

U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING
DOMESTIC WIRETAPPING IN THE WAR ON TERROR

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Friday, March 9, 2007

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The Commission convened in Room 540 at 624 Ninth Street, Northwest, Washington, D.C. at 1:00 p.m., Ashley L. Taylor, Jr., Acting Chairman, presiding.

PRESENT:

ASHLEY L. TAYLOR, JR., Acting Chairman

JENNIFER C. BRACERAS, Commissioner

PETER N. KIRSANOW, Commissioner

ARLAN D. MELENDEZ, Commissioner

MICHAEL YAKI, Commissioner

KENNETH L. MARCUS, Staff Director

STAFF PRESENT:

IMANI AFRYKA

TYRO BEATTY, Director, Human Resources Division

DAVID BLACKWOOD, General Counsel

CHRISTOPHER BYRNES, Attorney-Advisor, to the
Office of the Staff Director

DEBRA CARR, Associate Deputy Staff Director

PAMELA DUNSTON, Chief, ASCD

BARBARA FONTANA

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DEREK HORNE

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SOCK-FOON MacDOUGAL

EMMA MONROIG, Solicitor & Parliamentarian

BERNARD QUARTERMAN, JR.

MOHAMMAD SULIEMAN KHAN, Intern

MARIA O. THOMPSON, Intern

KIMBERLY TOLHURST

AUDREY WRIGHT

MICHELE YORKMAN

COMMISSIONER ASSISTANTS PRESENT:

KIMBERLY SCHULD

RICHARD SCHMECHEL

PANELISTS:

JOHN C. EASTMAN, Chapman University School of Law

GREGORY T. NOJEIM, American Civil Liberties Union

KAREEM W. SHORA, American-Arab Anti-Discrimination
Committee

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P R O C E E D I N G S

1:00 P.M.

1
2
3 COMMISSIONER TAYLOR: On behalf of the
4 Commission on Civil Rights, I wanted to welcome
5 everyone to the briefing on domestic wiretapping in
6 the War on Terror.

7 I want to start by saying that public
8 comments may be provided through what date?

9 STAFF DIRECTOR MARCUS: Thirty days from
10 today.

11 COMMISSIONER TAYLOR: Thirty days from
12 today. They can be mailed to our mailing address
13 which is Room 720, 624 Ninth Street, N.W., Washington,
14 D.C. 20425.

15 Mr. Staff Director, would you have the
16 witnesses sworn in, please?

17 STAFF DIRECTOR MARCUS: Yes, in fact, I'll
18 defer to our General Counsel who will do the swearing
19 in himself, Mr. David Blackwood.

20 (The witnesses were sworn.)

21 COMMISSIONER TAYLOR: This morning we are
22 pleased to welcome Gregory T. Nojeim, Associate
23 Director and Chief Legislative Counsel of the American
24 Civil Liberties Union, Washington Legislative Office.
25 We're also pleased to welcome Kareem W. Shora,

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1 National Executive Director of the American-Arab Anti-
2 discrimination Committee; and Dr. John Eastman, Henry
3 Salvatori Professor of Law & Community Service at
4 Chapman University School of Law and Director of the
5 Claremont Institute Center for Constitutional
6 Jurisprudence.

7 We are also supposed to have David Rivkin
8 who is a partner with Baker and Hostetler join us, but
9 unfortunately he's been called out of town on an
10 emergency and is unable to participate.

11 I want to let everyone know we have a very
12 hard break at 2:30 due to a number of travel schedules
13 and I know that there are a number of Commissioners
14 who have a lot of questions that they want to ask of
15 you all. So I'm going to ask you all if you would
16 adhere to the 10-minute rule and we have a timekeeper
17 here and we have a lighting system that I'm sure you
18 all are very accustomed to. The red light will
19 indicate exactly what you think it indicates.

20 So with that, I'm going to introduce Mr.
21 Nojeim, who as I mentioned is the Associate Director
22 and Chief Legislative Council of the American Civil
23 Liberties Union, Washington Legislative Office. And
24 he has been with the ACLU since 1995 and has been
25 responsible for analyzing the civil liberties

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1 implications of federal legislation related to
2 terrorism, national security, immigration and
3 informational privacy. He has a distinguished legal
4 career which I will not detail here, other than to say
5 that he has practiced with the firm of Kirkpatrick and
6 Lockhart. But his legal career began in the great
7 Commonwealth of Virginia where he received his juris
8 doctorate degree. Welcome.

9 MR. NOJEIM: Thank you, Commissioner
10 Taylor. Thank you other Commissioners. It's a
11 pleasure to speak to you today on behalf of the
12 American Civil Liberties Union. The ACLU is a
13 nonprofit, nonpartisan organization with 53 affiliates
14 nationwide and with over 600,000 members and
15 activists.

16 In 2002, the President signed a secret
17 order that authorized the National Security Agency to
18 monitor emails, telephone calls and other
19 communications of U.S. citizens and foreign nationals
20 without obtaining warrants. Communications monitored
21 under the program involved at least one person in the
22 United States and one person abroad. The ACLU
23 believes that the program is illegal and
24 unconstitutional and a Federal Court agrees.

25 We compliment the Commission for holding

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1 these hearings, this briefing, to shed additional
2 light on the program and on the intelligence
3 surveillance that continues today.

4 The Supreme Court has long held that the
5 conversations of Americans in the U.S. cannot be
6 seized under the Fourth Amendment, except with a
7 warrant and with Court oversight. In a case involving
8 warrantless wiretapping by the Nixon Administration in
9 the name of national security, the Supreme Court
10 stressed that Fourth Amendment freedoms cannot
11 properly be guaranteed if domestic surveillance may be
12 conducted solely within the discretion of the
13 Executive Branch.

14 In the aftermath of Watergate, the Church
15 Committee found that the NSA had unconstitutionally
16 monitored every single international telegram sent or
17 received by U.S. residents or businesses. At that
18 time, Congress determined that through the NSA's
19 warrantless surveillance programs it had created files
20 on approximately 75,000 U.S. citizens and eavesdropped
21 on journalists, Members of Congress, and other
22 governmental officials.

23 Congress found that the NSA had also
24 created a watch list of Americans who were suspected
25 of foreign influence merely because they opposed the

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1 Vietnam War. In response to the findings of the
2 Church Committee, Congress passed the Foreign
3 Intelligence Surveillance Act to provide the exclusive
4 authority for wiretapping of U.S. persons in the
5 United States to protect national security. Under
6 FISA, a federal agency is generally required to get
7 court approval in order to monitor the communications
8 of any person in the U.S. FISA provides that no one
9 may engage in electronic surveillance except as
10 authorized by statute and it specifies civil and
11 criminal penalties for electronic surveillance
12 undertaken without statutory authority. It is a
13 criminal statute.

14 By failing to follow the exclusive
15 provisions of FISA and Title III of the Criminal Code,
16 the warrantless wiretapping program violated both the
17 Fourth Amendment and the letter and spirit of federal
18 law designed to protect against crime, protect
19 national security and protect privacy and trust, all
20 at the same time.

21 The Administration claims that the
22 Authorization for the Use of Military Force that
23 Congress enacted in September of 2001 authorized the
24 warrantless NSA surveillance program. And yet, there
25 is no evidence that Congress intended to override the

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1 explicit provisions of FISA in passing the AUMF, which
2 itself does not mention wiretapping. Wiretapping was
3 not even mentioned during the debate on that
4 legislation.

5 In fact, within 40 days of the vote on the
6 AUMF, Congress enacted 25 changes to FISA at the
7 request of the Administration, but none of those
8 amendments struck the requirement that surveillance be
9 conducted subject to judicial approval. Congress also
10 made other changes to FISA in the last four years,
11 suggesting the continuing legal obligation of the
12 Administration to follow FISA regardless of the
13 authorization to use military force.

14 ACLU brought a lawsuit in Michigan to
15 challenge this program on behalf of prominent
16 journalists, scholars, attorneys and others, whose
17 work requires them to communicate by telephone and
18 email with people outside the United States. The
19 District Court ruled in our favor. It refused to
20 dismiss a challenge to the wiretapping program under
21 the states' secrets privilege and it ruled that the
22 program violates the First Amendment, the Fourth
23 Amendment and the Foreign Intelligence Surveillance
24 Act. The Judge wrote, "it was never the intent of the
25 framers to give the President such unfettered control,

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1 particularly where his actions blatantly disregard the
2 parameters clearly enumerated in the Bill of Rights."

3 That case is on appeal.

4 In January 2007, the Administration
5 announced that it had abandoned the warrantless
6 wiretapping program in favor of a new program that is
7 subject to FISA Court approval. Unfortunately, the
8 Administration still claims inherent authority in the
9 President to engage in warrantless eavesdropping and
10 nothing would stop the Administration from resuming
11 the warrantless surveillance at any time.

12 The Government used a process to secure
13 approval by the FISA Court that has created a number
14 of questions that need to be answered. For example,
15 why did it take two years -- *two years* to get the
16 approval of just one of the 15 FISA Court Judges?
17 What other Judges were approached to approve the
18 program? What kind of an innovative arrangement was
19 used to obtain the approval? And to what extent will
20 the Government release information to the public that
21 will help us understand whether the order that it
22 obtained clearly does meet the requirements of the
23 Foreign Intelligence Surveillance Act?

24 It's not yet clear whether the Government
25 is now getting individualized warrants based on

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1 individualized suspicion, or program warrants that do
2 not require individualized suspicion of wrongdoing.
3 In fact, this question has been put to Administration
4 officials by Members of Congress and has not yet been
5 answered. We believe that both FISA and the Fourth
6 Amendment require that the warrants be obtained based
7 on individual suspicion.

8 "Program warrants," which is really
9 another name for general warrants, were one of the
10 reasons Americans fought the Revolutionary War and
11 they are prohibited by the Fourth Amendment. Its very
12 purpose is to focus investigative intrusion, like
13 wiretapping, which is a search, on wrongdoers. With a
14 program warrant, agents are much more likely to
15 eavesdrop on conversations that do not involve a
16 person who is legitimately targeted for surveillance.
17 They raise the possibility of an unfocused intrusion
18 on many people, possibly affecting those who have done
19 nothing wrong and who are not agents of foreign
20 powers.

21 Furthermore, the claim that the new
22 program now complies with FISA does not pardon those
23 responsible for five years of lawless surveillance.
24 In fact, this assertion raises serious questions as to
25 why the Government would not comply with FISA in the

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1 first place.

2 ACLU believes that privacy need not be
3 sacrificed for security. For almost 30 years, the
4 Foreign Intelligence Surveillance Act has been
5 successfully protecting both. Again, FISA is a
6 criminal statute. When warrantless wiretapping
7 outside of FISA was conducted, a crime was committed.

8 One way to protect civil rights of Americans would be
9 for the Commission to insist that the Government
10 disclose the steps it is taking to minimize the damage
11 that the program has done to Americans' privacy and to
12 call for accountability for any illegal conduct.

13 The Government's lack of disclosure about
14 the warrantless surveillance program and the new
15 program has been troubling. Clearly, full oversight
16 and transparency are needed to ensure that the new
17 domestic surveillance program addresses civil rights
18 and due process concerns.

19 We commend the Commission for holding this
20 briefing as part of its oversight function and
21 statutory duty to appraise the Federal Government's
22 administration of justice. We ask that the Commission
23 conduct formal hearings into the program and that the
24 Commission recommend that Congress do the same.

25 In holding hearings, we would ask that the

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1 Commission, if necessary, use its authority to issue
2 subpoenas and interrogatories to the appropriate
3 government agencies in order to shed much needed light
4 on the Government's actions. At the conclusion of
5 this investigation, we are hopeful that the Commission
6 will recommend in any forthcoming report that Congress
7 find out how many Americans have had their privacy
8 rights violated through these surveillance programs,
9 and what has been done with the information that was
10 collected through it, and how that information is
11 being used.

12 The Commission should also recommend that
13 Congress investigate the Administration's claims that
14 the program now operates under the supervision of the
15 FISA Court and that such supervision is based on
16 individualized suspicion. By taking these steps the
17 Commission can help ensure that Americans remain both
18 safe and free.

19 Thank you very much.

20 COMMISSIONER TAYLOR: Thank you, Mr.
21 Nojeim.

22 Our next speaker is Professor Eastman.
23 Professor Eastman is associated with Chapman
24 University School of Law and has been since August of
25 1999 where he serves as the Henry Salvatori Professor

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1 of Law and Community Service, specializing in
2 Constitutional Law, Legal History, Civil Procedure and
3 Property. He also serves as the interim Associate
4 Dean of Administration. Having received his J.D. from
5 Chicago Law School and his Ph.D. in Government from
6 Claremont Graduate School. He also has a
7 distinguished legal career, was a former Supreme Court
8 Law Clerk, as I recall, as well as a former civil
9 litigator with an expertise in Federal and State Court
10 matters as well as State Attorneys General
11 investigation.

12 So welcome, sir, and we look forward to
13 hearing your comments.

14 DR. EASTMAN: Thank you, Commissioner
15 Taylor. One thing that my bio doesn't reflect any
16 more is I used to be the Director of Congressional and
17 Public Affairs for this Agency. We weren't in this
18 building at the time. We were down there on Vermont.

19 It's a pleasure to be back and see the new digs.

20 COMMISSIONER TAYLOR: I don't blame you
21 for not having it on there.

22 DR. EASTMAN: It's actually on the full
23 résumé, I'm honored to have it on there.

24 The one thing I recall though from those
25 days and I don't think the statutory authority has

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1 changed is that the Commission's mandate is not
2 broadly to look at all alleged violations of civil
3 liberties but only those that are of a particular
4 nature, that have racial, ethnic, or religious animus
5 as one of the conditions that leads to it.

6 And I assume we're going to address that
7 at some point on whether there are such jurisdictional
8 issues that would warrant a discussion by this
9 Commission. I've not seen any evidence on that score,
10 certainly not anything public, but I'm going to take
11 it as assumed for a moment that there are such things
12 that would warrant a hearing by this body and then lay
13 the groundwork for, I think, whether the President has
14 authority generically in this area which I think is a
15 precondition for assessing whether in the use of that
16 authority the President is violating particular racial
17 or ethnic or religious groups' civil rights.

18 And I think the answer to that from my
19 perspective is very clear. The President does have
20 authority here. The District Judge up in Detroit's
21 opinion notwithstanding. And when the program here
22 was first unveiled by the New York Times in December
23 of 2005, there were two important white papers that
24 were published, one by the Congressional Research
25 Service and the other by the Department of Justice

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1 itself and I would encourage you as Commissioners and
2 your staffs to review those competing documents and
3 put them side by side.

4 Try and look at it with a neutral
5 objective scholarly eye because I think if you do
6 that, you will find that the Department of Justice's
7 white paper is much better grounded in history, in
8 text, in legal precedent than the Congressional
9 Research Service report is. And I think there's a
10 good reason for that. The White House, in my view,
11 has been scrupulously trying to comply with every
12 nuance, with every precedent and yet do as much as it
13 possibly can as the President had said at the outset,
14 after 9/11, to protect this country against subsequent
15 attacks.

16 And there are two sources of authority for
17 the President's actions here. The first is the
18 authorization for the use of military force, adopted
19 by Congress after, shortly after September 11th. Now
20 Mr. Nojeim and the ACLU in the Detroit cases have
21 argued that that's not sufficient, that there was no
22 discussion during that debate that would have limited
23 the broad scope of FISA, the broad restrictions on
24 presidential authority under FISA, but that issue has
25 already been addressed by the U.S. Supreme Court and

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1 rejected in a very analogous context.

2 There was another statute applicable to
3 detention of U.S. citizens, the Anti-Detention Act and
4 the President was claiming the authority to detain
5 U.S. citizens and others in violation of that Act, or
6 outside the authority of that Act, by virtue of his
7 own inherent power and by virtue of the authorization
8 for the use of military force.

9 The Supreme Court held in the Hamdi case
10 that even though there was no reference to the Anti-
11 Detention Act and no discussion about detention in the
12 debates over the authorization or the use of military
13 force, the detaining of enemy combatants was so part
14 and parcel of the war power that had been authorized
15 by the AUMF, that the AUMF didn't need to specifically
16 say that we are giving you authority beyond what is
17 allowed by the Detention Act.

18 The same thing is true here. The ability
19 to conduct surveillance of enemy communications is so
20 central to the normal war powers that have been given
21 to the President under the AUMF that it has to be
22 viewed as authorizing the President to conduct this
23 program.

24 And here I'll tell a little story. I
25 remember visiting a great aunt of mine years ago who

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1 had been alive in World War I. She showed me some of
2 the letters that my grandfather had sent home from the
3 front in France. And they were chopped up and cut up
4 and excised by some Censor Board before the mail from
5 our own soldiers could be sent back home for fear that
6 some stray comment about a town in France that they
7 had visited would be captured and give some indication
8 to our enemy. There were no warrants collected before
9 the Government engaged in that surveillance. And
10 these were not even enemy communications. These were
11 communications between our own soldiers and their
12 family members back at home.

13 In times of war, we recognize that the
14 reasonableness requirement of the Fourth Amendment is
15 different than in times when we're not at war. And
16 it's not ever been the case that we had to seek
17 warrants for those kinds of interceptions of enemy
18 communications. It wasn't the case when George
19 Washington was doing it. It wasn't the case in the
20 War of 1812 when we were trying to capture enemy
21 communications. And it has never been the case, even
22 after the advent of electronic communications. Every
23 President has claimed the authority to do this since
24 electronic communications came on the scene.

25 The authorization of the use of force, I

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1 think, broadens that statutory authority. But even if
2 it doesn't, the constitutional analysis, though
3 somewhat nuanced, I think is equally clear in favor of
4 the President's position here. And here I'll refer to
5 the kind of landmark Supreme Court decision on this,
6 the Youngstown Steel case. It involved President
7 Truman's claim that he could take over steel mills in
8 order to ensure a supply of steel and equipment and
9 material for the troops that were then waging a police
10 action conflict or a war in Korea.

11 And the Supreme Court held that he could
12 not do that. It was domestic. It was far removed
13 from the battlefield and there was not specific
14 authority from Congress to do this. But importantly,
15 the thing that has come down to us from just -- from
16 that Youngstown Steel case, is Justice Jackson's
17 concurring opinion, considered one of the most
18 persuasive and authoritative concurring opinions ever
19 written in the Supreme Court. And he lays out three
20 categories of presidential power. When the President
21 is acting on conformity with authorization from a
22 statute of Congress, the two political branches have
23 joined forces and his power is at its height. My
24 claim is that this case fits within that model, that
25 Category 1 model because of the authorization for the

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1 use of force.

2 Category 2 is not at issue here when
3 Congress is silent. But Category 3, when the
4 President is acting contrary to the explicit statutory
5 authority of Congress, Justice Jackson says his power
6 is at its lowest ebb, but he is careful to never say
7 that the President is without authority in that
8 context. So even if we assume that the authorization
9 for the use of force does not give the President
10 authority here, that FISA's restrictions still apply,
11 Justice Jackson's analysis is critically important.
12 And there he says at its lowest ebb, but the power is
13 not non-existent. And it turns on the nature of the
14 two claims of power. There, there was no claim of
15 presidential power because there was no declaration of
16 war or authorization of force of the kind that we have
17 here. There, it was domestic and a war that was not
18 being fought on our shores. Those two things, it
19 seems to me, distinguish this case from Youngstown
20 Steel and lead to the conclusion that the President
21 does have inherent authority here.

22 September 11th made vividly clear to all
23 of us, our shore is part of the battlefield in this
24 war. And the most important front in that war is not
25 divisions that we have on the ground in Afghanistan or

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1 Iraq, but is in the intelligence-gathering
2 capabilities, the ability to listen to our enemies
3 before they attack again and find out where that
4 attack is going to be.

5 In this asymmetrical war, information is
6 the most critical military tool we have and to say
7 that the President doesn't have inherent authority
8 that cannot be trumped by Congress I think is to
9 ignore the founders' design of presidential power.

10 And I think it's also to ignore what
11 Congress itself understands. In FISA, and in the
12 precursors to FISA, Congress explicitly recognized
13 that the President has certain inherent authority
14 here. And there are others who testified to the same
15 view, both on the original statute when FISA was
16 enacted and subsequently. Griffin Bell, President
17 Jimmy Carter's Attorney General testified during
18 debate over FISA, that it does not take away the power
19 of the President under the Constitution. That's
20 exactly Justice Jackson's point. Congress cannot take
21 away powers that the President has directly from the
22 Constitution.

23 President Clinton's Deputy Attorney
24 General, Jamie Gorelick, made a similar point when she
25 was testifying before Congress when amendments to FISA

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1 were being considered in 1994. She said "the
2 Department of Justice believes and the case law
3 supports that the President has inherent authority to
4 conduct warrantless physical searches for foreign
5 intelligence purposes." I think that's correct.

6 The highest Court in the land to consider
7 this issue is the FISA Court of Appeal in a case
8 called In Re Sealed Case, and in that decision,
9 although it's dicta, the Court said that we assume
10 that the President has inherent authority here and
11 that if we interpret FISA to have limited that
12 authority, it would be FISA that's unconstitutional,
13 not the President's actions.

14 So I think it's important for this body as
15 you engage in trying to find out whether there has
16 been a misuse of the authority, to at least begin from
17 the proper understanding that generally the President
18 has the authority here in time of war, to conduct
19 intelligence surveillance gathering activities over
20 people that at least one side of the conversation have
21 been identified as an enemy of the United States
22 or working in concert with the enemies of the United
23 States. It's never been the case that we've required
24 a warrant for the President to take those actions. He
25 has those actions directly from Article 2 of the

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1 Constitution and we have never subjected his war
2 authority to the kind of second guessing of a Court
3 and asking permission of Courts before he takes
4 actions to defend this country.

5 As I said, I think this is a critically
6 important issue because the security of the United
7 States is at stake and the Founders' design was to
8 assign those authorities to the President under
9 Article 2.

10 Thank you very much.

11 COMMISSIONER TAYLOR: Thank you, Professor
12 Eastman.

13 Our next speaker is Mr. Shora, who is
14 currently the National Executive Director of the
15 American-Arab Anti-Discrimination Committee. He is
16 also currently a professor of Foreign Policy at
17 American University here in town. He received his
18 J.D. degree from West Virginia and also holds an LLM
19 in International Legal Studies from American.

20 Mr. Shora, welcome.

21 MR. SHORA: Thank you, Commissioner
22 Taylor. On behalf of ADC, I wish to thank the
23 Commission on Civil Rights for this opportunity to
24 participate in today's briefing.

25 As the information being made available to

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1 you today explains, ADC is the largest grass roots
2 organization in the U.S. dedicated to protecting the
3 civil rights and liberties of Americans of Arab
4 descent.

5 ADC was established in 1980 by former
6 United States Senator Jim Abourezk and has grown into
7 a national organization with headquarters in
8 Washington, D.C. and regional offices in
9 Massachusetts, New York, New Jersey, Michigan and
10 California, as well as 38 volunteer-based chapters
11 throughout the United States.

12 My remarks today will follow the theme of
13 this briefing, wiretapping and the War on Terror. As
14 part of that, I plan on highlighting some of the
15 challenges encountered by the Arab, Muslim, South
16 Asian American communities as a result of this
17 warrantless spying program and within the context of
18 some U.S. Government counter-terrorism measures
19 stemming from the 9/11/2001 terrorist attacks on our
20 nation.

21 The unfortunate, ineffective and for the
22 most part cosmetic action undertaken by the U.S.
23 Government in the days, weeks and months following the
24 horrific September 11, 2001 terrorist attacks on our
25 country left a bitter taste within the Arab, Muslim

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1 and South Asian American communities and a mark of
2 shame on the fabric of our American society.

3 To be just and fair, in the past two years
4 the Government has indeed undertaken constructive,
5 proactive steps, at regular dialogue with ADC and the
6 Arab, Muslim and South Asian American communities.
7 This constructive approach has indeed resulted in
8 addressing some very serious rights violations in what
9 can only be categorized as a professional and on
10 average consistent manner. We, as Arab Americans,
11 publicly acknowledge and thank our Government for
12 doing so.

13 Moreover, since 9/11, Arab Americans have,
14 in fact, recognized the special role they have as
15 partners with law enforcement and with other
16 government agencies in protecting our country. ADC
17 and others can provide multiple examples where we
18 stood shoulder to shoulder with law enforcement on
19 multiple occasions in helping to protect our country.

20 A specific example of such coordination includes the
21 ADC diversity and law enforcement outreach program
22 that we launched back in 2002. This program has
23 trained approximately 8,000 of our law enforcement
24 officials in cultural competency, providing them with
25 the necessary tools to exercise their duties more

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1 efficiently and effectively by expertly
2 differentiating actual threats and behavior from
3 cultural norms and mores associated with Arab culture
4 and Islam.

5 Additionally, we have provided law
6 enforcement across the country with local partners
7 available to coordinate legitimate law enforcement
8 efforts on a case by case basis.

9 However, and with that said, many
10 challenges remain unresolved including those
11 associated with both the substance and perception of
12 the warrantless domestic spying program. Many of the
13 so-called counter-terrorism programs initiated by the
14 U.S. Government in 2001 and 2002 directly targeted our
15 communities based on national origin. These programs
16 such as the now infamous and ineffective National
17 Security Entry-Exit Registration System or NSEERS
18 known as the special registration program, the FBI's
19 quote unquote voluntary interview initiatives and the
20 challenges associated with the multiple watch and no
21 fly lists. In its public defense of these programs,
22 the U.S. Government has yet to point to a single
23 terrorist charged with terrorism as a result of these
24 programs. Indeed, the only impact of which we are
25 aware is disproportionate enforcement that continues,

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1 in fact, to place the spotlight of suspicion on our
2 communities.

3 Four years ago, President Bush ordered the
4 NSA to illegally spy on American citizens by
5 monitoring their electronic communication, including
6 phone conversations made between the United States and
7 foreign countries. Later information and some
8 congressional testimony has made it clear that it was
9 or is communication between the United States and
10 countries in the Middle East that were or are in the
11 cross hairs of this program.

12 While the national security of the United
13 States should be at the forefront of government
14 efforts, we should make sure that those efforts are
15 efficient, effective and not self-defeating gestures
16 that cost us billions of taxpayer money while at the
17 same time clogging up our intelligence and law
18 enforcement agencies with a traffic jam of data
19 awaiting translation and processing.

20 In authorizing this warrantless program,
21 President Bush violated the law. And in fact,
22 trampled on our most fundamental liberties. However,
23 and my focus here today, is the damage this has caused
24 as a result of the apprehension it has created within
25 the Arab American community and the echoing negative

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1 effects that continue to reverberate in the Middle
2 East.

3 As we all know, following the
4 authorization of this spying program, President Bush
5 launched a public diplomacy campaign to quote unquote
6 win the hearts and minds of people in the Middle East.
7 However, the program, both under its previous
8 iteration under the NSA, as well as under its current
9 form, has killed any chances of success for this
10 campaign at winning any hearts or minds of people in
11 the Middle East.

12 Arab Americans and others representing the
13 Muslim and South Asian populations with family ties to
14 that part of the world are now afraid of communicating
15 with their family members by phone because of the
16 uncertainty of whether the conversations, often in
17 Arabic or other Middle Eastern languages will be
18 misunderstood or mistranslated by the NSA.

19 It was indeed a shame to see President
20 Bush publicly and repeatedly defending this program.
21 It is most shameful to learn that American citizens
22 now presume that their phone conversations with their
23 family members in the old country are being monitored
24 and recorded by government agencies with few precious
25 resources and fewer qualified professionals able to

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1 process the information being recorded.

2 The American people need to ask how we can
3 allegedly promote democracy in the Middle East when
4 our President has elected to trample upon it at home.
5 This program cannot be analyzed in isolation and must
6 be viewed in light of what we publicly know has taken
7 place as part of the Government's efforts on the War
8 on Terror during the past few years.

9 As I indicated earlier, another program
10 adopted by the United States Government under the
11 umbrella of counter-terrorism was the FBI's voluntary
12 interview initiatives. These interviews which were
13 initiated in 2001 and 2002 but which continued to take
14 place today on a more informal basis, demonstrated
15 that individual constitutional liberties and
16 protections were, in fact, being used and I'm not
17 saying abused, I'm saying being used, by the FBI in
18 its threat assessment processes.

19 Specifically, examples collected by my own
20 organization have demonstrated that some FBI Agents
21 and other law enforcement officials who engage in
22 these interviews as part of the multiple joint
23 terrorism task forces violate their publicly-stated
24 parameters and engage in patriotism tests of some
25 individuals. While the manner by which the FBI

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1 obtains its information is classified and
2 understandably must remain so, questions such as
3 individual religious practice, political views about
4 the war in Iraq and the Palestinian-Israeli conflict
5 and religious affiliation and practice, including some
6 inquiries of whether a person is a Sunni or Shiite
7 Muslim and how many times per week a person elects to
8 pray continue to be asked.

9 These examples, although rare in
10 frequency, have increased the negative perceptions of
11 the U.S. Government and specifically the FBI and law
12 enforcement within the Arab, Muslim and South Asian
13 American communities and have caused many to question
14 whether there is a link between the FBI's domestic
15 investigative efforts and the warrantless spying
16 program.

17 Moreover, the U.S. Government is yet to
18 effectively address the name confusion and
19 misidentification of individuals whose names might be
20 similar to ones located on one of the Government's
21 watch or no fly lists. Anecdotal examples suggest
22 that Arab, Muslim and South Asian Americans are more
23 likely to be flagged by Department of Homeland
24 Security authorities either when traveling by air
25 domestically or when returning from international

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1 travel to the United States, either by land or via
2 air. This includes visitors, as well as immigrants,
3 permanent residents, but most importantly, it includes
4 United States citizens.

5 Although the U.S. Government's position
6 states that it does not profile individuals based on
7 race, ethnicity or religion, the watch and no fly list
8 challenges have created tremendous levels of mistrust
9 and the perception of ethnic and racial profiling on
10 the part of the Arab, Muslim and South Asian American
11 populations in the United States.

12 Due to the secret nature of the
13 warrantless spying program, we cannot provide specific
14 examples, unequivocally demonstrating the negative
15 effects it has had on our communities. However,
16 anecdotal examples do suggest such effects. One
17 example was documented by ADC in 2004 when Dr. Z., an
18 American citizen of Arab origin received a phone call
19 from an FBI Special Agent. While extremely
20 professional and courteous the FBI Agent requested to
21 meet Dr. Z. for a casual chat about telephone calls
22 made between Dr. Z.'s home phone number in recent
23 weeks and a country in the Middle East. Dr. Z.
24 contacted ADC which provided an attorney to monitor
25 the meeting.

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1 Our attorney documented that the FBI
2 Agent, despite his professionalism and courteous
3 behavior during the meeting questioned Dr. Z. for
4 having regular phone calls made to a specific city in
5 an Arab country on a regular basis over a period of
6 two months. Dr. Z. explained during this meeting that
7 his mother-in-law was ill at the same time that his
8 wife was away visiting her and therefore Dr. Z. was
9 making routine phone calls to that specific city on a
10 regular basis to speak with his wife as she visited
11 her ill mother. To verify, the FBI Agent produced a
12 copy of call logs made between Dr. Z's home and that
13 specific area in the city, actually, it was an Arab
14 capital.

15 When asked by the ADC attorney whether the
16 FBI is monitoring Dr. Z.'s telephone and whether they
17 have any warrants to do so, the Agent stated that the
18 FBI was not monitoring Dr. Z's phone number and that
19 if they were they would have to alert Dr. Z. of such
20 monitoring and provide a copy of the warrant upon
21 speaking with him about the information they collected
22 through such monitoring. The FBI Agent additionally
23 indicated that the information presented in the call
24 log was provided through quote unquote intelligence
25 sources and not through any domestic FBI efforts. He

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1 further indicated that the FBI was simply following up
2 on a request provided through those quote unquote
3 intelligence sources.

4 I see that my time is up. I do have a
5 comment concerning the impact this has had on our
6 public diplomacy efforts, but I'll reserve that for
7 the discussion period.

8 Thank you.

9 COMMISSIONER TAYLOR: Thank you, Mr. Shora
10 and again, thank you to all the panelists for adhering
11 to the 10-minute rule. And at this point I'd like to
12 open it up to questions from the Commissioners.

13 COMMISSIONER MELENDEZ: Mr. Shora, I have
14 a question and this is how it affects a group of
15 people. How widespread is the perception among the
16 Arab American community that all Arab Americans or all
17 Muslim phone calls are being listened to by the
18 Government?

19 MR. SHORA: Commissioner Melendez, this is
20 a very valid question and this strikes at the heart of
21 why I'm here today. As I indicated in my comments
22 earlier, our community feels a special responsibility
23 to work with federal law enforcement in combatting
24 terrorism and violent extremism and we've taken up
25 that role very seriously.

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1 However, organizations like mine and many
2 others in both the Arab and Muslim American
3 communities are literally placed between a rock and a
4 hard place where we're trying to cooperate as much as
5 possible, to coordinate constructive efforts that are
6 legitimate by law enforcement officials while at the
7 same time our community has the extremely prevalent
8 perception that we are the targets. And that's
9 extremely unfortunate and is self-defeating in our
10 efforts to, in fact, combat real terrorism.

11 COMMISSIONER BRACERAS: Just to follow up
12 the question by my colleague, Commissioner Melendez,
13 what is your role in getting rid of the perception
14 that they're the targets? In other words, if they're
15 under a false perception, do you have a role to play
16 in changing that or do you believe that their
17 perceptions are accurate and if so, what do you base
18 that on?

19 MR. SHORA: We base -- the perception is
20 based on anecdotal examples. Obviously, because of
21 the secret nature of warrantless surveillance, there's
22 no way for us to tell. We're not --

23 COMMISSIONER BRACERAS: So you share the
24 perception.

25 MR. SHORA: All we can do is rely on

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1 reality. Our job is to receive complaints from the
2 community, to provide monitors --

3 COMMISSIONER BRACERAS: Is it possible
4 that you are fostering the perception?

5 MR. SHORA: Our job is to report what's
6 going on around the country and that's what I'm here
7 to do. I'm here to tell you, number one, there are
8 anecdotal examples. I just provided you with one and
9 we are willing to provide many others that this is
10 what's happening around the country. This is not
11 being made up. Number two, as a result of what's
12 happening around the country, it might be very limited
13 in nature, but the perception causes it to be
14 tremendous and that's unfortunate.

15 COMMISSIONER BRACERAS: Right, so my
16 question is what is your role? If the reality is that
17 it happens and --

18 MR. SHORA: How do we know the reality?
19 Do you know the reality?

20 COMMISSIONER BRACERAS: No, I'm asking you
21 though.

22 MR. SHORA: I'm not the United States
23 Department of Justice.

24 MR. NOJEIM: May I offer some thoughts on
25 this? There are a number of counter-terrorism

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1 programs that the Administration has launched that do
2 focus on Arabs and Muslims. Mr. Shora identified a
3 number of them in his testimony. They include NSEERS,
4 the "no-fly" program, the program about interviewing
5 Arab and Muslim Americans that involved 10,000 people,
6 and then 5,000 more.

7 Most of the people who were detained after
8 9/11 -- the Government admitted to about 1240 such
9 detentions - were of Arabs and Muslims. It would
10 actually be unusual for this program not to have
11 focused on Arabs and Muslims.

12 COMMISSIONER BRACERAS: Right.

13 MR. NOJEIM: Let me just add that the FBI
14 and NSA have gone on an all-out hiring spree to hire
15 people who speak South Asian languages and Arabic
16 languages. It would be, I think, a surprise if this
17 program was not focusing on Arabs and Muslims.

18 COMMISSIONER BRACERAS: But I think the
19 question, the original question was whether there's a
20 perception in the community that they are being
21 wrongfully targeted, and if there is a perception that
22 they are being wrongfully targeted in the community my
23 question for Mr. Shora is what obligation do groups
24 like his have to dispel that perception if it's a
25 perception that's wrongly held?

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1 MR. SHORA: My answer to you is very
2 direct and clear. We are not basing that perception
3 on pure myth. We are basing it on anecdotal examples
4 that is reported directly and first hand --

5 COMMISSIONER BRACERAS: But anecdotal
6 examples are the food, if you will, of urban legends.
7 We all know that urban legends take on a life of their
8 own and are often based on true examples, but they get
9 blown out of proportion and the extent of the wrong-
10 doing can often be exaggerated. So unless you come to
11 us with evidence that there is, in fact, a widespread
12 pattern and practice of discriminatory conduct by law
13 enforcement --

14 MR. SHORA: I just provided you with three
15 examples.

16 COMMISSIONER BRACERAS: Right, three
17 anecdotal examples.

18 MR. SHORA: No, three systemic examples.
19 The programs that I mentioned including NSEERS, the no
20 fly and watch list challenges we face are very clear
21 and can provide you with thousands of --

22 COMMISSIONER BRACERAS: So just to be
23 clear, you think that those three programs that those
24 are examples of programs that incorrectly and wrongly
25 and erroneously target members of your community?

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1 MR. SHORA: I can only provide you with
2 the answer that former Attorney General John Ashcroft
3 provided to the Senate Judiciary Committee when he was
4 asked about that.

5 COMMISSIONER BRACERAS: Okay.

6 MR. SHORA: He was unable to point to a
7 single example using NSEERS or any of the other
8 programs that demonstrate we charged terrorists with
9 terrorism charges as a result of those programs. The
10 only examples that the Justice Department came up with
11 included about 500 immigration deportations and what
12 we always say --

13 COMMISSIONER BRACERAS: Well, that's a
14 different threshold.

15 MR. SHORA: No, ma'am. If we are going
16 against terrorists, let's charge them and let's put
17 them in jail. You don't just send them out of the
18 country and deport them, because they tend to regroup
19 overseas. If they are, in fact --

20 COMMISSIONER BRACERAS: I think, I mean --
21 I think you and I both know that in the criminal
22 justice system there's often not enough evidence to
23 charge people with crimes that they may have been
24 planning to commit or may have committed. So that's
25 not dispositive to me.

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1 My question is in these cases, I mean one
2 thing you mentioned is that members of your community
3 are more likely to be flagged while traveling, right?
4 Are you asserting that that's solely because they're
5 Arab or are you asserting that that's -- or could it
6 also be because of other factors that are considered
7 by the Government?

8 MR. SHORA: I am here to provide you with
9 what we hear from around the country. I'm not here to
10 give you a black or white answer, because there is no
11 black or white answer.

12 COMMISSIONER BRACERAS: I think the answer
13 is critical because clearly if the Government is
14 flagging people solely on the basis of race and
15 ethnicity, that's a problem and that's a problem that
16 implicates the jurisdiction of this Commission. On
17 the other hand, if they're flagging people based on a
18 host of traits that might raise a red flag and it just
19 so happens that Arabs are disproportionately single
20 out, that is, that there's a disparate impact on that
21 community, then I'm not necessarily so concerned to be
22 honest with you.

23 COMMISSIONER TAYLOR: Mr. Nojeim, would
24 you address this issue because it sounded like you all
25 were in agreement with respect to the impact, that is,

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1 Mr. Shora was demonstrating the impact by way of
2 anecdotal evidence and you were saying it's only
3 logical that the numbers are what they are. So I'm
4 trying to square those two statements. They sounded
5 like you all were agreeing, but to Commissioner
6 Braceras' point no one discussed what precipitated the
7 targeting. But you suggested it was logical, so I
8 want to see if I can get you into this conversation.

9 MR. NOJEIM: The reason I said it that way
10 is because there are a number of programs that Mr.
11 Shora has already identified that have specifically
12 targeted Arabs and Muslims. And generally, those
13 programs are the ones that have involved large numbers
14 of people and they are engaged in for security reasons
15 and the Government would admit that it has targeted
16 Arabs and Muslims. The NSEERS program, for example,
17 was specifically targeting people from Arab and Muslim
18 countries. There's just no way to look at it another
19 way.

20 But I think it's also telling that the FBI
21 is not out there and the NSA is not out there trying
22 to hire to translate all of these intercepts, German
23 speakers. They're not trying to hire Polish speakers
24 and they're not trying to hire Russian speakers.
25 They're trying to hire --

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1 COMMISSIONER BRACERAS: Are the Germans,
2 Russians and Poles trying to destroy our country
3 through terrorism?

4 MR. NOJEIM: They're trying to hire people
5 who speak Arabic --

6 COMMISSIONER BRACERAS: I've seen no
7 evidence of that.

8 MR. NOJEIM: I'll finish. -- And who speak
9 Pashtun and who speak other South Asian languages and
10 I think that what Commissioner Braceras is basically
11 arguing now is that I'm right and that this program
12 probably does target Arabs and Muslims.

13 COMMISSIONER BRACERAS: I think it goes to
14 the definition of the word "target" and I'm trying to
15 ascertain what you mean by that. The jurisdiction of
16 this Commission is implicated only if there is
17 disparate treatment or discrimination against those
18 groups. Focusing on a certain group, one group or
19 another based on the evidence and the facts is not
20 necessarily discriminatory unless it's either
21 erroneous, on the one hand, or purely race based on
22 the other. So obviously, if somebody is assaulted and
23 they report it to the police that their assailant was
24 a 6 foot tall white man, of course it would make no
25 sense for the police to go out and interview 5 foot

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1 tall black women.

2 Law enforcement has to go where the
3 evidence points. So to some extent yes, there's
4 always going to be investigation based on facts that
5 are reported and that may or may not include a racial
6 component. That does not, however, mean that there's
7 been discrimination or that somebody has been
8 erroneously singled out on the basis of race. So
9 that's what I'm trying to understand. If that has
10 happened, then that's a cause for great concern.

11 MR. SHORA: I must make this assertion
12 though, if you don't mind. I am representing the Arab
13 American community here and I must make this assertion
14 that the Arab American community is not engaged in any
15 way, shape or form to quote unquote in your words
16 destroy our country. I assert that the Arab American
17 community is, in fact, one of our strongest assets in
18 the war in combatting terrorism and a lot of these
19 programs are self-defeating efforts. They actually
20 hurt our effort to combat terrorism.

21 COMMISSIONER BRACERAS: That may be. I
22 don't know necessarily disagree with you. My point
23 was simply responding to the comment that the FBI was
24 not out there hiring native Polish speakers to combat
25 terrorism and my point was well, why would they be?

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1 The people who have attacked our country through
2 terrorism haven't typically been Polish speakers.

3 COMMISSIONER TAYLOR: I think Commissioner
4 Yaki has a question.

5 COMMISSIONER YAKI: I just want to ask
6 this question of Commissioner Braceras because I'm not
7 quite sure she means to go where she wants us to go.
8 We are talking about, if I am not mistaken, domestic
9 wiretapping of residents who are in this country. We
10 are not talking about NSA, CIA intercepts between
11 cells and Afghanistan or Germany, what have you. We
12 are talking about a program where the FBI who is
13 charged with domestic surveillance, domestic terrorism
14 has gone on a hiring spree of Arabic, South Asian
15 language speakers.

16 We are talking therefore about a program
17 designed to impact and target members of a community
18 based in America. That is a totally different
19 question and where I disagree so strongly with Mr.
20 Eastman in his reading of Justice Jackson's opinion
21 which, concurrence, which was one of my lode stones
22 when I was in law school, is that if you go further on
23 in the Jackson opinion it's -- he talks about how the
24 presidential power is not -- does not escape
25 constitutional limitations. It does not escape the

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1 fourth amendment. It does not escape the third
2 amendment.

3 We are talking about domestic, a domestic
4 program aimed at Americans. We are not talking about,
5 as you seem to imply, the fact that people who came
6 into this country from outside, who engage in acts of
7 terrorism, they are not the Arab American or the
8 Muslim American community for which this program and
9 other programs has basically been designed. Am I
10 incorrect in my characterization?

11 DR. EASTMAN: I think so. This has an
12 uncanny deja-vu aspect to it on the use of statistics.
13 I remember back in the 1980s. We had a hearing here
14 about the disparate number of people detained at the
15 border who are of Mexican-American or Hispanic
16 background and we asked the INS Commissioner why is
17 that? Are you targeting Hispanics when you stop
18 people at the border. He said no. In fact, we're
19 targeting people that were driving Impalas because the
20 trunks are larger and are more likely to have people
21 buried in the trunk and it just so happened that, as
22 the result of targeting Impalas, there were more
23 people on the list that we had stopped to look in
24 their trunks that were Hispanic than otherwise.

25 COMMISSIONER YAKI: So we are targeting

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1 people with Motorola Razor phones or something? It's
2 not the same thing. You can't possibly be saying when
3 you tap someone's phone you're making an assumption
4 that somehow well, that phone line just happens to
5 belong to a Muslim American.

6 DR. EASTMAN: No, you asked me to respond
7 to a question. There is absolutely no evidence that
8 that's going on. The only evidence that we have is
9 what the President and the Attorney General have said
10 and information they have given about the scope of
11 these programs to Members in Congress on both sides of
12 the political aisle and had them reviewed by the FISA
13 Court and that evidence is this, that we have targeted
14 people who have engaged in communications with people
15 that we know were involved in terrorist activities
16 that were members of al Qaeda or that were affiliated
17 with al Qaeda. That's the touchstone that leads to
18 your phone being tapped under this program.

19 COMMISSIONER YAKI: And there's a line
20 that has 550 monitoring lines going at the same time,
21 so therefore there are 550 suspected members of al
22 Qaeda at one time talking all at once? That's
23 ridiculous and that's why --

24 DR. EASTMAN: No, you are taking the fact
25 that the number of people that we believe may have

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1 been on this list, whose calls are being intercepted,
2 we don't know, that --

3 COMMISSIONER YAKI: That's true, we don't
4 know.

5 DR. EASTMAN: -- that necessarily that
6 they are targeted because they are Arab American and
7 I'm saying there is no evidence that that's the case.
8 The only evidence that we have is in fact that this
9 program has targeted people because of the nature of
10 the communication, to whom it was going, people that
11 we had reason to believe were involved with terrorist
12 activities or affiliated with terrorist organizations
13 against the United States. And as a result of
14 targeting that, we should not be surprised that that
15 list is not overloaded with Swedes, given the current
16 nature of the war that we're in the middle of.

17 COMMISSIONER BRACERAS: And just to follow
18 up on Professor Eastman's point, if the INS is making
19 an effort to stop illegal immigration over the Mexican
20 border, by default, most of the people that they stop
21 are going to be Hispanic. That doesn't mean -- let me
22 finish -- that doesn't mean that they're stopping them
23 because they're Hispanic. They're stopping them
24 because they're crossing the border illegally and it
25 just so happens that that's the country they're coming

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1 from.

2 I think the analogy is a beautiful one and
3 works perfectly in that context.

4 COMMISSIONER YAKI: It is absolutely the
5 wrong analogy because you're talking apples and
6 oranges. The real analogy is if there were four
7 members of the Hispanic community in this room right
8 now and the FBI came in, walked in and said I'd like
9 to talk to those four people about being illegal
10 immigrants. That's a different story than the border.
11 We are talking about domestic wiretapping, going into
12 your homes, going into your private conversations in
13 which the only people who according to some statements
14 here would be justified under that theory would be
15 Muslim and Arab Americans. That's ridiculous.

16 Just one question as a matter of
17 procedure, did we contact members of the
18 Administration to come to testify?

19 STAFF DIRECTOR MARCUS: We did and had we
20 shaped the scope in the way it was discussed last
21 month, we probably could have gotten one.

22 COMMISSIONER YAKI: What kind of answer is
23 that, Mr. Staff Director?

24 STAFF DIRECTOR MARCUS: It's an answer,
25 yes, we did contact them.

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1 COMMISSIONER YAKI: What did they say?
2 What about the scope was different that they didn't
3 want to talk about?

4 STAFF DIRECTOR MARCUS: We contacted
5 people at the -- as I mentioned before, at the Office
6 of the Director of National Intelligence and
7 Department of Justice, the Office of National
8 Intelligence, they believe there was very little
9 relating to wiretaps that they could speak of usefully
10 that was not highly classified, but that if the scope
11 were broader dealing with civil rights and civil
12 liberties protections and the War on Terrorism, they
13 could speak to broader issues.

14 At the Department of Justice, where we
15 spoke to them specifically about the issue of wiretap,
16 what they indicate was that they did not believe that
17 there was enough that they could speak to meaningfully
18 that was not highly classified.

19 DR. EASTMAN: Commissioner Yaki, there are
20 two ways you could find evidence to support your
21 thesis here. You could look at calls from Swedes into
22 Afghanistan or Iraq and if those calls were not
23 listened into, then you might have a claim. Or you
24 could look at calls by Arab Americans that were not to
25 any targeted member and find out if those are being

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1 listened to, then you would have a claim.

2 We have no evidence that either of those
3 things have occurred.

4 COMMISSIONER TAYLOR: Let Mr. Nojeim in
5 here and then we're going to --

6 MR. NOJEIM: One useful role that the
7 Commission could play would be to gather that
8 evidence, to get those Administration witnesses here
9 and if they didn't want to come, if it, was serious
10 about conducting this investigation, to subpoena them.

11 That's an option that you have. It's a power that
12 you have and if there's some concern that the FBI is
13 hiring all these translators to do something that
14 they're probably not doing, well, why don't you get to
15 the bottom of it, bring them in.

16 COMMISSIONER TAYLOR: Commissioner
17 Kirsanow?

18 COMMISSIONER KIRSANOW: I want to thank
19 Staff for putting together a splendid panel. I thank
20 everyone for their testimony.

21 My question goes primarily to Professor
22 Eastman, but anyone else can jump in if they wish. It
23 strikes me that there's an inherent tension here in
24 the authority of the President to engage in the kind
25 of conduct we're talking about here under the

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1 authorization to use military force, combined with the
2 inherent power and (1:55:53) power in a war such as
3 this because there's a perception, it strikes me that
4 by many, we're not really engaged in a real war. It's
5 easy to forget that it's a war. We're not necessarily
6 fighting a standing army with a defined state and the
7 combatants don't necessarily wear uniforms.

8 So the question is under the AUMF and
9 combatting the inherent authority, aren't we really
10 talking about authority related to combatants? Very
11 often we can easily and perceptively slide into a
12 thought process by which we're dealing with criminal
13 activity, law enforcement activity to which the fourth
14 amendment may sometimes trump or under Jackson's
15 formulation we have the kind of sliding scale of
16 presidential powers.

17 DR. EASTMAN: Commissioner Kirsanow, I
18 think that's a wonderful question and I think part of
19 the confusion that surrounds this issue has been
20 whether we treat it as war or whether we treat it as
21 merely criminal matter for violating some provision of
22 18 U.S.C.

23 And there's a reason that in the law of
24 nations conduct that is not traditional war conduct is
25 considered unlawful enemy conduct because of the

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1 slippery slope that you have -- if people here are
2 engaging in war against the United States by
3 nontraditional means by the use of attacks on
4 civilians, by dressing in civilian garb, by engaging
5 in civilian communications with military purposes --
6 the fear is that you would have to, in order to
7 prevent that kind of attack on the United States, in
8 fact, do things that would normally not be done even
9 in time of war. And it's why those things are
10 considered to be unlawful combatancy and why unlawful
11 combatants can be prosecuted for violating the laws of
12 war, quite apart from any criminal matter that goes
13 on.

14 Normally, you want people playing by the
15 rules of war to the extent you have rules of war, so
16 that you don't get this slipover into civilian life.
17 We have an enemy here who, in fact, doesn't
18 acknowledge those rules of war. Their entire basis of
19 war is to attack civilian population by use of
20 civilian tools and that has made us try and respond
21 with restrictions that we might not otherwise wish to
22 do.

23 The touchmark for the Fourth Amendment,
24 though, and I want to go back to what Commissioner
25 Yaki said. I never said that the President doesn't

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1 have to comply with the terms of the Constitution or
2 the fourth amendment, but the touchstone there is not
3 warrants. The touchstone there is reasonableness, and
4 reasonableness in a time of war, particularly a war
5 like this where our enemies are using disposable cell
6 phones to be able to launch another attack, is
7 different than it might be prior to 9/11 and we have
8 got to acknowledge that, if we're ever going to
9 recognize both the fact that we're in a war and the
10 nature of that war and what it's going to take to win.

11 COMMISSIONER KIRSANOW: One question I had
12 for -- I'm sorry, did you want to respond?

13 MR. NOJEIM: I did. Regardless of whether
14 we call it a war or something else, we have to
15 recognize that it's something that's going to be with
16 us for decades, for generations. We're going to be
17 fighting this thing for a very long time and the rules
18 that we set are the rules that we should think about
19 setting for our society in perpetuity. Do we want it
20 to be the case in perpetuity that the President alone
21 would be able to decide whether a person should be
22 wiretapped when that person is in the United States
23 conversing with someone outside? That's a very
24 fundamental question and it goes to -- I think it goes
25 to who we are as a nation, what our values are, how

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1 we're going to balance freedom and security over the
2 long haul, not for the period that our troops are in
3 Afghanistan or in Iraq. This is a very long haul
4 issue.

5 COMMISSIONER BRACERAS: I agree with you
6 and I think there are some very serious civil
7 liberties concerns raised by these types of things,
8 but those are not concerns that this Commission is
9 authorized to address. And so that's why I pointed my
10 questions, aimed my question at trying to ascertain
11 whether or not in using these tools there's been
12 discriminatory conduct. The bigger question as to
13 whether or not the tools should be used at all is a
14 debate that we need to have in another forum.

15 COMMISSIONER TAYLOR: Commissioner
16 Kirsanow.

17 COMMISSIONER KIRSANOW: I would like to
18 just assess my own curiosity and this goes to anyone
19 who wants to respond, but particularly, Mr. Nojeim.

20 You talked about the balancing of freedom
21 and security and the fact that this is going to be a
22 difficult proposition over the long haul. It may have
23 a bearing on what kind of society we are if we set
24 certain rules or standards too low, for example.
25 We're operating to a large extent somewhat in an

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1 information vacuum, it strikes me, because we have
2 this January announcement that the Administrative has
3 changed its protocols related to NSA -- well, the
4 purported warrantless wiretapping. We don't know
5 precisely how it's done. It sounds like it's
6 programmatic change related to the FISA Court and from
7 that I tend to gather and I don't know if this is the
8 case, but rather than go in on individual cases,
9 there's a predicate that's established that will
10 permit them with approval from the FISA Court to go
11 ahead and wiretap or listen in. I don't know if
12 that's true or not.

13 My point is in balancing freedom and
14 security, if we take the Administration's
15 representation at face value that one of the reasons
16 it circumvented, and I don't know if that's the
17 correct term, but it didn't use the FISA procedures is
18 because they were too cumbersome. Let's credit that
19 for a moment. They were too cumbersome, were not
20 flexible and didn't allow for the immediacy or speed
21 that they needed in order to intercept a call or to
22 track something.

23 If that's true, that they needed that
24 immediacy and FISA didn't permit that, if there were
25 no concerns about disparate impact, and the failure to

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1 move quickly could result in New York City being
2 incinerated, at what stage would you draw the line in
3 terms of when it is that the President has the
4 authority or an Administration, the Executive has the
5 authority to go ahead and conduct this kind of
6 surveillance, presuming, of course, it's somebody in
7 the United States and there is some type of evidence
8 that's with somebody who is suspected of being a
9 combattant.

10 MR. NOJEIM: It seems to me that the issue
11 about whether the FISA Court could act quickly enough
12 has been pretty well resolved through discussions in
13 Congress. What Congress has said to the
14 Administration is if you think the FISA Court can't
15 act quickly enough, come to us, tell us what it needs
16 to do, tell us what the problems are. And, a number
17 of Members introduced bills that would cut away any of
18 the bureaucratic limitations that might have been put
19 in preparing FISA applications for FISA Court review.

20 And I have to point out to the Commission,
21 FISA has an emergency provision. If there's some risk
22 that New York City is going to be incinerated, the
23 Government can get an order immediately without going
24 to the FISA Court that lasts for three days and it can
25 get that order, it can wiretap without -- I'm sorry,

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1 it can conduct that wiretapping without a Court order
2 in that emergency for three days. It just has to go
3 to the Court within that three-day period and present
4 its application.

5 The FISA Court judges have said that they
6 can act very quickly. Sometimes agents have shown up
7 at their home while they're -- I think one judge said
8 while I was cutting the lawn -- and they immediately
9 adjudicate the application and move on. So it seems
10 to me like we're putting the cart before the horse to
11 say that the Court can't act quickly enough. The
12 judges think that they act quickly enough. There's an
13 emergency provision that gives the Government three
14 days of wiretapping without a prior Court order and if
15 that isn't adequate, then the onus is on the
16 Government to come forward and show to Congress that
17 it's not adequate and to seek additional authority.

18 COMMISSIONER TAYLOR: Commissioner Yaki
19 has a question and then I may have one as well.

20 COMMISSIONER YAKI: I guess my concern
21 about some of the statements made by Mr. Eastman and
22 made at the hearing dealing with well, remember these
23 are the people who tried to blow us up and therefore
24 we have a responsibility to make sure that we deal
25 with it adequately. Just sends me back to a time when

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1 my father was a young boy and there you had a
2 situation where a war was conducted against the United
3 States outside the normal boundaries of rules at that
4 time. It's different than before, the one that did
5 their formal declarations of war and took a couple of
6 months for everyone to attack one another, but World
7 War II was a lot different than the attack of Japan
8 and Pearl Harbor was an entirely different matter all
9 together. It was done without the official
10 communiqué, it was done without the usual warning that
11 we have declared war. It just happened.

12 Subsequently, the United States went into
13 a justifiably shock and the President in his executive
14 power, a President who I admire for many things except
15 for this one biggy, decided that there were rumor and
16 innuendo that there were enemy combatants among us in
17 the Japanese American population, proceeded to
18 quarantine where they could go, put curfews on what
19 they could do and then the next step was Executive
20 Order 9066 whose anniversary is celebrated every
21 February by the Japanese-American community that
22 resulted in the internment of the Japanese Americans,
23 all in the -- under the Article 2 powers of the
24 President and which unfortunately to this day remains
25 uncontradicted, perhaps avoided, but actually it may

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1 have been cited in the Hamdi case, the Koramatsu case
2 and which the Court upheld the internment of the
3 Japanese-American community despite the fact that in
4 subsequent trials held 40-odd years later, the
5 Government could not produce a single scrap of
6 evidence that there was any acts of sabotage,
7 disloyalty, what have you, by any member of the
8 Japanese-American community on the West Coast.

9 My concern stems from that. When we label
10 entire community as if they are part of the community
11 that attacked our country and so therefore, I worry
12 when a domestic wiretapping program has, as its
13 thesis, that we are going to listen in on those people
14 because those people are the ones who attacked our
15 country. And it would be good, I do not see this
16 happening from here, but hopefully Congress could, it
17 would be good to find out what -- before the program
18 changed in January of this year, to the extent that it
19 really has changed, no one really knows how much it
20 really has changed since January of this year, but
21 what were the numbers of people who were subjected to
22 the warrantless wiretapping? How many of them were in
23 the Arab American community or had Arab surnames or
24 were of Muslim background? What percentage of those
25 communities were the ones targeted by that, because it

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1 is important, I think, for the American people to
2 understand and be educated about why there is a
3 difference and should be a difference between
4 identifying those who attacked us and those who share
5 the same ethnic, religious, whatever or surname-
6 sounding name, because God knows we've heard a lot of
7 people getting put on the no fly list because their
8 name just happened to sound Arabic or Muslim, because
9 it is a very slippery slope and it's not one rooted in
10 fantasy, because 1942 did occur.

11 My father was interned in the desert in
12 Arizona all because of a different kind of war,
13 because we couldn't seem to separate what the idea of
14 an enemy combattant was within our own shores and so
15 we decided to en masse take them all in.

16 You're right, Professor, what the entire
17 scope of this program was, but my suspicion, based on
18 what happened in the first Gulf War, where the FBI
19 conducted sweeps of the Arab American community and
20 began questioning them, asking them to come in for
21 questioning. I was part of the opposition to that
22 when I was working in Congress and I know that
23 happened. They admitted it happened. They stopped it
24 after a lot of outcry, but I would not be surprised to
25 see it happening again here in this program. It would

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1 be instructive. I don't think we'll do it. I think
2 some other body would -- I'd love for us to do it.
3 But it is something that we have to watch out for. We
4 have to guard against, because it does strike the
5 civil rights of an identifiable or identified minority
6 in this country.

7 DR. EASTMAN: Commissioner Yaki, if there
8 was any evidence whatsoever that the President was
9 wholesale targeting people merely because of their
10 ethnic or racial background, then I would agree with
11 you. But this is not a program like President
12 Roosevelt launched in 1942. This is one, so far as we
13 know -- and people on both sides of the political
14 aisles, in Congress, have been apprised of every
15 detail of this and I guarantee you, if any aspect of
16 this program or any resemblance whatsoever to what
17 happened in 1942, we would not be speculating about
18 it. Nancy Pelosi would have made sure that the
19 country heard about it. There is no evidence of that
20 and I cannot reject in any more categorical terms or
21 characterization that simply because the number of
22 people that have been affected by this program are
23 more Muslim than not that therefore it's evidence of
24 discrimination.

25 If there was an al Qaeda number that we

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1 knew and every call into that number was tapped
2 because there was a call to that number and 100
3 percent of those calls were persons of Arab American
4 descent, that is not evidence of discrimination
5 against Arab Americans because the hook there is not
6 the color of their skin or their ethnic background.
7 It's because they called an al Qaeda number and the
8 only evidence we have about this program is that is
9 the trigger that launches the investigation.

10 COMMISSIONER YAKI: I would agree, but (a)
11 I don't think we have any evidence that that is the
12 trigger that launches it.

13 COMMISSIONER BRACERAS: We don't have any
14 evidence to the contrary.

15 MR. SHORA: May I interject?

16 COMMISSIONER YAKI: Yes.

17 MR. SHORA: I keep hearing this reference
18 and not just today, but repeatedly by advocates of
19 this program that we are taking it for granted that
20 any phone call made to a certain number is
21 automatically labeled an al Qaeda number. I just
22 provided this body today with a specific example where
23 one of our attorneys actually -- we have firsthand
24 information, demonstrating that the phone call being
25 made was to a hospital room in a capital city of one

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1 of our most important allies in the Middle East. We
2 should not lose track of that.

3 So making the assertion that every phone
4 call being monitored is one made to an al Qaeda number
5 is absolutely incorrect unless you can provide
6 evidence suggesting that that hospital, for example,
7 was being operated by al Qaeda.

8 MR. NOJEIM: It seems to me, I have two
9 points to make. One is that it seems to me that what
10 would best protect civil rights and civil liberties
11 would be adherence to the standard of individualized
12 suspicion. What happened with the Japanese Americans?
13 There wasn't individualized suspicion. There was
14 suspicion about a group. It was based on a race.

15 It seems to me that a role that the
16 Commission could play would be to look into whether
17 there really is individualized suspicion particularly
18 in this new program the Government has said that it
19 has taken to the FISA Court. It has been asked
20 whether program warrants -- which would not require
21 individualized suspicion -- are being issued, and it
22 hasn't answered that question.

23 The second point I wanted to make is that
24 Mr. Eastman has cited a number of cases and made
25 arguments that the President has this authority.

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1 Obviously, we disagree and disagree strongly. We
2 think that in the Youngstown Steel case, the Justice
3 Jackson concurrence, it's the case that Congress has
4 acted contrary to what the President wants to do. His
5 power, therefore, is at its lowest ebb, not that it
6 has done something that supports what he wants to do.
7 If you were to believe that they have done something
8 that supports what he wants to do, you'd have to
9 believe that they authorized by their silence that
10 which they had explicitly prohibited. They were
11 silent in the AUMF. They explicitly prohibited
12 warrantless wiretapping of people in the United States
13 in FISA. It's not an illogical position.

14 And to support that, I'd like to submit
15 for the record two letters from law professors and
16 other legal scholars, one dated January 9 of 2006 and
17 one dated February 2 of 2006. Would that be all
18 right?

19 COMMISSIONER KIRSANOW: I'd like to follow
20 up on that because that's an interesting point,
21 talking about Youngstown Sheet and Tool and the load
22 the President has. You mentioned the AUMF and that
23 there is -- it's solid with respect to domestic
24 wiretapping authority, but that there's a specific
25 statute that requires such authority.

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1 The question I have and I suspect I know
2 your answer, but I would like you to articulate it. I
3 think of Section 2A of the AUMF says that Congress
4 grants the President and acknowledges its
5 constitutional authority to deter and prevent
6 terrorist attacks. There's also the provision of FISA
7 that you just talked about that said that they don't
8 prohibit domestic wiretapping. In fact, there is an
9 exception where there are exigent circumstances where
10 there's a three-day emergency provision.

11 Reading those two together, wouldn't that
12 suggest that Congress understood and granted the
13 President authority to engage in wiretapping narrowly
14 subscribed and under specific circumstances where
15 there is presumably and I know that Mr. Shora
16 disagrees with this, but I'm presuming that they've
17 got some basis on which to say that's a quote unquote
18 al Qaeda or suspicion number. Do you think that to a
19 plus the FISA exception permits the President to
20 engage in this kind of conduct?

21 MR. NOJEIM: No, I don't and you have to
22 also factor into the equation the provision of FISA
23 that explicitly addresses the wartime situation. FISA
24 includes a provision that says that when there's a
25 declared war, the President can wiretap without a

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1 court order for 15 days. The legislative history
2 makes it clear that what Congress intended was that if
3 it was going to be -- if there was going to be a need
4 to wiretap for a longer period, the President would
5 come to Congress and get additional authority.
6 Congress would give it if it wanted to.

7 We had a war. The AUMF was adopted to
8 authorize the war. Most people in Congress believe
9 that it's the functional equivalent, if you will, of
10 the declaration of war when it comes to authorizing
11 the use of force and the things that go with it. If
12 Congress had wanted to authorize wiretapping for a
13 period in excess of the 15 days it had done by
14 statute, it would have said so.

15 But what this argument that Congress is
16 doing silently that which it prohibited explicitly, it
17 reminds me of a line from a Supreme Court case, that
18 doing that is not the sort of thing that Congress
19 would do inadvertently. "Congress, as the Supreme
20 Court said, Congress does not alter fundamental
21 details of a regulatory scheme in vague terms or
22 ancillary provisions. It does not, one might say hide
23 elephants in mouse holes."

24 DR. EASTMAN: Let me real quickly respond
25 because the Supreme Court has already addressed this

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1 issue as I said earlier.

2 The exact arguments were made in the Hamdi
3 case with respect to the detention statute. There was
4 no discussion and the Court held that Congress had, by
5 silence, with the authorization of the use of force
6 statute, in fact, pre-empted that old statute. And
7 they did so because the detention of combatants is
8 part and parcel of the war making effort, and here,
9 the ability to listen in on enemy communications is
10 equally as much a traditional part of the war making
11 power. And when they gave that authorization for use
12 of force, which is in unbelievably broad language,
13 discretionary authority or delegation of authority to
14 the President to add to what he already has under
15 Article 2, I think the Courts are very close.

16 This is a close question. But I wouldn't
17 stake my reputation on the reasoning of the District
18 Court's decision in Detroit. I think the Sixth
19 Circuit, if they reach the merits, has already
20 demonstrated that there's a likelihood that the
21 Government will prevail here by issuing a stay of that
22 lower Court order and I think every higher court that
23 has addressed this with precedent has supported that
24 position.

25 COMMISSIONER TAYLOR: Last word, Mr.

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1 Nojeim.

2 MR. NOJEIM: Hamdi involved a battlefield
3 detention. The case is explicitly about people found
4 on the battlefield. The page is 519. It's quite
5 another matter to say that what the Court in Hamdi
6 said covers domestic spying and domestic wiretapping.

7 COMMISSIONER TAYLOR: Mr. Nojeim,
8 Professor Eastman and Mr. Shora, I want to thank all
9 of you all for coming today. It's been information
10 and as you can see, we could be here all afternoon.
11 Again, thank you. And again, the record will be open
12 for the next 30 days. And with that, I think we stand
13 adjourned.

14 (Whereupon, at 2:20 p.m., the briefing was
15 concluded.)

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