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
LATTICE FOSHEE
DEREK HORNE
MAHA JWEIED
TINALOUISE MARTIN, Director of Management
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
# Agenda

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

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

STAFF DIRECTOR MARCUS: Thirty days from today.

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

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

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

(The witnesses were sworn.)

COMMISSIONER TAYLOR: This morning we are pleased to welcome Gregory T. Nojeim, Associate Director and Chief Legislative Counsel of the American Civil Liberties Union, Washington Legislative Office. We're also pleased to welcome Kareem W. Shora,
National Executive Director of the American-Arab Anti-
discrimination Committee; and Dr. John Eastman, Henry
Salvatori Professor of Law & Community Service at
Chapman University School of Law and Director of the
Claremont Institute Center for Constitutional
Jurisprudence.

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

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

So with that, I'm going to introduce Mr.
Nojeim, who as I mentioned is the Associate Director
and Chief Legislative Council of the American Civil
Liberties Union, Washington Legislative Office. And
he has been with the ACLU since 1995 and has been
responsible for analyzing the civil liberties
implications of federal legislation related to terrorism, national security, immigration and informational privacy. He has a distinguished legal career which I will not detail here, other than to say that he has practiced with the firm of Kirkpatrick and Lockhart. But his legal career began in the great Commonwealth of Virginia where he received his juris doctorate degree. Welcome.

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

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

We compliment the Commission for holding
these hearings, this briefing, to shed additional light on the program and on the intelligence surveillance that continues today.

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

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

Congress found that the NSA had also created a watch list of Americans who were suspected of foreign influence merely because they opposed the
Vietnam War. In response to the findings of the Church Committee, Congress passed the Foreign Intelligence Surveillance Act to provide the exclusive authority for wiretapping of U.S. persons in the United States to protect national security. Under FISA, a federal agency is generally required to get court approval in order to monitor the communications of any person in the U.S. FISA provides that no one may engage in electronic surveillance except as authorized by statute and it specifies civil and criminal penalties for electronic surveillance undertaken without statutory authority. It is a criminal statute.

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

The Administration claims that the Authorization for the Use of Military Force that Congress enacted in September of 2001 authorized the warrantless NSA surveillance program. And yet, there is no evidence that Congress intended to override the
explicit provisions of FISA in passing the AUMF, which itself does not mention wiretapping. Wiretapping was not even mentioned during the debate on that legislation.

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

ACLU brought a lawsuit in Michigan to challenge this program on behalf of prominent journalists, scholars, attorneys and others, whose work requires them to communicate by telephone and email with people outside the United States. The District Court ruled in our favor. It refused to dismiss a challenge to the wiretapping program under the states' secrets privilege and it ruled that the program violates the First Amendment, the Fourth Amendment and the Foreign Intelligence Surveillance Act. The Judge wrote, "it was never the intent of the framers to give the President such unfettered control,
particularly where his actions blatantly disregard the parameters clearly enumerated in the Bill of Rights."
That case is on appeal.

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

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

It's not yet clear whether the Government is now getting individualized warrants based on
individualized suspicion, or program warrants that do not require individualized suspicion of wrongdoing. In fact, this question has been put to Administration officials by Members of Congress and has not yet been answered. We believe that both FISA and the Fourth Amendment require that the warrants be obtained based on individual suspicion.

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

Furthermore, the claim that the new program now complies with FISA does not pardon those responsible for five years of lawless surveillance. In fact, this assertion raises serious questions as to why the Government would not comply with FISA in the
ACLU believes that privacy need not be sacrificed for security. For almost 30 years, the Foreign Intelligence Surveillance Act has been successfully protecting both. Again, FISA is a criminal statute. When warrantless wiretapping outside of FISA was conducted, a crime was committed.

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

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

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

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

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

Thank you very much.

COMMISSIONER TAYLOR: Thank you, Mr. Nojeim.

Our next speaker is Professor Eastman. Professor Eastman is associated with Chapman University School of Law and has been since August of 1999 where he serves as the Henry Salvatori Professor
of Law and Community Service, specializing in Constitutional Law, Legal History, Civil Procedure and Property. He also serves as the interim Associate Dean of Administration. Having received his J.D. from Chicago Law School and his Ph.D. in Government from Claremont Graduate School. He also has a distinguished legal career, was a former Supreme Court Law Clerk, as I recall, as well as a former civil litigator with an expertise in Federal and State Court matters as well as State Attorneys General investigation.

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

DR. EASTMAN: Thank you, Commissioner Taylor. One thing that my bio doesn't reflect any more is I used to be the Director of Congressional and Public Affairs for this Agency. We weren't in this building at the time. We were down there on Vermont. It's a pleasure to be back and see the new digs.

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

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

The one thing I recall though from those days and I don't think the statutory authority has
changed is that the Commission's mandate is not broadly to look at all alleged violations of civil liberties but only those that are of a particular nature, that have racial, ethnic, or religious animus as one of the conditions that leads to it.

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

And I think the answer to that from my perspective is very clear. The President does have authority here. The District Judge up in Detroit's opinion notwithstanding. And when the program here was first unveiled by the New York Times in December of 2005, there were two important white papers that were published, one by the Congressional Research Service and the other by the Department of Justice.
itself and I would encourage you as Commissioners and your staffs to review those competing documents and put them side by side.

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

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

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

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

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

And here I'll tell a little story. I remember visiting a great aunt of mine years ago who
had been alive in World War I. She showed me some of
the letters that my grandfather had sent home from the
front in France. And they were chopped up and cut up
and excised by some Censor Board before the mail from
our own soldiers could be sent back home for fear that
some stray comment about a town in France that they
had visited would be captured and give some indication
to our enemy. There were no warrants collected before
the Government engaged in that surveillance. And
these were not even enemy communications. These were
communications between our own soldiers and their
family members back at home.

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

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

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

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

September 11th made vividly clear to all of us, our shore is part of the battlefield in this war. And the most important front in that war is not divisions that we have on the ground in Afghanistan or
Iraq, but is in the intelligence-gathering capabilities, the ability to listen to our enemies before they attack again and find out where that attack is going to be.

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

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

President Clinton's Deputy Attorney General, Jamie Gorelick, made a similar point when she was testifying before Congress when amendments to FISA
were being considered in 1994. She said "the
Department of Justice believes and the case law
supports that the President has inherent authority to
c conducive warrantless physical searches for foreign
intelligence purposes." I think that's correct.

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

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

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

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

Thank you very much.

COMMISSIONER TAYLOR: Thank you, Professor Eastman.

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

Mr. Shora, welcome.

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

As the information being made available to
you today explains, ADC is the largest grass roots organization in the U.S. dedicated to protecting the civil rights and liberties of Americans of Arab descent.

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

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

The unfortunate, ineffective and for the most part cosmetic action undertaken by the U.S. Government in the days, weeks and months following the horrific September 11, 2001 terrorist attacks on our country left a bitter taste within the Arab, Muslim...
and South Asian American communities and a mark of shame on the fabric of our American society.

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

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

A specific example of such coordination includes the ADC diversity and law enforcement outreach program that we launched back in 2002. This program has trained approximately 8,000 of our law enforcement officials in cultural competency, providing them with the necessary tools to exercise their duties more
efficiently and effectively by expertly differentiating actual threats and behavior from cultural norms and mores associated with Arab culture and Islam.

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

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

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

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

In authorizing this warrantless program, President Bush violated the law. And in fact, trampled on our most fundamental liberties. However, and my focus here today, is the damage this has caused as a result of the apprehension it has created within the Arab American community and the echoing negative
effects that continue to reverberate in the Middle East.

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

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

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

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

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

Specifically, examples collected by my own organization have demonstrated that some FBI Agents and other law enforcement officials who engage in these interviews as part of the multiple joint terrorism task forces violate their publicly-stated parameters and engage in patriotism tests of some individuals. While the manner by which the FBI
obtains its information is classified and understandably must remain so, questions such as individual religious practice, political views about the war in Iraq and the Palestinian-Israeli conflict and religious affiliation and practice, including some inquiries of whether a person is a Sunni or Shiite Muslim and how many times per week a person elects to pray continue to be asked.

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

Moreover, the U.S. Government is yet to effectively address the name confusion and misidentification of individuals whose names might be similar to ones located on one of the Government's watch or no fly lists. Anecdotal examples suggest that Arab, Muslim and South Asian Americans are more likely to be flagged by Department of Homeland Security authorities either when traveling by air domestically or when returning from international
travel to the United States, either by land or via air. This includes visitors, as well as immigrants, permanent residents, but most importantly, it includes United States citizens.

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

Due to the secret nature of the warrantless spying program, we cannot provide specific examples, unequivocally demonstrating the negative effects it has had on our communities. However, anecdotal examples do suggest such effects. One example was documented by ADC in 2004 when Dr. Z., an American citizen of Arab origin received a phone call from an FBI Special Agent. While extremely professional and courteous the FBI Agent requested to meet Dr. Z. for a casual chat about telephone calls made between Dr. Z.'s home phone number in recent weeks and a country in the Middle East. Dr. Z. contacted ADC which provided an attorney to monitor the meeting.
Our attorney documented that the FBI Agent, despite his professionalism and courteous behavior during the meeting questioned Dr. Z. for having regular phone calls made to a specific city in an Arab country on a regular basis over a period of two months. Dr. Z. explained during this meeting that his mother-in-law was ill at the same time that his wife was away visiting her and therefore Dr. Z. was making routine phone calls to that specific city on a regular basis to speak with his wife as she visited her ill mother. To verify, the FBI Agent produced a copy of call logs made between Dr. Z's home and that specific area in the city, actually, it was an Arab capital.

When asked by the ADC attorney whether the FBI is monitoring Dr. Z.'s telephone and whether they have any warrants to do so, the Agent stated that the FBI was not monitoring Dr. Z's phone number and that if they were they would have to alert Dr. Z. of such monitoring and provide a copy of the warrant upon speaking with him about the information they collected through such monitoring. The FBI Agent additionally indicated that the information presented in the call log was provided through quote unquote intelligence sources and not through any domestic FBI efforts. He
further indicated that the FBI was simply following up on a request provided through those quote unquote intelligence sources.

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

Thank you.

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

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

MR. SHORA: Commissioner Melendez, this is a very valid question and this strikes at the heart of why I'm here today. As I indicated in my comments earlier, our community feels a special responsibility to work with federal law enforcement in combatting terrorism and violent extremism and we've taken up that role very seriously.
However, organizations like mine and many others in both the Arab and Muslim American communities are literally placed between a rock and a hard place where we're trying to cooperate as much as possible, to coordinate constructive efforts that are legitimate by law enforcement officials while at the same time our community has the extremely prevalent perception that we are the targets. And that's extremely unfortunate and is self-defeating in our efforts to, in fact, combat real terrorism.

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

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

COMMISSIONER BRACERAS: So you share the perception.

MR. SHORA: All we can do is rely on
reality. Our job is to receive complaints from the community, to provide monitors --

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

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

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

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

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

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

MR. NOJEIM: May I offer some thoughts on this? There are a number of counter-terrorism
programs that the Administration has launched that do focus on Arabs and Muslims. Mr. Shora identified a number of them in his testimony. They include NSEERS, the “no-fly” program, the program about interviewing Arab and Muslim Americans that involved 10,000 people, and then 5,000 more.

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

COMMISSIONER BRACERAS: Right.

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

COMMISSIONER BRACERAS: But I think the question, the original question was whether there's a perception in the community that they are being wrongfully targeted, and if there is a perception that they are being wrongfully targeted in the community my question for Mr. Shora is what obligation do groups like his have to dispel that perception if it's a perception that's wrongly held?
MR. SHORA: My answer to you is very direct and clear. We are not basing that perception on pure myth. We are basing it on anecdotal examples that is reported directly and first hand --

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

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

COMMISSIONER BRACERAS: Right, three anecdotal examples.

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

COMMISSIONER BRACERAS: So just to be clear, you think that those three programs that those are examples of programs that incorrectly and wrongly and erroneously target members of your community?
MR. SHORA: I can only provide you with the answer that former Attorney General John Ashcroft provided to the Senate Judiciary Committee when he was asked about that.

COMMISSIONER BRACERAS: Okay.

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

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

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

COMMISSIONER BRACERAS: I think, I mean -- I think you and I both know that in the criminal justice system there's often not enough evidence to charge people with crimes that they may have been planning to commit or may have committed. So that's not dispositive to me.
My question is in these cases, I mean one thing you mentioned is that members of your community are more likely to be flagged while traveling, right? Are you asserting that that's solely because they're Arab or are you asserting that that's -- or could it also be because of other factors that are considered by the Government?

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

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

COMMISSIONER TAYLOR: Mr. Nojeim, would you address this issue because it sounded like you all were in agreement with respect to the impact, that is,
Mr. Shora was demonstrating the impact by way of anecdotal evidence and you were saying it's only logical that the numbers are what they are. So I'm trying to square those two statements. They sounded like you all were agreeing, but to Commissioner Braceras' point no one discussed what precipitated the targeting. But you suggested it was logical, so I want to see if I can get you into this conversation.

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

But I think it's also telling that the FBI is not out there and the NSA is not out there trying to hire to translate all of these intercepts, German speakers. They're not trying to hire Polish speakers and they're not trying to hire Russian speakers. They're trying to hire --
COMMISSIONER BRACERAS: Are the Germans, Russians and Poles trying to destroy our country through terrorism?

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

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

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

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

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

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

COMMISSIONER BRACERAS: That may be. I don't know necessarily disagree with you. My point was simply responding to the comment that the FBI was not out there hiring native Polish speakers to combat terrorism and my point was well, why would they be?
The people who have attacked our country through terrorism haven't typically been Polish speakers.

COMMISSIONER TAYLOR: I think Commissioner Yaki has a question.

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

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

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fourth amendment. It does not escape the third amendment.

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

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

COMMISSIONER YAKI: So we are targeting
people with Motorola Razor phones or something? It's not the same thing. You can't possibly be saying when you tap someone's phone you're making an assumption that somehow well, that phone line just happens to belong to a Muslim American.

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

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

DR. EASTMAN: No, you are taking the fact that the number of people that we believe may have
been on this list, whose calls are being intercepted, we don't know, that --

Commissioner Yaki: That's true, we don't know.

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

Commissioner Braceras: And just to follow up on Professor Eastman's point, if the INS is making an effort to stop illegal immigration over the Mexican border, by default, most of the people that they stop are going to be Hispanic. That doesn't mean -- let me finish -- that doesn't mean that they're stopping them because they're Hispanic. They're stopping them because they're crossing the border illegally and it just so happens that that's the country they're coming
I think the analogy is a beautiful one and works perfectly in that context.

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

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

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

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

STAFF DIRECTOR MARCUS: It's an answer, yes, we did contact them.
COMMISSIONER YAKI: What did they say? 

What about the scope was different that they didn't want to talk about?

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

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

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

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

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

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

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

COMMISSIONER TAYLOR: Commissioner Kirsanow?

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

My question goes primarily to Professor Eastman, but anyone else can jump in if they wish. It strikes me that there's an inherent tension here in the authority of the President to engage in the kind of conduct we're talking about here under the
authorization to use military force, combined with the inherent power and (1:55:53) power in a war such as this because there's a perception, it strikes me that by many, we're not really engaged in a real war. It's easy to forget that it's a war. We're not necessarily fighting a standing army with a defined state and the combatants don't necessarily wear uniforms.

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

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

And there's a reason that in the law of nations conduct that is not traditional war conduct is considered unlawful enemy conduct because of the
slippery slope that you have -- if people here are
engaging in war against the United States by
nontraditional means by the use of attacks on
civilians, by dressing in civilian garb, by engaging
in civilian communications with military purposes --
the fear is that you would have to, in order to
prevent that kind of attack on the United States, in
fact, do things that would normally not be done even
in time of war. And it's why those things are
considered to be unlawful combatancy and why unlawful
combatants can be prosecuted for violating the laws of
war, quite apart from any criminal matter that goes
on.

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

The touchmark for the Fourth Amendment,
though, and I want to go back to what Commissioner
Yaki said. I never said that the President doesn't
have to comply with the terms of the Constitution or the fourth amendment, but the touchstone there is not warrants. The touchstone there is reasonableness, and reasonableness in a time of war, particularly a war like this where our enemies are using disposable cell phones to be able to launch another attack, is different than it might be prior to 9/11 and we have got to acknowledge that, if we're ever going to recognize both the fact that we're in a war and the nature of that war and what it's going to take to win.

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

MR. NOJEIM: I did. Regardless of whether we call it a war or something else, we have to recognize that it's something that's going to be with us for decades, for generations. We're going to be fighting this thing for a very long time and the rules that we set are the rules that we should think about setting for our society in perpetuity. Do we want it to be the case in perpetuity that the President alone would be able to decide whether a person should be wiretapped when that person is in the United States conversing with someone outside? That's a very fundamental question and it goes to -- I think it goes to who we are as a nation, what our values are, how
we're going to balance freedom and security over the long haul, not for the period that our troops are in Afghanistan or in Iraq. This is a very long haul issue.

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

COMMISSIONER TAYLOR: Commissioner Kirsanow.

COMMISSIONER KIRSANOW: I would like to just assess my own curiosity and this goes to anyone who wants to respond, but particularly, Mr. Nojeim. You talked about the balancing of freedom and security and the fact that this is going to be a difficult proposition over the long haul. It may have a bearing on what kind of society we are if we set certain rules or standards too low, for example. We're operating to a large extent somewhat in an
information vacuum, it strikes me, because we have this January announcement that the Administrative has changed its protocols related to NSA -- well, the purported warrantless wiretapping. We don't know precisely how it's done. It sounds like it's programmatic change related to the FISA Court and from that I tend to gather and I don't know if this is the case, but rather than go in on individual cases, there's a predicate that's established that will permit them with approval from the FISA Court to go ahead and wiretap or listen in. I don't know if that's true or not.

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

If that's true, that they needed that immediacy and FISA didn't permit that, if there were no concerns about disparate impact, and the failure to
move quickly could result in New York City being incinerated, at what stage would you draw the line in terms of when it is that the President has the authority or an Administration, the Executive has the authority to go ahead and conduct this kind of surveillance, presuming, of course, it's somebody in the United States and there is some type of evidence that's with somebody who is suspected of being a combattant.

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

And I have to point out to the Commission, FISA has an emergency provision. If there's some risk that New York City is going to be incinerated, the Government can get an order immediately without going to the FISA Court that lasts for three days and it can get that order, it can wiretap without -- I'm sorry,
it can conduct that wiretapping without a Court order in that emergency for three days. It just has to go to the Court within that three-day period and present its application.

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

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

COMMISSIONER YAKI: I guess my concern about some of the statements made by Mr. Eastman and made at the hearing dealing with well, remember these are the people who tried to blow us up and therefore we have a responsibility to make sure that we deal with it adequately. Just sends me back to a time when
my father was a young boy and there you had a situation where a war was conducted against the United States outside the normal boundaries of rules at that time. It's different than before, the one that did their formal declarations of war and took a couple of months for everyone to attack one another, but World War II was a lot different than the attack of Japan and Pearl Harbor was an entirely different matter altogether. It was done without the official communiqué, it was done without the usual warning that we have declared war. It just happened.

Subsequently, the United States went into a justifiably shock and the President in his executive power, a President who I admire for many things except for this one biggy, decided that there were rumor and innuendo that there were enemy combatants among us in the Japanese American population, proceeded to quarantine where they could go, put curfews on what they could do and then the next step was Executive Order 9066 whose anniversary is celebrated every February by the Japanese-American community that resulted in the internment of the Japanese Americans, all in the -- under the Article 2 powers of the President and which unfortunately to this day remains uncontradicted, perhaps avoided, but actually it may
have been cited in the *Hamdi* case, the *Korematsu* case and which the Court upheld the internment of the Japanese-American community despite the fact that in subsequent trials held 40-odd years later, the Government could not produce a single scrap of evidence that there was any acts of sabotage, disloyalty, what have you, by any member of the Japanese-American community on the West Coast.

My concern stems from that. When we label entire community as if they are part of the community that attacked our country and so therefore, I worry when a domestic wiretapping program has, as its thesis, that we are going to listen in on those people because those people are the ones who attacked our country. And it would be good, I do not see this happening from here, but hopefully Congress could, it would be good to find out what -- before the program changed in January of this year, to the extent that it really has changed, no one really knows how much it really has changed since January of this year, but what were the numbers of people who were subjected to the warrantless wiretapping? How many of them were in the Arab American community or had Arab surnames or were of Muslim background? What percentage of those communities were the ones targeted by that, because it
is important, I think, for the American people to understand and be educated about why there is a difference and should be a difference between identifying those who attacked us and those who share the same ethnic, religious, whatever or surname-sounding name, because God knows we've heard a lot of people getting put on the no fly list because their name just happened to sound Arabic or Muslim, because it is a very slippery slope and it's not one rooted in fantasy, because 1942 did occur.

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

You're right, Professor, what the entire scope of this program was, but my suspicion, based on what happened in the first Gulf War, where the FBI conducted sweeps of the Arab American community and began questioning them, asking them to come in for questioning. I was part of the opposition to that when I was working in Congress and I know that happened. They admitted it happened. They stopped it after a lot of outcry, but I would not be surprised to see it happening again here in this program. It would
be instructive. I don't think we'll do it. I think some other body would -- I'd love for us to do it. But it is something that we have to watch out for. We have to guard against, because it does strike the civil rights of an identifiable or identified minority in this country.

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

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

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

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

MR. SHORA: May I interject?

COMMISSIONER YAKI: Yes.

MR. SHORA: I keep hearing this reference and not just today, but repeatedly by advocates of this program that we are taking it for granted that any phone call made to a certain number is automatically labeled an al Qaeda number. I just provided this body today with a specific example where one of our attorneys actually -- we have firsthand information, demonstrating that the phone call being made was to a hospital room in a capital city of one
of our most important allies in the Middle East. We should not lose track of that.

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

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

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

The second point I wanted to make is that Mr. Eastman has cited a number of cases and made arguments that the President has this authority.
Obviously, we disagree and disagree strongly. We think that in the *Youngstown Steel* case, the Justice Jackson concurrence, it's the case that Congress has acted *contrary* to what the President wants to do. His power, therefore, is at its lowest ebb, not that it has done something that supports what he wants to do. If you were to believe that they have done something that supports what he wants to do, you'd have to believe that they authorized by their silence that which they had explicitly prohibited. They were silent in the AUMF. They explicitly prohibited warrantless wiretapping of people in the United States in FISA. It's not an illogical position.

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

COMMISSIONER KIRSANOW: I'd like to follow up on that because that's an interesting point, talking about *Youngstown Sheet and Tool* and the load the President has. You mentioned the AUMF and that there is -- it's solid with respect to domestic wiretapping authority, but that there's a specific statute that requires such authority.
The question I have and I suspect I know your answer, but I would like you to articulate it. I think of Section 2A of the AUMF says that Congress grants the President and acknowledges its constitutional authority to deter and prevent terrorist attacks. There's also the provision of FISA that you just talked about that said that they don't prohibit domestic wiretapping. In fact, there is an exception where there are exigent circumstances where there's a three-day emergency provision.

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

MR. NOJEIM: No, I don't and you have to also factor into the equation the provision of FISA that explicitly addresses the wartime situation. FISA includes a provision that says that when there's a declared war, the President can wiretap without a
court order for 15 days. The legislative history makes it clear that what Congress intended was that if it was going to be -- if there was going to be a need to wiretap for a longer period, the President would come to Congress and get additional authority. Congress would give it if it wanted to.

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

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

DR. EASTMAN: Let me real quickly respond because the Supreme Court has already addressed this
issue as I said earlier.

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

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

COMMISSIONER TAYLOR: Last word, Mr.
MR. NOJEIM:  *Hamdi* involved a battlefield detention. The case is explicitly about people found on the battlefield. The page is 519. It's quite another matter to say that what the Court in *Hamdi* said covers domestic spying and domestic wiretapping.

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

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