Islam is a total system of life for man and society;

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1 hence, it is infinitely superior to any system or  
2 ideology which man can devise." They went on, "We are  
3 actually living in an environment in which our Islamic  
4 standards of purity and modesty meet with a continual  
5 threat and can easily be destroyed all together."

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

20           But then, surprisingly, Siddiqi concludes,  
21 "We do not suggest that Muslims should leave America  
22 or go back whence they came." And he reassures that  
23 his proposed course of action will not deprive you of  
24 your jobs or your professions. So, what is this  
25 leading Islamic jurist proposing? He's proposing

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1 withdrawing from non-Islamic society, and Siddiqi  
2 urges Muslims in America to establish and support  
3 mosques, to build Islamic schools and colleges, read  
4 Islamic books, and ensure an Islamic system of  
5 marriage for their youth.

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

18 In his article, Siddiqi did offer one way  
19 out of this bond which was da'wah, or which is the  
20 missionary work, conversion of non-Muslims to Islam,  
21 comparable to what Christians see. Now, Siddiqi  
22 presents a job as the only possible justification for  
23 permanent residence in America. Yet, what he and other  
24 leaders and many non-Muslim critics fail to consider  
25 is how da'wah is to be pursued by Muslims holed up in

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1 their self-protective cocoons. These two scenarios  
2 obviously don't mesh. And it's no wonder that many  
3 Muslims have shunned their advice. If Muslim  
4 immigrants haven't assimilated to the mainstream  
5 American values, many of their children have.

6 And from another perspective, though,  
7 Siddiqi's formula has succeeded. Before 9/11, many  
8 Muslims did manage to pursue these careers while  
9 remaining aloof from the mainstream of American life.  
10 In the forays into the wider society, particularly in  
11 politics that they did make, they're largely  
12 defensive, and as many Muslims will tell you before  
13 9/11 they were very much caught up in their cocoons,  
14 in their Islamic fortresses. It was 9/11 that forced  
15 them out of those cocoons.

16 Now that Muslim leaders are trying to  
17 counteract this tendency and urge their followers to  
18 join the American mainstream, we must be equally  
19 realistic about what they're trying to accomplish. We  
20 speak freely of Muslim Americans in a Muslim American  
21 community, yet this is a highly diverse community,  
22 fragmented by sectarian religious divides, ethnicity,  
23 race, language, and what we need to be mindful of is  
24 that faced with such a fragmented body, Muslim  
25 American leaders often resort to civil rights calls

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1 partly on response to the reality of post 9/11  
2 America, but partly because this is the way to unify  
3 their followers into mobilizing into the political  
4 kinds of action that they had urged them previously to  
5 try to stay out of.

6 CHAIRMAN CASTRO: Thank you.

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

21 CHAIRMAN CASTRO: Thank you.

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

24 CHAIRMAN CASTRO: Thank you. We're going to  
25 open it up for questions now. Commissioner Achtenberg,

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1 and Commissioner Kirsanow, actually, I will ask a  
2 question between the two of you.

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

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

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

21 CHAIRMAN CASTRO: The First Amendment.

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

25 I think one thing that I've seen is that

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

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

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1 speech.

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

19 But, I think that I would just leave with  
20 this one take away, I highly recommend that the  
21 Commission approaches this issue from a structuralist  
22 perspective. I really think that if you can have a  
23 structure that is solid you will have a product that  
24 is efficient and that is effective. So, by having the  
25 right representatives, by having a process that is

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1 objective, and neutral, and transparent in deciding  
2 who's going to be the representative, by having  
3 oversight, making sure the money that's spent is  
4 actually spent where it's supposed to be. I couldn't  
5 find -- I did research and I couldn't find how much  
6 money they are going to spend on all this, and how do  
7 you know if it's being wisely used?

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

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

23 2002 and 2008, the Attorney General  
24 guidelines were amended and those safeguards were  
25 removed, so those are the types of structural fixes

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1 that need to be made that will produce a system that  
2 protects rights, and also protects security.

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

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

20 PROF. VOLOKH: I can't imagine how it  
21 wouldn't be. I think if that were the issue, I think  
22 everybody would agree that of course it's  
23 constitutionally protected speech. There's a  
24 longstanding decision from the court about the right  
25 to burn the flag that can't be punished. And, there

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1 are longstanding decisions from the court saying that  
2 you can't punish blasphemy and anti-religious speech.

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

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

18 PROF. VOLOKH: I'm pretty skeptical of the  
19 critics of the supposed "war on Christmas."

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

24 DR. VOLOKH: I think when people complain  
25 about the so called war on Christmas, they complain

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1 about several distinct things. One is attempts to use  
2 the Establishment Clause to bar certain Christmas-  
3 related displays from government property. That's not  
4 a free speech issue, because the government doesn't  
5 have free speech rights, as such. It's an  
6 Establishment Clause issue.

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

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

24 Rather, the criticisms are an attempt to  
25 participate in the marketplace of ideas and say to

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1       retailers, "you think you are actually winning  
2       customer good will by switching to a more secularized  
3       greeting, but we want to tell you you're losing  
4       customer good will, and we're trying to start a  
5       campaign to urge other people to, in fact, deny you  
6       their good will because of what you're saying." So  
7       that aspect of it is just a private speech aimed at  
8       influencing private institution's behavior, and I  
9       think that's constitutionally protected. Whether it's  
10      wise or not, I'm not sure.

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

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

23               CHAIRMAN CASTRO: But, what if that leads  
24      to discrimination, or exclusion, or profiling? Where  
25      do you draw the line?

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1 (Off record phone conferencing.)

2 CHAIRMAN CASTRO: Commissioner Yaki, are  
3 you back?

4 COMMISSIONER YAKI: Yes. What the heck  
5 happened?

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

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

20 Likewise, the Supreme Court has many times  
21 had to deal with the question: If criticism of some  
22 ideology or some government action leads to crime,  
23 when can the criticism be restricted? And, the answer  
24 is, in extraordinarily narrow circumstances. So, if  
25 somebody were to stand in front of a mosque saying

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1 Islam is an evil religion and we should all burn down  
2 this mosque, to a mob assembled in front of a mosque,  
3 that would be an example of something that fits within  
4 the incitement exception, which covers intentional  
5 incitement of imminent illegal conduct that is likely  
6 to lead to such conduct.

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

20           CHAIRMAN CASTRO: Commissioner Kirsanow.

21           COMMISSIONER KIRSANOW: Thank you, Mr.  
22 Chairman. I want to thank all the panelists. It's been  
23 very informative. I've got two questions for Professor  
24 Volokh. First is, you cited a number of instances  
25 where there was tension between the First Amendment

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1 and an attempted proscription by a state actor of  
2 certain speech. To the extent you know, and I don't  
3 know that you researched this, do you think that there  
4 is a greater amount of such type of tension in  
5 academia or in the public square generally?

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

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

25 COMMISSIONER KIRSANOW: In at least

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1 discrimination law, we've got a standard for prima  
2 facie case with respect to McDonald-Douglas versus  
3 Greene. If an adverse action is taken on the basis of  
4 protected class, someone in the protected class, the  
5 actor can say look, I've got a legitimate non-  
6 discriminatory reason for doing this. But, if that  
7 legitimate non-discriminatory reason is nonetheless a  
8 pretext, it still could result in a finding of  
9 discrimination.

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

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

25 PROF. VOLOKH: The answer is yes. There's

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1 a case called Waite, I believe, versus United States  
2 that holds that prosecution -- and I think the same  
3 thing would be true for probation revocation -- based  
4 on First Amendment protected conduct, is  
5 unconstitutional if it's really based on the First  
6 Amendment protected conduct even though it could have  
7 been based on something else.

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

23           When it comes to other government  
24 officials, it's just a more straightforward  
25 traditional attempt to figure out what was in the

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1 person's head. So, if somebody is allegedly fired  
2 based on his speech, you can introduce evidence that  
3 this is what happened: Often there are memos floating  
4 around, emails, people willing to testify about  
5 conversations. So, in principle, it's just like any  
6 other kind of discrimination law without the  
7 *McDonnell-Douglas* framework: Even if it's okay to have  
8 taken action based on one criterion, it's not okay to  
9 take it based on another criterion, whether it's race,  
10 or sex, or religion, or political speech. But, when it  
11 comes to prosecutors, it's especially hard to get the  
12 kind of discovery necessary to prove that kind of  
13 case. And that, again, is true whether the claim is  
14 that the prosecutor discriminated against me based on  
15 my speech or based on my race, religion, or sex.

16 CHAIRMAN CASTRO: Commissioner Kladney.

17 COMMISSIONER KLADNEY: Professor Aziz and  
18 Professor Rascoff, it seems to me that you both kind  
19 of agree as to an approach concerning outreach and  
20 investigative services that they should be separate,  
21 so I'm saying should there be a wall between the two  
22 where DOJ may be outreaching on one section, and then  
23 DOJ, FBI investigating one another, and the left hand  
24 not knowing what the right hand is doing, with the  
25 left hand, that would be say DOJ outreach not trying

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1 to select who the leaders are but be all inclusive.  
2 Because, I assume that the American Muslim community  
3 is made up of just a raphe of groups that have all  
4 sorts of different thoughts and approaches to issues  
5 and problems. And, I would like you to address that  
6 because I think even with Congressional oversight,  
7 which you propose those Congress people have a whole  
8 lot of different ideas and free speech. So, I was  
9 wondering if you could address that together,  
10 individually, whatever.

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

24 I think the FBI could come a long way if  
25 it were to enact a very sharp, and clear, and

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1 inviolate boundary between these two parts of its  
2 mission in order to allow the people who are being  
3 talked to in an informal engagement environment to  
4 have the confidence that this isn't some form or kind  
5 of surreptitious intelligence gathering. And, at the  
6 same time to be able to speak confidently in these  
7 sorts of engagement settings about the other half of  
8 the house that does inevitably do this more hard-edged  
9 work. So, I think yes, absolutely, keeping those two  
10 parts of the house separate and distinct in an  
11 ironclad way would be terrific.

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

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

23 DR. AZIZ: So, first I want to highlight  
24 that there is -- I'm doing a lot of research on these  
25 issues, and what I discovered is there is a paradox in

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1 the federal engagement effort as compared to community  
2 policing, which is the traditional model this  
3 engagement is being based on. Community policing was  
4 very -- took off in the 1990s and still exists in many  
5 cities. And, the paradox is that in the traditional  
6 community policing models, the members of the  
7 community go to engage with the police to protect  
8 themselves from criminals, to protect themselves from  
9 drug dealers, from violent crime from gangsters, from  
10 just dilapidated neighborhoods.

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

22 And then, they also are concerned that  
23 those acts then legitimize the private acts of bias,  
24 so there's a relationship between the two. And, I  
25 think that's where the First Amendment issues get

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1 really complicated because, in a vacuum, we like to  
2 say government officials say they're completely out of  
3 religious rhetoric and any kind of comments which I  
4 agree with in the abstract. The problem is that the  
5 public hangs on to every word that these government  
6 officials say, and there are people in the private  
7 context that are expanding that or are creating an  
8 echo chamber every time there's a bias statement said  
9 by a government official or a political candidate, and  
10 then you run into these private acts of bias. So, how  
11 do you disconnect that?

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

20 If you do that, you're going to have a  
21 significant number of grievances in the engagement  
22 context disappear because oftentimes that's the bulk  
23 of the complaint. But in terms of separating them, you  
24 know, I'm not sure if I'm comfortable saying having a  
25 complete separation, because I think that that may be

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1 -- I suspect some government officials may say well,  
2 you know, if we have that information walled, that's  
3 what got us in trouble with 9/11, and we've got to  
4 have more information sharing. So, I certainly don't  
5 want to set myself up to be someone who doesn't  
6 understand the complexities of how bureaucracy  
7 operates. But, yes, think that what has to happen is  
8 engagement efforts should not be used for  
9 surveillance, for investigations, for gathering  
10 intelligence, or for prosecutorial purposes.

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

18 DR. RASCOFF: My short answer to that is  
19 that fusion centers have not yet proved their worth.  
20 And, I'm skeptical whether they're in any danger of  
21 suddenly becoming highly useful. For one thing, you  
22 can fuse information that you don't possess. Fusion  
23 assumed a world in which the government was drowning  
24 in useful information and that the key problem was  
25 simply one of causing that information to travel to

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1 the right people in the right agencies. It turns out,  
2 I think, that the problem has a lot more complexity to  
3 it, and that the issue was really not about lots of  
4 stakeholders at the local or the state level in  
5 possession of lots of valuable information that was  
6 somehow getting jammed up in the system and not being  
7 shared.

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

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

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1 level a disappointment for national security.

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

16 They had that big special NPR about Mall  
17 of America, and how fusion centers had started to  
18 create this entire web of spies within the state and  
19 local level. And, then to add more complexity or  
20 frustration is that a lot of them are grant driven, so  
21 then you start to worry are fusion centers essentially  
22 just these money making machines that are -- let's  
23 build our fusion center, let's find something to do,  
24 because there's money out there to be made through  
25 grants. And that's fine if they are doing something

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1 that's keeping us safe, and that is not infringing on  
2 our rights, but I think we can't answer these  
3 questions without more transparency.

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

16 COMMISSIONER GAZIANO: Thank you.

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

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

21 COMMISSIONER GAZIANO: Thank you all, and I  
22 have a question for almost all of you, but I  
23 idiosyncratically will ask Professor Rascoff to  
24 elaborate on the following. I found your discussion of  
25 the difficulties of counter-radicalization at the

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1 domestic level very interesting, and I'd like you  
2 maybe to just reflect a little bit or explain to us  
3 how the United States' attempt in either foreign  
4 policy and actually military uses may -- whether you  
5 have the same concerns, and how there may be some  
6 overlapping. And, let me just throw out these three  
7 examples.

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

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

23 And then, on the battlefield, I understand  
24 we work with countries like Saudi Arabia, and these  
25 counter-radicalization center -- , I've been skeptical

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1 whether they work. I've read different reports on  
2 that. Is that at least more appropriate? I mean, by  
3 the way, we have the same competency issues, maybe  
4 not. Maybe the competency issues with regard to  
5 terrorists are different. It's worth the risk or  
6 something. What are your thoughts on this?

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

18 (Laughter.)

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

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1 it binds the U.S. Government in its relation to its  
2 citizens here within the United States.

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

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

22 At the same time, I agree with you, the  
23 boundary between foreign and domestic is also kind of  
24 permeable and complicated. It's not just Presidential  
25 rhetoric, it's cyber. So what happens when the U.S.

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1 Government is doing work in that domain? Sites can be  
2 accessed here, but they might be principally intended  
3 to be accessed elsewhere. These are the sorts of  
4 knotty questions that need to be worked out. But, I  
5 would say kind of overall such as applies overseas it  
6 doesn't bind in sort of in its full majesty the way  
7 that the Establishment Clause obviously does  
8 domestically.

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

11 COMMISSIONER YAKI: Mr. Chairman?

12 CHAIRMAN CASTRO: Yes, proceed.

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

22 DR. AZIZ: Well, I -- well, with regard to  
23 the CIA, I facially do not find that comforting at  
24 all. I think without having researched, having been an  
25 expert in intelligence law, domestic intelligence law,

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1 I think that when someone tells me the CIA is working  
2 with the NYPD, I think of Co-Intel Pro and I think of  
3 some dark days in the 1960s and '70s, and it concerns  
4 me that we are regressing back to a state of affairs  
5 that will ultimately harm a significant number of  
6 Americans, because it sets a very high precedent and  
7 puts us backwards. So, I think it warrants  
8 investigations, meaningful investigations, not just  
9 kind of rhetorical ones, but somebody needs to at  
10 least get to the bottom of whether this is even legal,  
11 and even if it is, is it good public policy, because  
12 it will spread. It's just a matter of time. We've seen  
13 it happen before. I don't know why we think it won't  
14 happen again, so I do feel very uncomfortable with  
15 that.

16 With regard to the rankings, I think the  
17 rankings should be kind of split into two. There's  
18 rankings for good effort, and then there's rankings  
19 for actually producing tangible results. And, I think  
20 that with regard to -- I must say that the two  
21 agencies I hold in the highest regard based on what  
22 I've seen them produce and the effort they put in is  
23 the Civil Rights Division of Justice and the Equal  
24 Employment Opportunity Commission. They have produced  
25 results. They litigate, they investigate civil rights

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1 grievances, and I -- the only recommendation I usually  
2 have with them is you need more lawyers, because,  
3 unfortunately, the volume isn't decreasing.

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

15 So, unfortunately, the privilege of being  
16 a professor does not in any way shield me from these  
17 types of experiences. But, as far as -- and I think  
18 CRCL which is where I used to work, you know, I would  
19 give them above a five for effort, but I have yet to  
20 see effective changes in policies particularly with  
21 regard to like the TRIP Program. I mean, as the other  
22 panelists had said in the previous panel that she has  
23 the lowest ranking for TSA. Well, that's because TRIP,  
24 the Travel Redress Inquiry Program doesn't seem to be  
25 meeting its promise. It takes too long to get redress,

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1 and it is very opaque, and the letters that  
2 complainants get are these -- just there's not enough  
3 information for people to feel that they actually did  
4 something.

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

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

21 CHAIRMAN CASTRO: Well, I want to thank  
22 this panel. You all were excellent. We appreciate your  
23 time and thank you. You're welcome to stay and hear  
24 the last panel, which I will begin to invite to come  
25 up. Thank you.

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1 (Whereupon, the proceedings went off the  
2 record at 12:30 p.m., and went back on the record at  
3 12:36 p.m.)

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

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

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

21 (PANEL 3 SWORN.)

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

24 **PANEL III - GOVERNMENT PANEL**

25 MR. TREENE: Yes, thank you, and good

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1 afternoon, Commissioner Castro, members of the  
2 Commissions. Thanks for providing the Civil Rights  
3 Division the opportunity to speak about the important  
4 issue of the engagement and enforcement of the civil  
5 rights of Muslim and Arab Americans.

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

17 Then, this all changed with the events of  
18 9/11. After 9/11 we saw a dramatic rise in hate crimes  
19 and discrimination against Muslims, Arabs and people  
20 perceived as being members of these groups such as  
21 Sikhs and South Asians. We had in the three months  
22 after 9/11, we opened 300 investigations of hate  
23 crimes against these groups. The number of cases filed  
24 with the EEOC of discrimination for Muslims doubled  
25 from 2000 to 2002.

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1           The Civil Rights Division moved very  
2 quickly to respond to these incidents, and the  
3 leadership on both engagement and enforcement came  
4 from the top. President Bush stood with Muslim  
5 Americans at the Islamic Center of Washington, D.C. a  
6 few days after the attack, declared that Muslims are  
7 Americans, they are fellow citizens and they should  
8 not face attack for what some people did on September  
9 11<sup>th</sup>. Attorney General Ashcroft made similar  
10 statements.

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

19           Now, the spike receded after several  
20 months, but the level of hate crimes remained  
21 significantly higher than what we saw prior to 9/11.  
22 The same is true with employment cases. Today,  
23 discrimination cases against Muslims are up by a  
24 factor of four from the late `90s. But our enforcement  
25 and outreach in 9/11 remains a significant part of our

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1 work. We have a sustained high level of hate crimes,  
2 employment cases as well as harassment cases of  
3 students in school. And, we've continued to have  
4 strong support from leadership.

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

10 We stepped up our engagement efforts  
11 forming a Muslim-Arab Engagement Advisory Group within  
12 the Department, and Attorney General Holder - has  
13 given speeches, has had meetings with groups, and for  
14 example just two days before the 10<sup>th</sup> anniversary of  
15 9/11, he called in an interfaith group of Catholic  
16 groups, Protestant groups, Jewish groups, a whole  
17 range of religious organizations, to talk about the  
18 increasing anti-Muslim animus that we were seeing in  
19 the lead-up to the 10<sup>th</sup> anniversary.

20 We also have had strong support from  
21 President Obama, who has again and again stressed that  
22 Islam is part of America, and I'll just read what he  
23 says. "Regardless of race, religion, or station in  
24 life all of us share common aspirations to live in  
25 peace and security, to get an education, and to work

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1 with dignity, to love our families, our community, and  
2 our God."

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

21 My position, Special Counsel, is to  
22 coordinate these issues and work with diverse groups,  
23 but we're based in Washington and there's a limit to  
24 what we can do. I can travel, Tom Perez can travel. We  
25 even have in our Litigating Sections, some attorneys

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1 who are specialists in employment law, fair housing  
2 law and they will travel and engage with communities.  
3 But, it's really critical that we leverage U.S.  
4 Attorneys offices and our resources on the ground.

5 The Community Relations Service, for  
6 example, has regional offices. They do great work with  
7 outreach and training law enforcement on cultural  
8 competence. But also the U.S. Attorneys: Attorney  
9 General Holder had the U.S. Attorneys come in, in  
10 2010, about a third of them came in to talk about  
11 Muslim and Arab engagement, and how they can do a  
12 better job. Since then, other U.S. Attorneys have come  
13 as well.

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

22 And, we continue -- these are all critical  
23 tools, because we continue to face challenges. From  
24 2009 to 2010, hate crimes against Muslims jumped 50  
25 percent. In RLUIPA -- religious land use cases --

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1 disputes involving churches, synagogues, and mosques,  
2 we have seen a sharp rise in cases against mosques.  
3 I've been doing this really since the start of the  
4 statute when it was passed in 2000, and as a Division  
5 we've opened 31 cases involving mosques in the last 11  
6 years, 21 of those have been in the last -- I'm sorry  
7 the last 12 years, 21 of those have been in the last  
8 two years, so a huge number of cases we're seeing now  
9 involving land use.

10 Engagement is also a critical part of our  
11 work here, because there's only so much that we can do  
12 if we don't know about cases. Many of our cases come  
13 to us because of community contacts, because of  
14 community outreach, cases involving harassment in  
15 schools, where maybe people don't know where to turn,  
16 or didn't think it was a big enough deal for a federal  
17 matter, but they talked to us. We found a girl who'd  
18 been harassed so badly that her hair began to fall  
19 out. It was an elementary school girl and her -- she  
20 couldn't sleep. Well, we investigated it. We came to  
21 an agreement with -- it was an out of court settlement  
22 with the school board. Even just supplying  
23 information, sometimes -- I know I'm running out of  
24 time, I'll just finish with this thought, that we  
25 don't even need to bring a case. Sometimes by giving

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1 folks materials on civil rights in their languages, we  
2 do it in 17 different languages, by educating them so  
3 they can tell the community about their rights,  
4 they'll download information from our website that  
5 they can use to take care of problems before they even  
6 rise to the level of the DOJ needing to get involved.  
7 And, that's why engagement with communities, with all  
8 communities and the statutes we enforce is a critical  
9 part of our enforcement efforts. Thank you.

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

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

25 I joined DHS in 2006, shortly after the

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

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

25 In the early days of our efforts, most of

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

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

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

22 So, as you see, the Department reaches a  
23 broad range of people on a number of issues. We  
24 learned from affected communities about their concerns  
25 and their ideas for solutions. CRCL has, for example,

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1 coordinated meetings with religious leaders to hear  
2 their concerns about modesty prescriptions in airport  
3 screening, with communities of recent immigrants to  
4 discuss language access issues, and with disability  
5 groups to discuss accessibility issues at ports of  
6 entry. I could describe countless examples of our  
7 effectiveness resulting from our engagement, and many  
8 of these are actually published in our annual reports  
9 to Congress.

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

23 Now, to address the specific concern  
24 described in the Commission Concept Paper, and also  
25 alluded to especially in our most recent panel that

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1 you heard before this one, allow me to describe how  
2 our work relates to efforts to counter violent  
3 extremism.

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

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

24 In fact, we're hosting a conference next  
25 week in Nashville, a two-day conference with privacy

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1 and civil liberties officers from all of the fusion  
2 centers around the country, and that conference will  
3 include training on cultural competency.

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

19 The first objective of the SIP is to  
20 enhance federal engagement with and support to local  
21 communities that may be targeted by violent  
22 extremists. There are two other objectives involving  
23 building government CVE expertise and countering  
24 violent extremism narratives that you can find details  
25 about in the actual SIP and National Strategy.

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1           For our part at CRCL in implementing the  
2 first objective, CRCL represents DHS in co-chairing  
3 the National Task Force on CVE Engagement. The Task  
4 Force attempts to fulfill the first objective of the  
5 SIP by helping to coordinate federal community  
6 engagement efforts at the national level.

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

17           Now, though the SIP and CRCL's efforts to  
18 support it could be perceived to directly tie the work  
19 of the Civil Rights office to a security mission, our  
20 engagement activities remain overwhelmingly focused on  
21 promoting civil rights for all people affected by the  
22 Department and its partners. As noted in the SIP,  
23 violent extremist narratives espouse a rigid division  
24 between us and them that argues for exclusion from the  
25 broader society and a hostile relationship with

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1 government and other communities. Anwar al-Alawki, who  
2 many of you are familiar with, argued this in his  
3 recruitment videos. It's well document that --

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

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

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

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

21 CHAIRMAN CASTRO: Commissioner Kladney, and  
22 then Commissioner Achtenberg.

23 COMMISSIONER KLADNEY: I'd like to thank  
24 you gentlemen for coming today. I think you both  
25 represent some great agencies that are obviously like

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1 everyone else here today, wants you to protect America  
2 and protect everyone's civil rights.

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

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

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

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

19 COMMISSIONER KLADNEY: Thank you,  
20 Commissioner Gaziano.

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

22 COMMISSIONER KLADNEY: Why don't you lead  
23 because he got the thumbs up.

24 MR. GERSTEN: Well, that's right. And, I  
25 was here for the whole -- we had some thumbs up, as

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1 well, I must say. And, I think there are a number of  
2 things I will take back. I did take extensive notes. I  
3 felt that it was very important to be here and hear  
4 especially from those who have viewed our engagement  
5 from the outside, but also in particular, Professor  
6 Sahar Aziz has a very unique perspective having been  
7 on the inside, worked as a -- with an NGO, worked on  
8 the inside helping to conduct engagement, and now  
9 studying just how engagement works. I think she  
10 offered some very interesting points.

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

19 We certainly understand that no program is  
20 perfect, and we certainly understand that there are  
21 programs that need a great deal of work. I was  
22 particularly interested in hearing about the concerns  
23 about the TRIP program, that's the Traveler Redress  
24 Inquiry Program. I was very involved in the formation  
25 of TRIP. One of my first assignments when I came to

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1 DHS was to organize the working group that led to the  
2 creation of that program. And, we do hear very mixed  
3 messages about that program. We hear that overall it  
4 has certainly reduced the number of people who are  
5 misidentified and mismatched against traveler  
6 databases, but that the hard cases that remain, those  
7 cases that may involve people who do have derogatory  
8 information are not necessarily going to be solved by  
9 a redress program. They may have to be solved through  
10 the affordance of better due process to examine the  
11 derogatory information itself.

12 I'll also say that I must take back from  
13 Professor Rascoff's testimony and some of his writings  
14 a very interesting concern about the relationship  
15 between CVE and civil rights-based engagement. I would  
16 say that in his paper, he notes that should the  
17 community itself enter into an effort to combat  
18 violent extremism that may be emanating from that  
19 community, there is certainly no problem. I don't know  
20 if he says certainly, but he seems to suggest that  
21 there is not as much of a concern for that  
22 relationship. And, we have started to see that. In  
23 Minneapolis, and in Columbus, the Somali community in  
24 particular has hosted its own conferences on CVE and  
25 invited us to attend. It would be actually

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1 irresponsible, I think, for us not to be there to  
2 describe Department of Homeland Security procedures  
3 and help them to solve that.

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

19 You know, it's important to engage within  
20 Washington, don't get me wrong, but it's very  
21 important to go outside the Beltway. And that's why  
22 we've evolved down to the U.S. Attorneys who are  
23 developing relationships in their districts. Someone  
24 may not be part of a national civil rights group for  
25 Muslims, but they are involved in their community, and

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1 how do we reach them and hear what they have to say?  
2 So, that's been a very important part of our effort.  
3 It's something we can certainly do more of and do  
4 better, but it's -- and we're very much aware of it,  
5 and something we are working to implement.

6 Jim Zogby's points about training are very  
7 apt. It's hard to do engagement and then have  
8 something come out where people are saying, you know,  
9 gross generalizations and falsehoods about the group.  
10 It muddies the water. It's one of those things where  
11 20 good things are erased by one stupid thing that  
12 somebody does out in the field. You know, with  
13 training, and this has come out in th media and the  
14 FBI, of course, has removed the problematic training  
15 materials. But, we certainly recognize how damaging  
16 this is to engagement efforts. And, we continue to  
17 work within the Department.

18 I mentioned the Attorney General's Arab-  
19 Muslim Advisory Group. Spun off from that group is a  
20 training working group that I chair in the Civil  
21 Rights Division, and each component has done a review  
22 of their internal materials to make sure that they are  
23 accurate, and that they do not contain gratuitous  
24 offensiveness. I don't say offensiveness because  
25 materials might offend that are true, and sometimes

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1 things need to be taught to people, but there's  
2 certainly no reason for the kind of gratuitous offense  
3 that we've seen in certain instances. So, we're  
4 working with that. We developed guiding principles on  
5 training that the Deputy Attorney General issued that  
6 set forth how the things to be taken in consideration  
7 in setting up training. So, we continue to work on  
8 that because we recognize how high the stakes are with  
9 regard to training.

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

13 MR. TREENE: I'm sorry, the United States  
14 Attorneys.

15 COMMISSIONER KLADNEY: The U.S. --

16 MR. TREENE: The federal U.S. Attorney.

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

21 MR. TREENE: Yes, through two mechanisms.  
22 There's the Executive Office of U.S. Attorneys, an  
23 office in Justice that coordinates the work of the  
24 U.S. Attorneys offices, and they have people tasked  
25 who I work with on a regular basis who are

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1 responsible, for tracking what they are you doing as  
2 far as engagement, and report back to our Arab-Muslim  
3 Engagement Advisory Group. So, they are tied in that  
4 way. They're also tied in through the AGAC, the  
5 Attorney Generals Advisory Council, which is composed  
6 of U.S. Attorneys who are chosen and chair different  
7 groups, like Steve Dettelbach from Cleveland chairs  
8 the Civil Rights Group. He's very active in engagement  
9 and encouraging engagement. Barbara McQuaid is also  
10 involved in that out of the Eastern District of  
11 Michigan, and is also very involved. They have regular  
12 meetings with U.S. Attorneys where they come together,  
13 they talk about a host of issues, and this is one of  
14 the issues that they address.

15 COMMISSIONER KLADNEY: But in the  
16 community, as well. I mean, they talk to the  
17 community, or they engage --

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

24 MR. GERSTEN: And, I would also add that  
25 the National Task Force proceeding engagement that I

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1 mentioned in my testimony is co-chaired. I'm one of  
2 the co-chairs. The other co-chair is with the  
3 Executive Office of U.S. Attorneys. And, the U.S.  
4 Attorneys, as Mr. Treene has mentioned, do partner  
5 with us in many of the cities that we hold roundtables  
6 in.

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

12 COMMISSIONER KLADNEY: Being included.  
13 Right?

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

25 COMMISSIONER KLADNEY: Thank you.

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1 CHAIRMAN CASTRO: Commissioner Achtenberg.

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

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

17 The other thing I wanted to commend to you  
18 was I didn't mean to trivialize Mr. Skerry's  
19 observations. They actually are quite interesting, and  
20 I thought complex and true to some extent. And, I just  
21 wanted to sort of clarify, I made a flip comment that  
22 was not flip in that it was also true that, you know,  
23 theirs is not the only group that has asserted its  
24 superiority in the face of isolation and  
25 discrimination from the majority. But, he goes on to

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1 make a number of astute observations, so I would  
2 commend to you his work, as well. I think we'll see  
3 some of his observations, I would hope, appear in our  
4 own report.

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

22 Professor Aziz said that there's -- it's  
23 extremely important that there be perhaps bright lines  
24 between the various functions so that people will have  
25 faith and confidence in them. It seems to me you had a

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1 structure already built in that has observed those  
2 bright lines for many years, and I'm wondering if that  
3 rings true to you. And, if so, if you could highlight  
4 for our benefit those attributes so that we might be  
5 able to observe how they might apply to other  
6 institutions that are not similarly structured.

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

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

24 COMMISSIONER ACHTENBERG: Yes, that's new,  
25 isn't it?

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

22 CRS is a unique institution in that they  
23 are completely without enforcement power by design.  
24 They go in, they don't take sides, they listen to  
25 communities, try to mediate conflict, bring people

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1 together. That's their specialty. I don't know how --  
2 I'm not an expert in the work they do, so how to  
3 replicate it can be tricky. But, I do know that they  
4 focus on train the trainer programs. They go out and  
5 do Muslim and Arab cultural awareness, or Sikh  
6 cultural awareness and one of their goals is train the  
7 trainer. So, they get in people from sheriff's offices  
8 and local law enforcement, all kinds of folks,  
9 community members, and in the morning they do the  
10 presentation, and in the afternoon they have another  
11 presentation which is if you want to be a trainer. So,  
12 we'll train you how to do what you just saw so you can  
13 take out and do it. So, they're trying to leverage the  
14 work that they do in that manner.

15 MR. GERSTEN: If I could also mention just  
16 a few things about our office, so you have an  
17 understanding of why we are somewhat unique. Unlike  
18 most civil rights offices that are outward facing and  
19 are essentially attempting to protect civil rights for  
20 recipient agencies, for instance at the Department of  
21 Education where I was before DHS, we're looking at  
22 universities and school districts. DHS' Office for  
23 Civil Rights and Civil Liberties is exploring whether  
24 or not rights are being respected within its own  
25 agency. And, its own agency is a very large agency,

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1 and it has an enormous amount of contact with the  
2 public on a daily basis.

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

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

24 CHAIRMAN CASTRO: I actually have a  
25 question, and then I don't know, Commissioner Yaki,

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1 you want to end with a last question. But prior to --

2 COMMISSIONER YAKI: Yes, please, I do.

3 CHAIRMAN CASTRO: Okay. Prior to the  
4 President appointing me last year to this Commission,  
5 this Commission almost 10 years ago appointed me to  
6 the Illinois State Advisory Committee to the  
7 Commission, and on my first day there, that Commission  
8 issued a report, actually May of 2003 called Arab and  
9 Muslim Civil Rights Issues in the Chicago Metropolitan  
10 Area Post September 11<sup>th</sup>. And, that's actually part of  
11 our record. And, one of the observations that the  
12 Committee, the Illinois State Advisory Committee, made  
13 almost a decade ago is -- I'm going to quote here, "It  
14 is also difficult to track changes in hate crimes  
15 directed against Arab Americans or Muslims, or against  
16 those who have come from Arab countries, because in  
17 the past, crime record keeping whether dealing with  
18 victims of hate crimes or otherwise, has not attempted  
19 to separate out Arab Americans, or Muslims, or those  
20 of Arab nationality. At least for the foreseeable  
21 future that kind of categorization and record keeping  
22 would appear to be useful in order to track changes in  
23 discrimination and in the incidents of hate crimes  
24 affecting these communities." And, I think we've heard  
25 today from earlier panels that issue remains a decade

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1 later. Are there any efforts underway within your  
2 agencies to better track and disaggregate this  
3 information, and also include other communities? We  
4 heard about the Sikh community. It would seem to me,  
5 at least on this side of the desk, that that should be  
6 relatively simple to do.

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

24 And, out of that meeting came the idea  
25 that Sikhs should be added because of the large

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1 incidents of hate crimes, through anecdotal evidence  
2 through our enforcement experience, and through  
3 surveys that the Sikh community had done of members of  
4 how often they've been victims of hate crimes.

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

20 The Civil Rights Division and the  
21 Community Relations Service who co-sponsored this  
22 meeting made a formal recommendation to the Advisory  
23 Policy Board Subcommittee on the Uniform Crime Reports  
24 October 18<sup>th</sup> and said we believe that these three  
25 groups, Sikhs, Jews, and Arab Americans should be

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1 separately tallied.

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

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

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

20 I guess I just -- I want to end with sort  
21 of a question that goes to the heart of my concern  
22 about what has happened to this country since 9/11. I  
23 want to thank both of these gentlemen for the great  
24 work and excellent work that they are doing, but you  
25 touched on something about -- that I care deeply

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1 about, which is there is a sort of fish bowl aspect to  
2 how we look at all this inside the Beltway, and were  
3 it not for the fact that we have limited funds, I  
4 wanted to have this hearing outside of Washington,  
5 D.C. for the very reasons that -- many of the reasons  
6 you discussed before, because when it comes right down  
7 to it, people think of -- people don't look at the  
8 nuances of what your program is doing at DHS, or what  
9 the other program is doing at Civil Rights. They look  
10 at us as the federal government, the outside world,  
11 but the communities that are affected, the average  
12 American just sees it's the federal government doing  
13 this. And, in some ways, it's overbroad, and sometimes  
14 the Congress really has their finger on something.  
15 And, it comes down to this question.

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

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1 you're trying to do.

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

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

25 We are certainly not responsible to the

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1 FBI or for the FBI, or the CIA as DHS. We're a partner  
2 with those two agencies on numerous programs. And, I  
3 think that it's important, where we can, to invite FBI  
4 to the table and bring them out into the field. And,  
5 they join us at our roundtables and answer questions  
6 directly.

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

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

25 COMMISSIONER YAKI: Well, what -- then how

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1 -- sorry to interrupt, but how then did those New York  
2 Police Department training materials slip by  
3 everybody, I guess? That's certainly one of the stark  
4 glaring examples out there where the training  
5 materials and NYPD surveillance manuals that have been  
6 outed and in public, how do --

7 MR. GERSTEN: Well, I -- sorry.

8 COMMISSIONER YAKI: No, go ahead.

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

16 COMMISSIONER YAKI: No, but what --  
17 apparently -- I understand, but apparently that  
18 training -- I mean, this is my frustration and part of  
19 your frustration, as well, which is part of that  
20 training as I understand from those manuals came from  
21 the FBI. And, that's what I'm trying -- I'm not saying  
22 -- you can't possibly deal with what some guy with a  
23 Xerox machine in the NYPD department may or may not  
24 do, but if there are federal officials going --  
25 advising them and helping them put these things

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1 together, you know, isn't there some kind of check or  
2 anything that you or your division can do to say why  
3 would you be saying these kind of things? Why would  
4 you allow these kinds of materials to come out? I  
5 mean, is this basically a Secretary-level decision, or  
6 AG-level decision that has to be dealt with, or is it  
7 something that interagency working groups could deal  
8 with at some level?

9 MR. TREENE: Yes. This is Eric Treene here.  
10 It's important to remember that we are one division,  
11 one department at the Department of Justice. The FBI  
12 has a very strong brand and has its own building, but  
13 it is part of Department of Justice, and the Attorney  
14 General, and the Deputy Attorney General are  
15 ultimately in charge of and responsible for what the  
16 FBI does. And they have been -- FBI has been very much  
17 a part of our Arab-Muslim Engagement Working Group.  
18 They are very much a part of our review of training  
19 and training principles and putting together the  
20 document that sets forth what are the principles that  
21 must be in all DOJ-funded or conducted trainings, the  
22 basic principles. And, that is binding on them. So,  
23 yes, they are very much -- you know, we're involved in  
24 these discussions with them, and they are also a big  
25 contributor to the discussions. They've had a lot of

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1 experience fixing the problems that they found with  
2 training in a comprehensive review, and implemented  
3 measures to prevent this from happening again in the  
4 future. But, certainly, we are one department and we  
5 are -- we all feel responsible for anything that goes  
6 out under the DOJ name.

7 **V. ADJOURN BRIEFING**

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

14 But, also, I just want to thank all my  
15 fellow Commissioners for their engagement today.  
16 Again, special thanks to Commissioner Yaki for his  
17 leadership on moving this forward. And, I want to give  
18 special thanks to our staff once again, Margaret  
19 Butler in the Office of Civil Rights Evaluation and  
20 her team who are responsible for this briefing today,  
21 and the materials. She did a wonderful job, as always,  
22 and we appreciate her effort. And, I also want to  
23 thank Yasmin Elhady from our Office of General Counsel  
24 who provided support, as well. And, of course, Pam  
25 Dunston who handles all of our logistics here.

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1 I also want to let folks know that the  
2 record for this briefing will remain open for the next  
3 30 days, and if panelists or members of the public  
4 would like to submit materials, they can do it one of  
5 two ways. They can either mail them to the U.S.  
6 Commission on Civil Rights, Office of Civil Rights  
7 Evaluation, 1331 Pennsylvania Avenue, N.W., Suite  
8 1150, Washington, D.C. 20425, or you can send them via  
9 email to mbutler, M-B-U-T-L-E-R@USSCR.gov. And, that  
10 will get to us faster that way, because I think  
11 there's some kind of screening of our mail, so we  
12 don't always get it as quickly as we'd like to. So,  
13 thank you everyone. This briefing is adjourned.

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

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