

**HEARING OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE  
UNITED STATES**

SUBJECT: SIXTH PUBLIC HEARING

CHAired BY: THOMAS H. KEAN

**WITNESSES PANEL I: INTELLIGENCE COLLECTIONS WITHIN THE UNITED STATES;**

LARRY D. THOMPSON, SENIOR FELLOW, THE BROOKINGS INSTITUTION, AND FORMER DEPUTY ATTORNEY GENERAL OF THE UNITED STATES;

STEPHEN J. SCHULHOFER, PROFESSOR OF LAW, NEW YORK UNIVERSITY;

**PANEL II: PROTECTING PRIVACY, PREVENTING TERRORISM;**

JUDITH A. MILLER, PARTNER, WILLIAMS & CONNOLLY, AND FORMER GENERAL COUNSEL, DEPARTMENT OF DEFENSE;

STEWART A. BAKER, PARTNER, STEPTOE & JOHNSON, AND FORMER GENERAL COUNSEL, NATIONAL SECURITY AGENCY;

MARC ROTENBERG, EXECUTIVE DIRECTOR, ELECTRONIC PRIVACY INFORMATION CENTER;

**PANEL III: PREVENTIVE DETENTION: USE OF IMMIGRATION LAWS AND ENEMY COMBATANT DESIGNATIONS TO COMBAT TERRORISM;**

JAN TING, PROFESSOR OF LAW, TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW, AND FORMER ASSISTANT COMMISSIONER FOR REFUGEES, ASYLUM AND PAROLE, IMMIGRATION AND NATURALIZATION SERVICE;

KHALED MEDHAT ABOU EL FADL, VISITING PROFESSOR, YALE LAW SCHOOL, AND PROFESSOR, DISTINGUISHED FELLOW IN ISLAMIC LAW, UCLA SCHOOL OF LAW;

DAVID MARTIN, WARNER-BOOKER DISTINGUISHED PROFESSOR OF INTERNATIONAL LAW, UNIVERSITY OF VIRGINIA LAW SCHOOL, AND FORMER GENERAL COUNSEL, IMMIGRATION AND NATURALIZATION SERVICE;

**PANEL IV: GOVERNMENT ORGANIZATION AND DOMESTIC INTELLIGENCE;**

WILLIAM P. BARR, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, VERIZON COMMUNICATIONS, AND FORMER ATTORNEY GENERAL OF THE UNITED STATES;

JOHN J. HAMRE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, AND FORMER DEPUTY SECRETARY OF DEFENSE;

JOHN MACGAFFIN, DIRECTOR, AKE LLC, AND FORMER ASSOCIATE DEPUTY DIRECTOR FOR OPERATIONS, CENTRAL INTELLIGENCE AGENCY

LOCATION: 253 RUSSELL SENATE OFFICE BUILDING, WASHINGTON, D.C.

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THOMAS H. KEAN: As Chairman of the National Commission on Terrorist Attacks Upon the United States, I'd like to convene our sixth public hearing. We've taken as the topic of today's hearing, "Security and Liberty." I guess its very title suggests the myriad of issues we'll be examining today. In one or more respects, all deal with civil liberties, how they can be preserved while our nation seeks to enhance the security of its people in the aftermath of the most heinous attacks ever launched against our country by a band of international terrorists.

In some respects, a debate that continues to surround the PATRIOT Act, use of immigration laws and other measures is not terribly surprising. Historians that are either with us in the audience today or watching us on television would remind us that questions not unlike those we'll be hearing today have come up each time our nation has gone to war. Legal scholars can cite an impressive stack of case law that grew out of them. They can also cite some obvious infractions of civil liberties, the suspension of habeas corpus, the interment of Japanese citizens. These are things our society as a whole grew to regret.

At the same time, as my colleague Lee Hamilton, Vice Chair, has reminded us, the unprecedented nature of the attacks on September 11th produced a strong response. We want to know more about that response, how well current policies are working, and what steps are needed to protect our cherished liberties as well as to protect our nation. We've assembled four distinguished panels to help us do that.

The focus of the first will be intelligence collection within the United States. The theme of the second panel will be privacy protection and how this can be achieved while discouraging and preventing terrorism. These need not be incompatible goals. Our commissioners are particularly eager to hear what our guests have to say as to how we as a nation can achieve both goals simultaneously.

Our third panel will examine what is going under the heading of preventive detention. In particular, witnesses will assess how immigration laws and enemy combatant designations have been used in this war against terrorism. In addition to making recommendations on all of these important issues, the Commission has been charged to consider whether the domestic intelligence function should remain within the FBI. As we proceed with our investigation, we'll be asking ourselves whether the FBI should

perform this role or whether a new entity should be established to perform collection, analysis and dissemination of intelligence within the United States, primarily to prevent, curtail and combat terrorism.

As you know, opinions differ widely on this. In our recent hearing, we heard some of these different views from three universally acknowledged experts in this field and we'll do so again today with our final panel.

Before we begin, just to do a small amount of housekeeping, we are operating today under a very, very tight schedule. We'll be hearing from a dozen witnesses. In order to be fair to each of them, I'm going to give appropriate attention to the concerns they raise and allow for free-flowing discussion. I ask each of our panelists to abide by the five minute timeframe that we've imposed. I request also that they reserve additional comments they care to make hopefully for the question period. They may also submit additional materials to the record, which we'll hold open for an additional 10 days.

In exchange for our panelists' advance cooperation, I hope we can ask our commissioners to keep our questions short and to the point and to keep their eyes on the clock as well. Upon the conclusion of today's hearing, Congressman Hamilton and I will be available, as always, for questions.

We will now hear from our first panel, offering their views on intelligence collection within the United States, Larry Thompson, senior fellow, the Brookings Institute, and former deputy attorney general of the United States, and Steven J. Schulhofer, professor of law, New York University. If we could begin with Mr. Thompson.

LARRY D. THOMPSON: Thank you. Good morning. Thank you for asking me to appear before the Commission this morning. As the Chairman has said, I'll try to abide by the five minute limitation. I have prepared written testimony but this morning what I would like to do is briefly highlight three points that I made in my written testimony and then expand a bit with respect to one of the points.

The subject of this morning's panel is intelligence collection. Intelligence collection is, however, as I point out in my written testimony, only the first step that we need to be concerned about in combating terrorism. Once you collect information, Mr. Chairman, you need to share it and disseminate it. Those are very important steps that we need to take. Now, even before the horrific events of September 11, I witnessed first hand, as the deputy attorney general, some of the problems that we in the department had with sharing information, even in the department, sharing information with intelligence officials on one hand of the FBI and with our prosecutors on the other hand

in the Criminal Division and in at least the Southern District of New York U.S. Attorney's Office.

And these problems caused me on August the 6th of 2001 to write a memo to the head of the FBI, to the head of the Criminal Division and the head of our Office of Intelligence and Policy Review, OIPR. And I reminded these gentlemen of the need for the FBI intelligence officials to notify the Department's prosecutors as soon as possible of the existence of the possibility of federal criminal law violations during the course of an intelligence or counterterrorism investigation. And, Mr. Chairman, we still had problems with that issue up to the horrific events of 9/11.

Now, with the help of Congress, we in this country have made great strides toward getting more tools and resources in our efforts to combat terrorism. Many of the new resources or tools are embodied in laws, especially, as the Chairman mentioned, the PATRIOT Act. I'd like to just mention one provision of the PATRIOT Act this morning, highlight one provision that I think is extremely important, and that is section 218. Section 218 of the PATRIOT Act has allowed the FBI and the Department of Justice prosecutors to expand the nature of the investigation of terrorist activity, especially as it relates to electronic surveillance activities and search activities.

As you know, section 218 provides that FISA investigations, investigations under the Foreign Intelligence Surveillance Act, can be utilized when foreign intelligence is a significant purpose of the investigation, as opposed to the old primary purpose of the investigation. This is a very important distinction and this is a very important provision.

I would like to point out to the Commission this morning that section 218 of the PATRIOT Act, as well as 15 other provisions of the PATRIOT Act will sunset, cease to be in effect, as of December, I believe, 31, 2005. December 2005 at least. We cannot afford to let these important provisions of the PATRIOT Act sunset without, I think, further reasonable, dispassionate and informed discussion as a country as to how important these provisions are to our anti-terrorism efforts.

I mentioned in my written testimony three ideas that I believe we can focus on that can help us in our fight against terrorism, but this morning briefly I would like to focus and highlight one of them. We need to clarify the scope of some of the court opinions as it relates to the statute dealing with the material support of terrorism. This statute has been an invaluable tool in our war against terrorism and it works.

Let me quote to you, members of the Commission, a conversation that was unsealed in court recently that was between Mr. Jeffrey Battle, an individual in Portland, Oregon who was accused of participating in terrorist activity and an FBI

informant. And Mr. Battle explained why his terrorism activities were not working as well as he thought he could be, and let me quote to you what he said. "Because we don't have support. Everybody's scared to give up money to help us. You know what I'm saying? Because that law that Bush wrote about, you know, supporting terrorism, whatever, the whole thing. Everybody's scared. He made a law that says, for instance, if I left out of the country and I fought, right, but I wasn't able to afford a ticket but you bought my plane ticket, you gave me the money to do it. By me going and me fighting and doing that they can, by this new law, they can come and take you and put you in jail."

So the terrorists are getting the message. This is a very important statute, it needs to be clarified. Representative Mark Green of Wisconsin has introduced legislation to do this and I would hope that the Commission would review this and study it and support that proposed legislation.

I hope -- I've tried to -- I hope I've had fidelity to my promise to stick to five minutes, and after the professor's testimony I would be pleased to try to answer any questions that the members of the Commission might have.

MR. KEAN: Thank you very much.

Dr. Schulhofer.

STEPHEN J. SCHULHOFER: Mr. Chairman, thank you very much. Commissioners, thank you for this opportunity to contribute to your work. I want to stress first that the legal issues are far less important than the public generally thinks.

After 9/11, legal experts quickly concluded that we needed to strengthen the government's intelligence gathering authority, that we needed to shift the balance, as the saying goes, shift the balance between liberty and security. But legal rules are largely irrelevant at the stages where our intelligence problems have been the greatest, and that includes sharing information, as Larry Thompson just said, coordination, translation, analysis and delivery. Even at the initial stage of gathering the intelligence, our capabilities are largely determined by agency culture, by technical and human resources. Again, all areas where our deficits have been enormous.

So under these circumstances, the preoccupation with questions with legal authority can be misleading and dangerous. Obviously the legal problems should be corrected. My point isn't to question their relevance, but we have to keep our priorities straight. The really grave weaknesses of our intelligence process can't be fixed by passing more laws. But if we focus so much on legal issues, as we have repeatedly since 9/11, we're inevitably going to be diverted from problems that matter much, much more.

Now, looking specifically to the situation pre-9/11, the government's legal authority was strong. There were imperfections, but the record is clear that the legal imperfections were not to blame for the failure to prevent the attacks. We had severe human budgetary and organizational deficits that prevented our law enforcement and intelligence communities from using their legal powers effectively. The Moussaoui fiasco in August of '01 was a particularly clear example of that. And there's no reason to believe that additional legal authority would have been used to any greater advantage.

For example, DOJ documents make clear that at least by April of 2000, April of 2000, department officials were aware of a pattern of FBI legal mistakes, and specifically FISA mistakes by the UBL Unit. It's not clear what efforts were made to correct those deficiencies, either in the last half of 2000 or in the first half of 2001, but whatever the explanation, it's clear that by the summer of '01, we had many bright red warning lights flashing, clear, at least in retrospect. And it's our deficiencies in organization, in resources and in priorities that cost us whatever chances we might have had to abort the plot.

Now, turning to the future, I've developed several ideas in my written testimony but I'd like to focus quickly on five conclusions. First, overall, the government currently has sufficient legal tools but it remains sorely lacking in the non-legal capabilities needed to deploy these tools effectively. Second, more than a dozen legal initiatives since 9/11 are demonstrably not justified as a response to September 11. They impair privacy and they impair freedom, but they are completely irrelevant to fighting terrorism. Examples include parts of the new sneak and peak search powers and major parts of the new FISA powers, because these parts are available for use in investigations that are completely unrelated to terrorism.

Now, thirdly, many of the new powers are relevant to fighting terrorism, but they are so over-broad that they actually undermine our security. Steps have been taken to restrict public information, to restrict access to the courts, and to reduce judicial oversight of searches and surveillance. The common thread that runs through these measures is the erosion, and in many instances, the complete obliteration of traditional checks and balances, reducing accountability to the courts, to the public, to the press and even to Congress.

Now, when I've just said that, that might sound a bit critical, so I want to be clear that this is simply a description, and I think an uncontroversial description of what has gone on. The Justice Department acknowledges this and the Justice Department has publicly defended these steps as appropriate and necessary in our present circumstances. But the absence of effective systems of accountability is a recipe for

wasted effort, misdirected resources and bad mistakes. Does not help our security.

Fourthly, our security depends on building confidence around the world that America exercises its power with restraint and with respect for the rule of law, but our present policies of secrecy and unchecked law enforcement power are fueling alienation and mistrust. So we're purchasing short-term gains and usually slender gains at best. We're purchasing them at the price of fostering lasting animosity among the very people here and abroad whose help we need most if we are to break the cycle of terrorist violence.

An example is the so-called enemy combatants' power, and I gather that you have a section to focus on that. But this is particularly central to the idea of accountability. The Administration's claim of power to seize a U.S. citizen here in the United States and hold the person indefinitely with no access to the courts or even to his own family, no other democratic country, including Israel, who has at least as serious problems as our own -- no other country would detain an alleged enemy combatant for as long as 18 days, much less for the 18 months that Jose Padilla has been held incommunicado.

Finally, to maximize our security and to preserve fundamental freedoms, we have to act quickly in two areas that I would urge you to focus on. First, we must restore effective checks and balances. Secondly, we have to make the commitment to provide a substantial infusion of resources. We need resources to support the intelligence process, we need resources to facilitate accountability, and we need resources to protect soft targets on the ground. Without protective measures, too many of our high priority targets will be vulnerable, no matter how good our intelligence may be.

One lesson of the two most recent attacks in Saudi Arabia is that even with unlimited government powers of surveillance and interrogation, those powers aren't much help if important targets are not well-protected. On both of those occasions, intelligence officials warned that an attack was imminent, but without adequate defense on the ground, the plot succeeded anyway. So here at home we are nowhere near what's needed to protect key targets like ports, chemical plants and our major weapons facilities.

Now, doing what's needed in those areas will be expensive, but if we're willing to pay that price, we can be reasonably safe and reasonably free. If we're not willing to pay that price, we cannot be safe, no matter how much of our liberty we're willing to surrender. Thank you.

MR. KEAN: Thank you very much, Doctor.

Commissioner Fielding.

FRED F. FIELDING: Thank you. How's that? Thank you all very much for your testimony. The purpose of this hearing today and the theme of it, if you will, is security and liberty. And I would first like to thank you for your contribution to that debate. This is obviously something that's one of the most important deliberations that we're going to have to deal with. And also while I'm at the thanking, thank you both for your years of public service and for your contributions to not only the profession of the law but also for the administration of justice. We're all very grateful that you're here, we're sorry that Professor Heymann can't be here. I had a series of questions I was curious to hear him in the debate on his book, but we'll perhaps have that for another day.

It's the juxtaposition of the concepts of security and liberty that are the major focus today and while we ponder which recommendations for future actions we have to take and what we want to recommend to the leaders of the nation and to the citizens of this country. And I hope it goes without saying that when we focus on the horrible acts of 9/11 that we must be careful that our anger doesn't lead us to overreaction and that our fear of future plots doesn't cloud our judgment as to the measures that are really necessary to protect and prevent any such future acts of terrorism. We must be aware and we have to all collectively, both witnesses and us, be sure that our recommendations to provide security are consistent with the need to balance and preserve the elements of liberty, which are really the bulwark of our governmental system. It would be horrible if we don't do that, and then the terrorists would have a second victory that would be far beyond their wildest notions of success.

So with that in mind, I've got a few questions I'd like to ask you. You know, at the end of the day our job is to make recommendations, and in trying to formulate this, it's why we are so grateful that you're all here. I've got a few areas of questioning that I'd like to pursue, and then in deference to time, I will turn it over to my colleague, Tim Roemer, and I must tell you that also my other colleagues all have questions they'd like to ask you. So I'll proceed with just a few.

I'd like to start with you, Larry Thompson, just because you had just discussed changing the law and maybe refining or -- the value of redefinition of the law under the PATRIOT Act. I think, as I recall, there's a recent Ninth Circuit decision on this, but there had been some concern about the application of material support law, especially to individuals who contribute to organizations and are unaware that the money may be used or has been used for terrorist activities. And I would really appreciate any guidance you can give us to as to whether you think this is a significant problem, and if so, how we might be able to rectify it. And, Professor, I'd like you to also comment on that as well.

MR. THOMPSON: Yes, Mr. Fielding, you referenced the Ninth Circuit case, and if I can recall that case held that certain parts of the material support statute were unconstitutionally vague, especially as it related to providing one's own services, one's own persona, if you will, to participating in, for example, a terrorist training camp. And the legislation that I referenced in my written testimony, my written statement, and what I mentioned briefly this morning would clarify that to make it clear that if you go and participate in a terrorist training camp and an activity that clearly provides material support to terrorism -- to your point about the need to make certain that we do not change the fundamental character of this country as we deal with terrorism, as we -- as Congress has passed more laws to give the government better tools to fight terrorism, I agree with that.

And with respect to the PATRIOT Act, I recall reading just recently some comments by Senator Dianne Feinstein in which she said there's been a great deal of concern and angst and misinformation about the PATRIOT Act. She said that she called the ACLU's office and asked the ACLU to provide her of any instance of an abuse by the Department of Justice of the PATRIOT Act as it has been recently passed and implemented by the Department of Justice. And the ACLU told her they were not aware of any abuse, any instance of the law being misapplied. And the point I'm making here is that the important electronic surveillance and search provisions of the PATRIOT Act are subject to judicial review, they're subject to judicial scrutiny. And no lawyer will sacrifice or jeopardize his or her career by making false statements and affidavits in support of search warrants, in support of applications for electronic review. I think that's very important and I think it's needed. But the point is, that with respect to the PATRIOT Act, I believe that there has been a great deal of misinformation.

The Act has not been discussed in the dispassionate and reasonable and informed manner that I think it's needed to be discussed. But most importantly is that some very important provisions of that act, especially section 218 which has allowed the government to expand its coverage of suspected terrorist activity, subject to judicial approval. That provision is going to sunset and I think it would be a terrible mistake to allow that provision to sunset.

MR. FIELDING: Thank you.

Professor?

MR. SCHULHOFER: Thank you. First of all, specifically on the material support statute, I think that no one questions the importance of cutting off material support to terrorist organizations. The problem arises when people who may have inadvertently given material support find themselves at the

bottom of a ton of bricks because, having given material support, they're treated like the first assistant to Osama bin Laden and facing a sentence of life imprisonment.

So what we need to do with the material support statute is to be sure that these very, very severe penalties are targeted and limited by law to people who have knowingly given material support and that people who have inadvertently given material support are either subject to very modest penalties or, I believe in the case of protected First Amendment activities, should not be subject to any penalties at all.

The flow of the money can be cut off by the government itself in targeting those charities which have a mixture of terrorist and legitimate activity. The government can target that without treating the inadvertent contributors as the worst criminals that are out there. That would be number one. Now, I do have a number of disagreements with my good colleague here, and it may be that I disagree with the ACLU because I do think there are some significant problems with the PATRIOT Act.

Number one, I think it's true that we're not aware of much because so much secrecy surrounds the way that PATRIOT Act provisions have been applied. So I would have to say as well that many of the things concern me. I can't give you specific example because the Justice Department has not told us and has not told the congressional oversight committees either how many of these provisions are being applied. An example -- something that was an example was section 215 which gives the Justice Department access to business records and non-business records, including records, membership records of religious organizations -- library borrowing records has been the one that's been most controversial. There's been a big hullabaloo about that and the Justice Department for many months refused to say how often it was being used. Finally they revealed that it had not been used at all.

Well, so I guess one could say that it's not an abuse, but I think the fact that it hasn't been used for more than two years suggests that it's not so necessary and that the chilling effect a provision like that inevitably has probably outweighs the benefits. More broadly, and I may be going beyond your question and reflecting the comments of my good friend here, more broadly I believe that there are -- number one, there are instances where we have to balance. I think it's quite true that there are instances where there is a trade off, where we may, at least from one perspective, be sacrificing enormously important liberties for the very long term. This is a war likely to last for much longer than any other. Sacrificing very central liberties for a very tangential, speculative game. That is balancing.

More often it seems to me the choice is simply a false choice. That we don't necessarily need to give up liberty to get security. And in fact I think the assumption itself is very

misleading, because I think the public tends to assume that if we are giving up liberty, then we're getting security. People take that for granted and because that so often that isn't the case, it's an assumption that's actually quite dangerous. I think it's understandable that people have these intuitions, and I think it's understandable they have the preference to be secure at any price. I myself live and work in lower Manhattan, and I feel that intuition, I believe, as strongly as anyone. But most often it's a false choice.

I think an example, just to give one, accountability measures have been a source of great frustration to the Justice Department because they take time, they take paperwork, they're a distraction, or they appear to be a distraction. And the Justice Department has often said we need to simplify and short circuit these checks and balances so that our agents can devote themselves to investigative work on the ground. But the solution to that is not to sacrifice the rule of law so that we can free our personnel for field work -- that's the seeming dilemma between liberty and security. But the simple solution is simply to provide sufficient resources so that we have enough agents and enough time to allow for accountability.

Israel, for example, faces at least as serious threats and at least as severe resource constraints as we do. But very recently their supreme court confronted exactly this issue and they said that a shortage of personnel doesn't justify curtailing checks and balances. What they said was when there are emergency conditions that demand a large scale deployment of security forces, then by the same token, the government has to devote comparable effort and resources to preserving accountability.

So that would be one of, I believe, many examples where this choice becomes a false choice. And I think protecting soft targets would be another example of where we can be both free and secure if we're willing to devote resources.

MR. FIELDING: Thank you very much. I trust that the headline tomorrow will not be that you disagree with the ACLU. But in regard to the PATRIOT Act, this is obviously something that we're going to have to deal with in some way in our report. And it's also very clear that this is a very volatile issue and one that's subject to extreme debate. I would really appreciate your comments, both of your comments, as to how we should address this. I know that Mr. Thompson -- I believe about a month ago you made a suggestion in a speech that maybe there should be a commission appointed to review this. I guess we all have our views on commissions these days, but that certainly would be one alternative. But as we address this, we would appreciate your guidance as to how we should address it.

We obviously can't be in a position where the Commission votes six to four to repeal 218 and seven to three to do

something. So we need a mechanism. So could I draw upon your experiences and your judgment on that, please?

MR. THOMPSON: That's a very important question and it's one that I'm struggling with as I am now a private citizen and am out of government and have to interact with fellow citizens about what the country is doing in responding to the terrorist attacks and talking about the PATRIOT Act. And the one thing that is frustrating, and the professor mentioned accountability. I don't know how more accountable the Department of Justice lawyers and FBI agents can be other than under oath signing affidavits that there is probable cause to conduct a search, that there is probable cause to believe that an individual's engaged in an international terrorist activity and therefore obtaining an application for electronic surveillance under the FISA statute.

I don't know what additional accountability you can have. That's the traditional way to be accountable in our criminal justice system. That's the way prosecutors and agents have been accountable to society for years. But the point is, we have a great deal of suspicion out there about the PATRIOT Act, we have a great deal of, I think, misinformation. And, Mr. Fielding, what I think is critically important, and what I hope this commission would give us advice and counsel on, is that we cannot as a country allow at least some of the very important provisions of the PATRIOT Act to sunset without a greater, more reasoned, less political and more informed discussion as to why we need them in our war against terrorism.

And I agree with the professor, I do think that we have to have a national consensus, if you will, as to what the government is doing, and people need to be comfortable that we're going to pursue -- the government is going to pursue its important public safety and national security measures in a fair and impartial way. That's important. But what is happening with respect to the PATRIOT Act and the debate that we're having I'm very frustrated about because it's a debate that's permeated with a lot of misinformation, sometimes false information. And I did suggest that we have a commission of legal scholars, practitioners in the national security and criminal enforcement area to study the provisions of the PATRIOT Act that are going to sunset. And if we're going to have something like that, it probably would be better not to have it in 2004 or it would be subject to some of the political considerations that are obvious. But it needs to be ready to go after the election so that Congress can get the benefit of a dispassionate, reasoned and informed advice as to the efficacy of some of the provisions of the PATRIOT Act.

Again, I personally would support all of the provisions that are scheduled to be sunsetted to continue, but I think that's something that we need to look at very carefully. And certainly provisions like 218 that are so important to our anti-terrorism

efforts, cannot afford to be allowed to sunset without the kind of discussion that I'm talking about.

MR. FIELDING: Thank you.

Professor?

MR. SCHULHOFER: Yes. I think on this subject there's probably far more agreement than disagreement between the two of us. Number one, I think it would be wonderful if we could take that debate out of politics or at least to a lesser -- turn down the political temperature on that debate. And if a commission or a panel, perhaps delegated by the judiciary committees of the Congress, to develop a report would be a way of perhaps lowering the political temperature a little bit, I think it would be very constructive.

On this I agree completely. There's an enormous amount of misinformation. I think the issue has been overly politicized on both sides. The ACLU, I think, has exaggerated some of the problems. I think on the other side the Justice Department has, to some extent, exaggerated the benefits. I'm surprised when, for example, the changes -- proposed legislation to -- under the national security letters. There is an important need there to expand the definition of what is a financial institution for purposes of national security letters, and bring that up to date, that's fine. But that proposal was announced by the President of the United States in a major address. That seems to me, surprising. I don't understand why something of that technical nature should be elevated to the level of a politically salient kind of issue. This is where I think we could all benefit by lowering the tone a bit.

There is misinformation, but I would highlight on the substance. First of all, there are many provisions of the PATRIOT Act that give the Justice Department powers to be used in investigations that are entirely unrelated to terrorism. And the Justice Department's report on the PATRIOT Act actually acknowledges this and brags about it. I guess you could say identifies a number of investigations including an extortion inquiry, a gambling, a narcotics inquiry, where new PATRIOT Act powers were used in a conventional criminal investigation. Now, maybe there's a case to be made for that, but if there is we should take it out of the debate about terrorism and make the case a free-standing case on its own terms why the sneak-and-peek search powers and several of these other powers should be used for conventional law enforcement.

With respect to section 218, I agree that some change in the wall and some change in the significant purpose requirement is appropriate for terrorism investigations. I do not agree that those changes are appropriate for conventional criminal law enforcement, and the fact is that the PATRIOT Act expansion of FISA powers is now available to the Justice Department for any

criminal investigation. In fact, when the primary purpose is to investigate prostitution in New Orleans, or gambling in Montana, the FISA provisions can be used as long as the very broad conception of foreign intelligence -- which as I believe the commission knows, covers a very large waterfront unrelated to terrorism and even unrelated to hostile foreign powers, those are there. So that's an example.

Larry Thompson, I think appropriately, suggested that we should try to be specific about where more accountability would be appropriate. Without extending my answer I would just give a couple of examples because I think it's fair to want to be concrete about that. The National Security Letters of course involve affidavits but they bypass the courts. A number of the administrative subpoena provisions bypass the courts, the demands for documentary evidence under FISA have much more limited judicial oversight than we would conventionally require outside of the foreign intelligence area.

So anything that's FISA is much less accountability. There's some accountability, but it's much less than we would traditionally require. FISA is exceptional. It's an exception to our normal regime, and we should do it where it's appropriate but not -- but we should be careful about whether it is appropriate or not, because that's a dilution. And the last one I would mention that's not a PATRIOT Act example, but the enemy combatants again, there is no accountability there. None, absolutely none.

The concept of the rule of law disappears completely if you accept the Administration's position that they can seize a U.S. citizen right here in the United States, and that by the President's determination that the person is an enemy combatant cuts off all access to the courts, to the press, to counsel, to anything whatsoever. That is a substitution of the judgment of one person -- to be sure it's our commander and chief, but it is nonetheless, it's the judgment of one person without any outside accountability. That's one I think that sorely needs to be rectified.

MR. FIELDING: Okay, thank you. Let me just ask one final question of both of you, and I'm going to switch gears and you can put your prepared text down, because you have expertise in this area. One of the major problems that we're going to have to decide at the end of the day is whether we should recommend a change in our domestic intelligence gathering. Some of the concepts have been to have an MI5 type of an entity or something like that. If you could each give us your views on that succinctly, I'd appreciate it.

Mr. Thompson?

MR. THOMPSON: Yes, Mr. Fielding, I think it would be a terrible mistake to create a separate domestic intelligence

agency, if you will, if I understood your question, to indicate that that's what you proposed to do?

MR. FIELDING: That's correct, thank you.

MR. THOMPSON: And I explained more reasons more fully in the written statement that I prepared, but what we have here in terms of how we are going to deal with terrorist activity in this country, and this is a response too to something that the professor said, is that you need to have an integration of your intelligence investigative activity, your counterterrorism investigative activity with your prosecutors. They need to be talking to each other. You cannot have FBI counterterrorism agents pursuing an investigation, not talking to the prosecutors and not knowing what available criminal statutes, and they do not have to be the material support statute, it may be some other kind of statute.

But what kind of available criminal statutes are out there that when the decision is made that this person has gone too far and that we've exhausted our intelligence capabilities, we need to take him off the streets? And what we were having before is that because of lots of reasons, and because of lots of walls, there was no integration or there was not enough integration in our efforts. And so our counterterrorism agents were not talking to our prosecutors sometimes because they were trying to hide information improperly, sometimes because they were afraid to do so, and you need to have this integration.

We need to have section 218 help bring the walls down. I would respectfully submit that the creation of a new agency would bring the walls back up. I visited the United Kingdom and I've talked to officials at MI5. They have a much different legal system and what has developed over there is appropriate for their system. There are only 40 some-odd different law enforcement agencies for the MI5 to deal with here. We have thousands of different agencies. The FBI is undertaking a restructuring that I think is going a long way toward emphasizing intelligence, emphasizing greater analytical support, so I would say it would be a big mistake to do that.

MR. FIELDING: Thank you.

Professor?

MR. SCHULHOFER: Yes. On this subject, I'm afraid, I have more questions than answers. I find it a very, very difficult and troubling issue. I agree that we have to be very careful not to create more walls and more barriers. Most of the barriers are cultural and organizational rather than legal. And nonetheless, if you create a different agency, you run the risk of exactly what Larry Thompson just described. The problem, I think, with the FBI is that because it has had a traditional law enforcement

focus, its orientation and training and perspective on problems is different from the intelligence gathering function.

FBI agents are excellent at building a provable case and sensitivity to evidence that will be admissible in court. It's a different perspective and I'm not sure whether we can turn that ship around and create a new culture within the FBI. There are also, I think, bureaucratic imperatives here in Washington that, even if we knew what the ideal solution was, I'm not sure that we could get the sufficient political momentum to get people on board for it. One of the proposals that I've seen which I think has some attractiveness is to create within the FBI an intelligence function whose director would report more or less directly to -- either to the DCI or to some individual that would have a more proactive role in integrating intelligence.

But in other words, you could have housed within the FBI -- thereby addressing some of the bureaucratic momentum -- but housed within the FBI an organization that would have a different culture training recruitment and perspective that would have more of the quick, creative, imaginative, proactive kind of culture that I think you need for an intelligence agency. But with that said, I'm I think as puzzled about this problem as anyone else.

MR. FIELDING: Thank you both, gentlemen.

Mr. Chairman.

MR. KEAN: Congressman Roemer?

REP. TIMOTHY J. ROEMER (D-IN): Thank you, Mr. Chairman.

Thank you, Mr. Commissioner Fielding, for warming up our two distinguished guests today on this cold, frigid day in Washington. I know Professor Heymann couldn't make it because of, they say, two or three feet of snow we hear from our friends up in Boston and New England. It might have been four feet of snow. It gets bigger and bigger all the time, but we certainly appreciate both of you being here today. I want to follow up right away on one of Fred's questions and push Mr. Thompson a little bit harder here.

Mr. Thompson, it might be said by critics of the FBI's performance prior to 9/11 that to sustain an intelligence gathering system that was devised back in 1947 with the separation of domestic and foreign gathering resources and this bright line, that that is no longer sustainable in a 9/11 world with the terrorism we have. Professor Schulhofer has just indicated that he might -- well, he's got a lot of questions, like we all do. He might be open to something being put into the Department of -- to the FBI.

Let me throw three things, options out at you and you tell me what you'd be more in favor of, but give me a couple more

specific reasons why. The current status quo, creating something within the Department of FBI to help us gather this domestic intelligence information and create this better handoff without the stovepipes or something within the Department of Justice. Again, trying to bring down the wall, trying to expand our capabilities to keep up with technology, trying to make sure that the PATRIOT Act reflects some of these challenges and opportunities but certainly not going back to the status quo that we've had for the last 56 years.

MR. THOMPSON: Congressman, I agree that we shouldn't stay at the status quo. That's unacceptable. Thinking about what you said, I believe based on my experience in dealing with these issues that we should proceed along the second alternative and I know before I left that's what Director Mueller was doing with a sense of great urgency. I know that there was created within the FBI an Office of Intelligence that reported to the assistant head of the FBI for Counterterrorism and that person now is an individual who has an intelligence background which I think is terrific.

There has been more effort being put in to recruiting and training analysts, and that's something that we need to do. We need to continue to consider how we can create a career track for people within the FBI who are going to specialize in intelligence collection, who are going to specialize in analytical studies. So those are all the things that we need to be doing better. I think we're on the track to doing that. But on the other hand, I think we need to continue to make certain that the FBI and other organizations are working very closely together. We have stood up the TTIC, the Terrorist Threat Integration Center. I think that goes a long way toward doing some of the things that are so important, that are needed with respect to how we deal with terrorism.

I have 30 years of law practice, and almost all that 30 years has been either as a prosecutor or as a defense lawyer, and as a defense lawyer I know how important it is to maintain the balance that Mr. Fielding was talking about with respect to our important civil liberties. And while the FBI has made some mistakes in that area over the years, by and large the thousands of men and women who are their special agents are trained to deal within the four corners of the Fourth Amendment, for example. They're trained to deal with legal issues. Many of our intelligence officials do not have that kind of training, and maybe they shouldn't have that kind of training with respect to what's required in intelligence.

You need to be creative. But I think in terms of dealing with the domestic issues that the professor pointed out, dealing with the domestic issues as it relates to our counterterrorism efforts, it's very important to have an organization like the FBI that's been trained to deal within the confines of a wall. In addition, it's very important to have an organization like the

FBI that has this network of informants throughout the country who are bad guys and who know a lot about what's going on in their respective communities, and that in itself is a valuable repository for intelligence information, and just one other final point.

We need to have this integration because there's a lot that can be done in the prevention area when you can leverage the possibility of a long prison sentence because someone has violated the wall with cooperation, and with that cooperation you're going to get the kind of intelligence if the person was engaged in terrorism activities that we need.

REP. ROEMER: Thank you.

Dr. Schulhofer, did you have anything you wanted to add subsequent to Mr. Thompson's answer there to your first one?

MR. SCHULHOFER: Well, let me just try to be brief because I think I agree very largely with what he said. I think integration of this function is crucial. We have an enormous problem in this country because we have, I believe I saw a figure, 38,000 law enforcement agencies in this country. It's not like Britain or France or any other country, so even at the federal level we're just scratching the surface of the necessary integration that you need with the NYPD and thousands of other police departments.

I think the Terrorist Threat Integration Center -- TTIC, is it? I'd wondered how that one was pronounced -- is a beginning, but my understanding is that the way TTIC is structured, there is not a government official who has budgetary authority and agenda setting authority over that. It's a working group among a number of big heavy hitters with nobody in charge, so I think it's a step in the right direction but it doesn't really integrate as much. It doesn't integrate, and we need something of that nature which really is integrated and that you maybe need to have someone like -- above the director of central intelligence who's in charge of the counterterrorism function.

Lastly, I would just say that I'm delighted we're talking about this, and part of my concern was that all the debate about the PATRIOT Act, as important as it is, has been diverting attention from things like this which are so much more difficult and so much more important. They don't get the public attention of library borrowing and things like that, but this is really where the action is, and it's part of the reason why I kind of bristle when I hear talk about the PATRIOT Act because yes or no, whether the issues are right or wrong, they're really not the ones that we should be most concerned to talk about.

REP. ROEMER: Let me now follow up on a question that goes directly to the heart and soul of our mandate on this 9/11 Commission, and that is what happened prior to 9/11? We're

supposed to write the definitive accounting of the terrorist action and the government's activities leading up to September 11th as well, and I think from your book, professor, *The Enemy Within*, a Century Foundation report, you bring up this resources question over and over again that you believe that the need for additional resources might even be greater than the need for additional legal authorities and battling terrorism, and we have Mr. Thompson here from the Justice Department.

I want to put out a quote from your book and have you both respond to it if you would. Quote, "Yet on September 10th, in a political environment that gave high priority to shrinking the government, Attorney General Ashcroft rejected an FBI request for an additional \$58 million to fund a strengthening of its counterterrorism effort." Unquote. We have a Department of Justice, former Department of Justice official here that might be able to shed some light on that accusation from Professor Schulhofer.

Mr. Thompson, do you have any recollection of that request for a \$58 million increase in the counterterrorism budget? And then we'll have Professor Schulhofer tell us a little bit more about his perspective on that.

MR. THOMPSON: My recollection, Congressman, is that that took place in the give and take of developing a budget, and there's a process, and Commissioner Gorelick is well aware of this process of a component coming in with a certain request for funds, and leadership in the Department of Justice for negotiating with that component for the right level of funding but as I recall, and this is just my present recollection, is I recall that September 10th situation evolved in the context in the developing of the Department's budget.

I think what's more important, though, is that following the attacks of September 11th, the Department's budget for counterterrorism efforts increased dramatically as well as the FBI's budget for counterterrorism, so I think you should look -- we should focus more on what happened in terms of what happened to the budget after 9/11 and when the budget was finalized. But one other point and that is this: Those of us who've been involved in federal law enforcement for a number of years have been concerned about the fact that federal law enforcement resources have traditionally been stretched thin and have been stretched thin as we ebb and flow in terms of the various social and law enforcement priorities we've had in this country.

In the '80s, when I was in the Department of Justice, there was a great desire to push the FBI into drug enforcement. There have been other times where the FBI's been pushed into more violent crime areas, there have been times that it's been pushed into public corruption. And we're going to continue to have to deal with the fact that not only the FBI but all of federal law enforcement has limited resources and we have to be very smart

with respect to how we're going to deploy those. And I think right now we've deployed them in a way that focuses on the fact that terrorism is our number one law enforcement priority. I think that Director Mueller has done a great job in deploying those resources to deal with terrorism. And I agree with the professor that we will need to continue to look at resources and to make certain that our law enforcement officials have adequate resources to do the job.

REP. ROEMER: Thank you, Mr. Thompson. As a supporter when I was in Congress of the Balanced Budget Act, I fully support the proposition that we don't have unlimited resources and we have to make tough decisions and not go into deficit spending.

Professor, you say that the FBI could have used this for analytical capabilities, more available personnel, better computer quality, translation capabilities, \$58 million prior to September 10th. Would that have been helpful, and in your response, why was that proposal rejected?

MR. SCHULHOFER: Well, first of all, I'd like to be clear just in case there is anyone listening who might misunderstand my point. I certainly do not think the result would have been different the following morning if the attorney general had made the other decision. That particular decision by the attorney general did not contribute in any way. What I do think is that the decision was symptomatic of an attitude that pervaded the Justice Department during the first nine months of the Bush administration and I believe it also pervaded the Justice Department in the previous administration. An attitude that was both -- consisted of very limited, very thin, very widely stretched resources and the wrong set -- what we can see in retrospect at least, a tragically inaccurate set of priorities.

Now the second one has been fixed. It was fixed within hours after September 11. We don't have to worry any more about people not paying attention. But the problem of inadequate resources, in my judgment, has not been fixed. I would say, by the way, that I would want to acknowledge, as Larry Thompson said, that immediately after September 11 there was a dramatic increase in Justice Department resources. In fact, I was looking for this and I found it, I thank you for referring to my book and I thought I'd hold it up for you again --

(Laughter.)

(Cross talk.)

MR. SCHULHOFER: It is not for profit and not for royalties, but it is out there. On page one of my book I mentioned the dramatic increase in resources that has occurred since September 11, that was on page one. But I still -- I do believe that we need to do a great deal more. And I hear mixed messages. In part I was glad to hear Larry Thompson say that we need to keep

looking at it but I also heard, I believe, a sense that we have to accept the fact that resources are going to be limited and that we have to make choices. I don't accept it.

Of course to some degree they're always going to be limited, but I don't accept the fact that we're at the right baseline now. I don't think we are either in terms of the Justice Department itself or in terms of the Department of Homeland Security, which has the main mission of trying to address the soft targets. And if you read the DHS strategy document for protection of critical infrastructure, and it's something I would -- I realize it's not part of our panel, but in my mind, you can't separate the civil liberties issues from the alternative ways of buying security. And if the Commission takes a good look at that strategy document, as I would encourage you to do, I believe you'll see that there are no real priorities, there are no real choices made.

REP. ROEMER: Absolutely, Professor. Let me stop you there because I do want to get a couple more questions in. We did look at this critical infrastructure report last month, prior to the set of hearings. And there is a drastic paucity of the Administration, both the previous Administration, the current Administration and the legislative branch's inability to make these priorities, whether they be toward border issues, container issues, nuclear power plants, chemical plants and assess what has been made safer since 2001. We don't have that kind of qualitative measurement right now in place.

Let me go back to something that Fred brought up a couple of minutes ago but I don't think we got to the bottom of. And that's this issue of administrative subpoenas. The President has said to Congress that they need to pass a statute that would give the FBI this administrative subpoena power in anti-terrorism investigations. The FBI, as you both know, already has this power of issuing the National Security Letters.

I think most Americans don't know much about these national security letters. They know a lot about the ability under section 215 to possibly go and get library records, but they don't know in a FBI field office, in any city in the country, that the FBI can write internally in that field office, in Indianapolis, Indiana, my home state, a National Security Letter. It doesn't need approval from anybody other than the special agent in charge in that office in Indianapolis. I don't think that there is judicial review of that procedure. That can entail telephone records of an individual -- maybe more Americans are concerned about their telephone records and the security and sensitivity of those than they are about what they're reading at the library, I don't know. That might be a case for debate.

Let me ask the question to you, do you believe that the existing National Security Letter authority is inadequate? And

that the FBI does need this additional administrative subpoena power and why? Mr. Thompson?

MR. THOMPSON: Yes, Congressman. There have been instances in which the national security letters have proven inadequate to get the requested information, to obtain the requested information in a timely manner. And that's what's important here, getting information in a timely manner. And that's why --

REP. ROEMER: Mr. Thompson, just be specific to me. In terms of timely manner, I outlined how quickly a National Security Letter can go through a field office. The agent writes it, he only has to go to the supervised special agent in charge, can happen in my understanding, pretty quickly. Why is timing something that would be important to you in this instance?

MR. THOMPSON: The resistance of the person who is, excuse me -- because of the objection, if you will, of the person who is to provide the information and --

REP. ROEMER: The objection of the --

MR. THOMPSON: The recipient.

REP. ROEMER: The recipient, and in this case, the telephone company? Or whoever.

MR. THOMPSON: Whoever, correct.

REP. ROEMER: My understanding is the telephone company hands this over pretty quickly.

MR. THOMPSON: I'm just giving you my recollection as to why the administrative subpoenas are needed. And it makes no sense why the FBI cannot have an administrative subpoena for a -- to conduct investigations as it relates to terrorism when it does have that authority in any number of other areas. For example, it has that authority to use administrative subpoenas in healthcare fraud investigations.

And again, getting back to what you and the professor mentioned with respect to safeguards and accountability, as you know, an administrative subpoena, while it is believed that that administrative subpoena in certain situations would enable the FBI to get information in a more rapid manner, important information quicker, these subpoenas are not self-executing and if the recipient objects, they are subject to challenge in court. It makes -- it just seems to me, as someone who looked at this in my previous position that it makes no sense for the FBI and law enforcement not to have that arrow in its quiver with respect to the tools that are available to conduct terrorism investigations when it has that authority in a whole variety of areas. I don't recall the number but there were multiple areas in which federal law enforcement agencies have the ability to utilize

administrative subpoenas, and it simply makes no sense not to have that available to conduct terrorism investigations.

REP. ROEMER: So who would approve the issuance of this, Mr. Thompson, the administrative subpoena? And how do we prevent against -- how do we make sure there are safeguards so that these are not abused?

MR. THOMPSON: Well, typically the way they are dealt with in non-terrorism matters is that the FBI works hand-in-hand with an assistant United States attorney and the administrative subpoenas are issued.

REP. ROEMER: Professor, you argue again in your book -- I won't mention the name since you've already got plenty of publicity on it. On page 30 you talk about, and I quote, "There has been an expansion of the government access to private information with little intelligence value and enlarge its powers to investigate offenses entirely unrelated to terrorism." Unquote. You talk about financial records, educational records, personnel files, e-mail. Can you be a little bit more specific about how you would approach this issue of National Security Letters in the administrative subpoenas, checks and balances here and whether or not we need those?

MR. SCHULHOFER: Right. I think that national security letters, as your question implied, have far fewer safeguards. They don't have zero because there does have to be a certain amount of paperwork, but they have far fewer safeguards than we normally require for the subpoena of personal records held by a third party. Normally, the person who's concerned, the owner of the records or the person to whom the records relate, would have the opportunity to object to the subpoena and to question its relevance, and the national security letter short-circuits that process and, in fact, it typically prohibits the holder of the records from notifying the person concerned that the records have been subpoenaed and turned over to the government. There are circumstances --

REP. ROEMER: And, Professor, can you be clear on that then? Can you emphasize -- so in a -- state that again. In an instance where you're trying to get this information under the National Security Letter and you go specifically to the telephone company to request an individual's telephone records, the telephone company does not have to inform that individual, that American citizen, that they have cooperated with the FBI and released those personal records. Is that correct?

MR. SCHULHOFER: That's correct. I believe that even --

REP. ROEMER: And any other case they do have to inform the individual. Is that correct?

MR. SCHULHOFER: I believe it's even worse than that. It's not simply that they don't have to inform the person, they're prohibited by law from informing them.

REP. ROEMER: And what's the penalty in these different cases? Is there a penalty on the telephone company?

MR. SCHULHOFER: Yes. I don't believe I could tell you accurately exactly what the penalty is, but I think the telephone companies and banks and so on understand that they're under severe penalties for violating that requirement. And there are cases when urgency is a factor and it should be respected, just as any exigent circumstances in many other law enforcement contexts. The problem here is that we take the possibility of exigent circumstances as a justification for greatly reducing accountability checks, even when there is no urgency. So that's something that could be addressed.

I do think that FISA, the FISA structure poses a problem, because there are a limited number of FISA judges. The number has been expanded since 9/11 but it's still a relatively limited number, compared to the district judges that sit around the country. And it's my belief, although this is -- I believe this may be classified information, I don't know, I don't have access to it, but my impression is that the FISA court is centralized, sits in Washington. And if that's true, then there is a problem for an agent in Indianapolis to proceed in a timely fashion with a request if it has to go through the FISA court and it has to get bumped up to Washington. That is a problem. But it seems to me that's a problem in cases of exigent circumstances, and it doesn't justify obliterating checks and balances for those cases that don't require it.

Now, having --

REP. ROEMER: Let me stop you for a second because I'm running out of time. Do you have any idea of how many times the FBI has used the National Security Letter since 9/11 --

MR. SCHULHOFER: I don't --

REP. ROEMER: -- across the country?

MR. SCHULHOFER: I don't. I --

REP. ROEMER: Do they tell -- does the FBI or Justice Department tell us how many times they've used it? Mr. Thompson, would you know that or --

MR. THOMPSON: I don't know what information has been provided to the Commission but I'm almost certain, Congressman, that that information has been provided to the intelligence committees, part of the oversight function.

MR. SCHULHOFER: If I could just add one detail here. First of all, I believe that the expanded National Security Letter authority was enacted within the last month or so by Congress. And part of that enactment appears in the congressional record as a complaint by the intelligence committees that they were not provided information by the Justice Department, and they expressed their understanding that with this -- or their hope that with this expanded authority, that the Justice Department would be more forthcoming.

I do agree that the definition of financial institution needs to be updated, but nonetheless, part of what's been lumped in there, for example, is access to credit card information, which in my judgment, is much broader than the situation really calls for.

REP. ROEMER: Final question, Mr. Thompson, Professor Schulhofer. Again, I very much appreciate your insights. I wish you could spend a lot more time with us. You might not want to but we certainly have benefited from all your advice and counsel here. A national identification card, would you support it, not support it, have a great deal of concern about it, caveat about it? Mr. Thompson?

MR. THOMPSON: I haven't thought a great deal about that, Congressman, so I may want to punt.

REP. ROEMER: Well, I'll try to catch your punt if you will respond in writing at some point and let me know your thoughts on it.

MR. THOMPSON: I would like to just elaborate a little bit about your last question, and that is, under the guidelines --

REP. ROEMER: Can I still get your written response --

MR. THOMPSON: You can still get my written response.

REP. ROEMER: Thank you very much.

MR. THOMPSON: But I think it's important to point this out is that under the guidelines that we develop for FBI agents in this area, it's very important to note that these kinds of investigations and these kinds of inquiries that you're talking about with respect to the national security letters cannot be undertaken except for a legitimate counterterrorism investigation for the purpose of detecting terrorist activity. Now, can an FBI agent or can an office short-circuit that? Human nature says that sometimes rules are going to be broken. But if they are broken, there are severe professional consequences for that kind of thing.

So we have guidelines and we have to rely on the professionalism of the overwhelming majority of our law

enforcement officials, and they do not undertake these kinds of inquiries lightly and they do not undertake them to get information about activity that's otherwise protected by the Constitution or by other laws.

REP. ROEMER: Mr. Thompson, very well stated. I wouldn't disagree with anything. My questions have just been targeted at when they've done it, and let's say they'd done it in Indianapolis a dozen times, how do we have any kind of judicial review over making sure they don't abuse it, and outside that local office in Indianapolis, is there any kind of review of it, not just judicial review but any kind of administrative review in the FBI office? I don't know that we have good answers to either one of those questions.

A national identification card, once again?

MR. SCHULHOFER: I too have not thought through all of the dimensions of that. My intuition has been that the aversion to national security -- I'm sorry, national identity cards has been a little bit overdrawn. I don't fully understand why there is such an instinctive -- a relatively widely held public aversion to that idea. I think what we need to be careful about is the information that goes with the national identity card --

REP. ROEMER: So what would it be?

MR. SCHULHOFER: That's the area where I think whether it includes health information, biometric information, Social Security number. In the world that we're living in now, that kind of information plugs into -- what I see over there maybe from another hearing -- the total information awareness. And what we need --

REP. ROEMER: Do you want me to ask you that question next? Report that, modify it, throw it out?

MR. SCHULHOFER: That's easy, I don't. But what we need to be very clear about if we do have a national identity card is clear structures of accountability and restriction on the use of information. There's a lot of legitimately acquired information that can be used for illegitimate purposes, and we all know that the identity of a covert CIA agent was recently revealed by someone for political purposes. That's the kind of thing that's just the tip of a huge iceberg. So even when the government acquires information legitimately, it's crucial that we have very careful procedures in place that limit the use of that.

That's where accountability comes in, and this is where it makes me a little bit sad to hear Larry Thompson, who I respect so much, translate a concern about accountability into questions about the -- into a sense that there are doubts about the professionalism or honesty of our law enforcement officers. To me, that's not what accountability is about. We've had -- the

Fourth Amendment has had for over 200 years the idea that a law enforcement officer's good faith affidavit of need and relevancy is not enough unless an independent judicial mind passes on his belief and on the basis for his belief.

That's certainly something that applies in ordinary law enforcement, and it's not because we think the officer is dishonest, it's not because we think he's not professional, it's because we've learned for hundreds of years the importance of having an independent check, and as I mentioned in my testimony this goes back to George Washington who is by far the most widely trusted executive in our entire history and from the very beginning, Washington himself accepted that what he did in the area of executive action would be and should be subject to review by the courts. He didn't take it personally and I would hope that our people in the Executive Branch today would be proud of our system that subjects everything that's done to that kind of a check.

REP. ROEMER: Well, I knew I'd get the two of you disagreeing on something. After 20 or 25 minutes there, you were very cordial to each other the whole time. I just want to end on your note about General Washington, certainly paraphrasing the widely noted quote about him, "First in war, first in peace," but certainly first to establish an intelligence capability for us in this country which we've read a lot of about as members of the intelligence committee for several years in that capability even back 220 years ago, so I want to thank you both again. I know I have lots of colleagues that want to ask both of you questions, and thank you very much for your time once again.

MR. KEAN: A number of the Commissioners want to ask questions, so if we can keep it as brief as possible, make sure they all get in.

Commissioner Ben-Veniste.

RICHARD BEN-VENISTE: Thank you, Mr. Chairman, and I'd like to join my colleagues in thanking you for your appearance today and your insights, and the amount of preparation that's gone into your presentations this morning. I start my analysis of the balance between the need for greater intrusiveness into the privacy of United States citizens with the observation that our intelligence with respect to the 9/11 hijackers was pretty good prior to the catastrophe that took place on 9/11.

Where our law enforcement and intelligence community failed was in utilizing the information that was available in a way that could have interrupted the plot. I would note that nothing that I have seen so far in the course of our investigation on this commission has caused me to change that assessment. The changes that have been put in place since 9/11 have on the other hand created an atmosphere of concern over government intrusiveness

with respect to the privacy and free speech rights of our citizens.

There has been anecdotal information put forward and so I caveat it at that point that individuals who have been involved in protests regarding the Iraq war have wound up on no fly lists and have been treated in a way that makes them suspect that perhaps their names have been added by reason of their political action. With that preamble, I would like to put two questions. First, what assurances are there, if any, that expanded powers given to law enforcement to combat terrorism have been or are likely to be used for ordinary law enforcement not related to terrorism?

And historically, I would put forward the example of the RICO statute, which was designed to combat organized crime but has since been utilized in every conceivable way having nothing to do with organized crime. And secondly, given the concern that legitimate free speech and privacy rights may be infringed and given the enormous effort now underway to accumulate and disseminate databases with respect to United States citizens, something we're going to deal with a little bit later in these hearings today, I want to call your attention to a recent FBI intelligence bulletin and get your comments.

This bulletin came out on October 15th, 2003 and I'll just quote very briefly from it and get your comments about this bleed-over effect. The intelligence bulletin, which has circulated to federal, state and local law enforcement agencies throughout the country says, "On October 25, 2003, mass marches and rallies against the occupation in Iraq are scheduled to occur in Washington DC," and then it talks about potential violent or terrorist activities associated with the protest. It goes on to say, "Even the more peaceful techniques can create a climate of disorder," and they use as examples obstructing traffic, possibly intimidating people from attending the events protested.

It goes on, "Extremists may be prepared to defend themselves against law enforcement during the course of such a demonstration," and some of the indicia of extremists protecting themselves are the wearing of sunglasses and layered clothing. Activists may also use intimidation techniques such as videotaping. And then it concludes that law enforcement agencies are encouraged to report any potential illegal acts to the nearest FBI and Joint Terrorism Task Force.

By this, I think you can see that the definition of terrorism and terrorist acts or violent acts is particularly squishy with regard to this bulletin, and it of course created something of an uproar, and so my question with respect to that is are we overreacting, or is there the potential for creating a climate in this country that is so counterproductive to our ideals that we ought to look at it midcourse and make some

suggestions regarding correcting it? Professor, why don't you take a first crack at the --

MR. SCHULHOFER: I've had the consistent opportunity to get in the last word.

(Laughter.)

So it's only fair. First of all, first question was what assurances do we have that the expanded powers won't be used for unrelated purposes? We have no assurances, and quite to the contrary, the Justice Department acknowledges that it has used these powers for unrelated purposes, particularly the Justice Department document, "USA PATRIOT Act: Myth versus Reality," which I believe is September '03. In the course of debunking myths such as the fact that the powers might be used for unrelated purposes, the report itself documents, and separately for each section, the instances in which they've been used, and it documents specifically instances when they were used to investigate the theft of trade secrets, investigate extortion, investigate what they called narco-terrorism which I believe is drug trafficking, and so on. It's all made very explicit so we know that this is being done and it's inexcusable because it's very simple as a matter of draftsmanship to do what the PATRIOT Act does in most of its section, which is to say that these are for purposes of a terrorism investigation.

Secondly, about the ability of this to bleed, I believe your question enters particularly sensitive areas of political protest. I think your question indicates itself how quickly we've moved in that direction. And we thought we had learned this lesson in the '70s, with the FBI guidelines that were adopted by Attorney General Levi and President Ford, which laid down rules intended to prevent the overly wide sweep of information that could intimidate the expression of First Amendment activity and it could be misused for inappropriate purposes.

Among other things, and I don't want to disparage the importance of First Amendment rights, it's extremely important, but I think it's also important for the public to understand that we don't get more security this way. What we get is an incredible misuse of FBI counterterrorism investigative resources, which as we have heard, are stretched very thin. And they're to be used to prevent the obstruction of traffic in cities.

So it was with this in mind that the FBI guidelines adopted in 1976 structured this to try to prevent this type of abuse. And one thing that happened on May 30th of '02 was that the attorney general announced very substantial changes to those guidelines that, in effect, relaxed and obliterated, unloaded most of the -- many, I should say, many of the significant restrictions that had been in place since 1976. And again, I try

to make this answer brief, so I would just say again, this is another instance of a change that's totally unrelated to terrorism, because the guidelines that were changed, the FBI guidelines that were changed, were not the guidelines that governed international terrorism investigations. They were the guidelines that governed the investigation of general crimes. And I have yet to hear and explanation of why that was necessary.

So are we overreacting? I think it's demonstrable and not debatable that we have overreacted in ways that not only damage our liberty unnecessarily but they are counterproductive and they foster mistrust in a sense of oppressive surveillance and they foster alienation in the very communities whose help we need if we're going to win this fight. Thank you.

MR. BEN-VENISTE: Larry?

MR. THOMPSON: Commissioner, the professor and I have been on another panel and he did a great job, but I'll try to give you an explanation as to why we made some of the changes in the guidelines because we carefully reviewed those guidelines with respect to making changes that we thought were appropriate. And, Commissioner, you pointed out the fact that there was intelligence with respect to the individuals that were involved in the 9/11 attacks and there was information in the system about those men. But one of the problems I think we had prior to 9/11 is that we had a paradigm, certainly in the law enforcement community and perhaps throughout government, which was a reactive philosophy.

In other words, we were going to wait until something happened, then react to it, then investigate the heck out of it and prosecute the individuals who were responsible for the events. And it was crystal clear after 9/11 that we had to do a different -- we had to undertake a different approach and we had to focus on prevention. And we had to be proactive, and we had to undertake measures that were designed to detect and prevent terrorism at the very beginning.

Now, that does create the tension that the professor talks about and we certainly cannot overreact but we do need to develop a situation in which our law enforcement officials can undertake activities, especially activities that are open to the public that are designed to detect instances of terrorist activity. I do not know what the underlying intelligence was as it related to why the FBI offered that memo, I have not reviewed it. But we have to be careful, I agree with you, we have to be careful. But on the other hand, we have to be ever vigilant in terms of doing what we can to be proactive.

The one thing that the attorney general and I though were very concerned about when we reviewed the guidelines was to make crystal clear that while you could undertake activities of a public nature that were designed to detect terrorist activity,

you could not undertake activities that were designed to interfere with our citizens' constitutional rights, rights that are protected by the Constitution or other laws. And that's a fine line and it's a judgment, but law enforcement officials make judgments every day.

So I would just respond to the memo, and that is I think it's important that we have to continue this new paradigm of prevention and disruption. And we have to be proactive with respect of what we're doing. But we cannot interfere with activities that are protected by --

MR. BEN-VENISTE: What are you protecting against and what are the disruptions? In that memo it doesn't appear to me to be related to the kind of terrorism that we're concerned with.

MR. THOMPSON: Sir, I would agree with your comment, except that I don't know the underlying intelligence that led to that memo and perhaps some of the unfortunate words that were used in that memo.

MR. BEN-VENISTE: Just one follow up to your answer, Mr. Thompson, and that is with respect to the changes that have been put in place post 9/11, which is after all, the central focus of what we're involved with in this commission. Other than clarifying gripes under FISA, which the FISA court, incidentally, said was unnecessary, but other than that, can you point to any particular aspect of what has been changed since 9/11 in our laws that would have directly impacted on the interruption of the 9/11 plot?

MR. THOMPSON: Other than --

MR. BEN-VENISTE: The clarification of FISA, which the FISA court said was simply a misreading by those who were applying FISA -- of the terms of FISA.

MR. THOMPSON: But, Commissioner, that misreading had been in place when I got to the Department of Justice, and it was certainly the way we were doing business in the Department of Justice.

MR. BEN-VENISTE: That's why I say, putting that aside, is there anything else that has been enacted since 9/11 that in your view would have likely resulted in the interruption of a plot?

MR. THOMPSON: Enacted is a narrow word, but I would say this: That if we had in place system-wide, government-wide, a paradigm that we were going to do everything that we can to prevent and disrupt terrorist activity, that we were going to share information, perhaps that paradigm, given what we now know that we knew about the hijackers' activity, perhaps, I don't know, but perhaps we would have been able to do a better job with respect to investigating, you know, those activities.

MR. BEN-VENISTE: That's a question of focus rather than law, isn't that right?

MR. THOMPSON: Correct. May I respond to your point, Commissioner, about the other PATRIOT Act provisions. Many of those provisions are general criminal law provisions and I think it would be difficult, but more importantly I think it would be inappropriate for the Department of Justice and federal prosecutors to limit those provisions, provisions that are in title 18 that are designed to go after crime, to any particular kind of criminal activity. And if the statute applies to general criminal activity that may be terrorism, but it may be bank fraud, it may be money laundering, I think you should use that statute to its fullest extent to go after that particular --

MR. BEN-VENISTE: Thank you. And I'll leave with the observation that some who are skeptical about how the PATRIOT Act was passed and the time that it took to pass it and what was included in it, have suggested that many of the provisions were essentially on the shelf on the wish list of law enforcement -- I see you smiling -- prior to the catastrophe of 9/11 and, as you have said, have not been restricted to use only to combat terrorism. Thank you, Mr. Chairman.

MR. KEAN: We've got two commissioners who have something to say and about three minutes to get the questions and answers in if we keep on schedule.

Commissioner Gorelick.

JAMIE GORELICK: Thank you, Mr. Chairman, I'll try to be brief.

Mr. Thompson, as you know I sat in your shoes at one point when you were deputy and I was deputy before that.

MR. THOMPSON: I tried to follow in your shoes.

MS. GORELICK: Oh, thank you, flattery will get you nowhere. I would like to ask you a philosophical question about the role of the Department of Justice. As you know, it has two basic roles, one is investigative prosecution in this context, and the other is the protection of rights. And post 9/11 it seems to me that there has been enormous pressure on the institution to favor the first role just because of how terrible an event 9/11 was. And so my question to you is who speaks for civil rights and civil liberties in that perspective within the councils of government?

And this question to bought to mind when I appeared on a panel and I know you were on the same program but on the Third Circuit, where the former head of the Office of Legal Policy and the former head of the Criminal Division essentially said that

the government's position with regard to taking American citizens and holding them incommunicado without lawyers and with no opportunity to challenge whether they were properly being held as enemy combatants was unsustainable.

One of the gentlemen, Viet Dinh, said it was unsustainable, the other, Mike Chertoff, said we need a new system to make sure there are checks and balances. So I have a two part question. The first is were you so advised when you were deputy, and who spoke when we were -- we as a government, were creating the architecture that put people incommunicado without counsel, without ability to challenge the circumstances under which they were being held. Who spoke for our rights when that system was being set up and do we need a new structure to have that voice be heard?

MR. THOMPSON: Commissioner, at that conference, the Third Circuit conference, I quoted from a decision of the Supreme Court of Israel that I kept on my desk for the past two and half years. Shortly after the events of 9/11 I was visited by Justice Barak from the Supreme Court of Israel, he tried to -- wanted to see the attorney general, but the attorney general was traveling and he saw me. And he left with me a decision of the Supreme Court of Israel, that dealt with the interrogation of terrorist suspects and the use of what was called their moderate physical pressure in the interrogation of terrorist suspects. And I don't really know technically what moderate physical pressure is but it's --

MS. GORELICK: One can imagine.

MR. THOMPSON: -- one beyond questioning, just simple questioning.

(Laughter.)

And the Supreme Court of Israel prohibited that activity and in some very eloquent words and I think my old speeches are online at the Department of Justice, but I quoted from that speech throughout my tenure as deputy attorney general, and I refer to that speech in not only the Department of Justice internal deliberations but in interagency deliberations. And the gist of that is that we're a democracy, we have to abide by the rule of law, and that not all means that are available to protect a democracy sometimes can be utilized. And sometimes a democracy, while it looks like we have to fight with one hand tied behind our back, we have to do so if we're going to preserve our basic values.

So, to answer your question, I tried to and I know other officials always thought about these very important civil liberty concerns. We would be making a terrible mistake as a country and certainly as a Department of Justice if we allowed what happened on 9/11 to change the essential character of our country. I

don't believe that has happened. We certainly have differences of opinion as to how we are, how we should have reacted, some of the ways that we are trying to proceed in combating terrorism, but I don't believe that we have retracted from those.

For example, when we undertook the revisions of the Attorney General Investigative Guidelines, it was always of paramount concern to myself, and I know it was of concern to the attorney general, that nothing in there give rise to any belief, and that's why we specifically stated it in black and white that the agents that undertake any kind of investigation of activities that are designed -- that are protected by the First Amendment or other laws.

Enemy combatant situation -- I'm really not punting but that was a matter that I was involved in as a lawyer. I don't believe -- and it's still in litigation so, Commissioner, I don't believe it would be appropriate for me to make any kind of extensive comments on a matter that's in litigation and a matter that I was deeply involved in as a lawyer.

MS. GORELICK: Well, we will, with all due respect to that position, I think we will need to return to it as a factual matter --

MR. THOMPSON: I understand.

MS. GORELICK: -- to determine how those decisions got made. One of the things that's been striking across the panels that we've had on every subject is that you get an amazing amount of candor once they take their respective uniforms off. And to hear two former Justice Department officials say that a position that was taken by the Department essentially was unsustainable, is unsustainable and to hear that now is disturbing and leads me to wonder whether we have the right checks and balances in place or whether we have put so much pressure on the Department of Justice to be the investigator that we perhaps need a countervailing voice, a counterpoint, some independent body to be the voice of civil rights and civil liberties.

And I'd be happy to give you the last word here. Had I had time I would have returned to that theme with respect to the Foreign Intelligence Surveillance Act because I believe when I was at Justice that I had enormous power that was essentially unchecked. And of course with the changes in the PATRIOT Act there's even greater power in the Department of Justice and I really do wonder whether there are sufficient checks. But I know -- I should give you the last word and then I know there are other commissioners who would like to have an opportunity to give a question or two.

MR. THOMPSON: I believe Judge Chertoff's comments will speak for themselves, but as I understood what he said was that a lot of decisions were made in the context of a crisis and people

were making the very best calls that they could and that with respect to procedures in terms of granting access to counsel, that perhaps we should review and revisit some of the thinking with respect to those procedures. I think that's what he said, which is a little narrower than --

MS. GORELICK: Well, it's a matter of public record and we don't have time to pursue it now.

MR. THOMPSON: I hope you understand my comment on it.

MS. GORELICK: But I do appreciate that there were urgencies of the moment, and that's one of the purposes of this commission is to step back from those urgent moments and take a look at whether we have the right structures in place going forward. Thank you very much for your testimony, both of you.

MR. KEAN: Last question from Senator Gorton.

SLADE GORTON: Professor, your critique of the use of the phrase of the status, enemy combatant. Was it limited to the apprehension of citizens of the United States in the United States? Does it extend to the apprehension of non-citizens in the United States, to United States citizens apprehended in say, Afghanistan or in Germany, or non-citizens apprehended outside of the United States, say as a guerilla out of uniform in Samara?

MR. SCHULHOFER: Thank you, it's a very important question. First of all my position, my critique, certainly encompasses the seizure within the borders of the United States of both citizens and foreign nationals. These are people who are seized far from any zone of combat in an area where the courts are open and functioning and they should have all the rights provided by the Constitution.

When you deal with the seizure of individuals overseas in a zone of combat, and there I would include both U.S. citizens and foreign nationals again, when they're seized in a zone of combat, there is a need for -- what I think an obvious need for, discretion on the part of military commanders and different rules apply. In addition, our courts are not open and functioning in those areas. So certainly different rules apply. I believe that in this zone of combat situation there still should be a conception of due process that enables people seized in that circumstance to have the opportunity for some kind of hearing in some kind of tribunal to raise the question: Were they a war correspondent, were they a reporter, were they just a civilian caught up in trouble?

We held hundreds -- we held hundreds of those hearings during the Vietnam War and we held hundreds of those hearings during the first Gulf War. We have not held any of those hearings, as you know, with respect to people that are being held

at Guantanamo at this point, more than a year after their capture. You referred I believe to Samaria? Is that --

MR. GORTON: Well, a city in Iraq where people are shooting at us.

MR. SCHULHOFER: Right. The Israeli Supreme Court uses that term to refer to occupied territories on the West Bank --

MR. GORTON: I spelled it differently.

MR. SCHULHOFER: But I think it's pertinent here because with respect to people seized in a zone of active combat, there's another Israeli Supreme Court decision more recent than the one Larry Thompson mentioned, a decision from February of this year, in which the Court said that alleged enemy combatants seized in a zone of combat on the West Bank have no right to a hearing until they can be removed from the zone of combat, which is a matter of days. But once they are removed they have the right to a hearing. I've cited that and quoted from that decision in my comments. So certainly we're in a completely different regime.

But we should not allow and we should not accept what I believe is the Justice Department's position and that has been that since you have these rules that apply to the battlefield and since after 9/11 the whole country is part of the battlefield, then the Justice Department has argued that the same rules should apply right here in the United States that would have applied in Samaria or Kandahar or anything else and that's a conception that if we accept it, the entire Bill of Rights --

MR. GORTON: Just one narrow follow up on perhaps the most difficult of yours -- let's presume the arrest of a non-citizen of the United States, a non-citizen who is not here, not legally -- Mohammed Atta himself before 9/11 or for that matter, the German saboteurs who landed here in 1942. Do they have the same rights as citizens?

MR. SCHULHOFER: Foreign nationals certainly don't have the same rights, they have no right to remain here. They can be deported and under certain circumstances I myself am very comfortable with the idea of preventive detention subject to some kind of independent judicial review of the need for it and the basis for it. That's a constant and I'm probably belaboring the point, but that has been my constant theme. I don't object to the substance of powers like these if they are appropriately reviewed by independent Article III judges. So certainly, foreign nationals have different rights.

The German saboteurs admitted that they were enemy combatants. They admitted that they were members of the German Navy. They admitted that they had buried their uniforms when they landed here. The question that's posed by the Padilla case is whether the rules that apply to someone who acknowledges their

role should be the same as the rules that apply to someone who is being accused. And if we want to make -- if we think that being an accused enemy is the same thing as being a proven enemy then the Justice Department's position is sound.

MR. GORTON: Thank you, Mr. Chairman.

MR. KEAN: Thank you very much, Professor Schulhofer and Mr. Thompson, thank you very much for enlightening and interesting and we appreciate you taking the time.

MR. THOMPSON: Thank you.

MR. KEAN: If I could ask our next panel please, to assemble?

(Recess.)

MR. KEAN: Okay, if we could call the hearing back to order? Our second panel has assembled. They are Judith A. Miller, partner in Williams and Connolly, and former general counsel of the United States Department of Defense. Stewart A. Baker, partner Steptoe and Johnson, former general counsel National Security Agency, and Marc Rotenberg, executive director of the Electronic Privacy Information Center.

Mrs. Miller?

JUDITH A. MILLER: Should I start?

MR. KEAN: Go ahead, yes.

MS. MILLER: Mr. Chairman, Mr. Vice Chairman, members of the Commission, I am delighted to be here this morning. The topic of protecting privacy, preventing terrorism is central I believe to our ability to reduce the possibility of other catastrophic attacks. Better intelligence supported by technology is not all that is needed to defeat possible terrorist attacks here and abroad, but it is in my judgment a crucial element of any strategy to do so.

I know that time is short this morning, so I would like to make three basic points in this opening statement before our broader discussion begins. First, I believe the reaction to the Total Information Awareness Initiative at DARPA, the Jet Blue Initiative undertaken by the Army and the various efforts at watch list at DHS all demonstrate that privacy, civil liberty and fairness concerns must be built into any information sharing technology from the beginning in order to earn the trust and be consistent with the values of the American public.

The work of the Markle Task Force that Stewart and I have both participated in, as well as Commissioner Gorton, provides building blocks for what is necessary, I think. First, adopting

guidelines on the use of technology that address relevance, retention, dissemination and reliability issues. Second, improving oversight, including audit and review procedures. Third, reviewing risk and benefits before the adoption of any of these powerful tools and using technology to enable both imaginative cooperation and privacy. To analyze data, control access to databases and facilitate audits of the use of those databases.

Second, and building on these principles, our task force recommended a System-wide Homeland Analysis Resource Exchange or SHARE network. A visualization of how this might work, permitting collaborative analysis of emerging threats in basically real time and using both stored and current information from around the world conveys the power of this approach far better than I can and I would commend that demonstration to this commission. But notionally, seeing state, FBI, CIA and trusted experts all collaborating in such an environment, a shared information environment, brings me to my third point.

None of this technology-enabled sharing will work if we can't find a way to incentivize the cultures of those agencies charged with implementing it to use it effectively. Although efforts are ongoing at the FBI and elsewhere, my own view is that this is the hardest problem by far. The task force makes some modest recommendations in this area as well. A simple but dramatic step, also urged by others, is to revise the "tear sheet" culture of intelligence reporting so that you write an unclassified version of the report first, not last. But if the intel community one year or five years from now still focuses its best efforts on making it into the PTTR every day, you will have a litmus demonstration that the new culture of collaborative sharing has not taken hold.

Thank you, and I'll await your questions.

MR. KEAN: Thank you, Mrs. Miller.

Mr. Baker?

STEWART A. BAKER: Thank you, Mr. Chairman, Vice Chairman and members of the Commission. I'd like to focus on a question that actually Commissioner Ben-Veniste asked or observed. That we actually had pretty good intelligence about the terrorists in the lead up to September 11. And I think that's right and what I'd like to focus on is not September, but August. Because in August the FBI learned that there were two terrorists whose names we had, who were in the country who were clearly here to kill Americans.

We had two and a half weeks to find them. They were living openly in San Diego, they were getting California IDs, they were buying stuff, engaging in financial transactions, signing rental agreements all in their own name, making reservations on the

plane that they would ultimately fly into the Pentagon. We couldn't find them. That's a terrible failure. And I'd like to explore a little, from what I can gather, I'm not cleared to review any of this material anymore, but I have reviewed pretty carefully the public discussions of what happened to try to explore what went wrong there.

And I think when you look at it closely, it's really a failure of tools and a failure of rules. The tools problem is the problem we're here to talk about today. The FBI agent who discovered this and made it his mission to try to find these guys had some electronic tools, he was able to look in some databases for arrests, for certain automobile registrations. They hadn't been arrested and they hadn't been registered in any vehicles. He did not have access to a lot of government information, so that it took him about a week and a half to figure out what address one of the terrorists had put on his visa as he entered and then to check with the hotel that he put down to see if the guy ever stayed there.

He didn't have a computerized access once he got legal authority to go into either of those databases. So we lost weeks there. Once more, he didn't have computerized access to any of the records that these guys were generating -- not the financial records, not the travel reservation or even some of the California records. So there's clearly a failure of tools. If he could have been able to find those two guys and then check the links that they had to many of the other terrorists -- there were direct shared addresses as I remember, links to the people who flew into the south tower and the north tower. We had a chance to stop this. The one chance that I can see in all of the errors that were made where we really could have prevented this if we had the tools to find these guys, and it is a scandal that we don't have them.

So we need that. We need at a minimum an ability to do those searches quickly and efficiently, not just by shoe leather and by calling people which is the method that the FBI has used for a generation. That's just to fight the last war. Obviously the next set of terrorists is not going to be so accommodating as to use their real names. We're going to need other mechanisms and I've listed in my testimony which I've provided about a dozen IT capabilities that our investigators need in order to find these folks and to respond appropriately to crises.

So clearly we need more tools. But I think when you read the story of what went wrong in those two weeks with an eye that is informed by bureaucratic realities and political realities you'll see that there's a problem with the rules as well. It's really -- it's heartbreaking to read what this agent said when he asked for the authority to get the assistance of law enforcement -- there are a million law enforcement agents in the country, there were three times as many FBI law enforcement agents as intelligence agents, he wanted to get help on that side of the

FBI and he was told by FBI headquarters, not on your life. You cannot capitalize, cannot do that because there's a wall between law enforcement and intelligence.

And his response was to say, the American people will not understand this, someone is going to die because of this. Osama bin Laden is the principal beneficiary of the wall that we have built. How can we possibly maintain this? The answer was, we don't like it either, but that's the rule.

Now, I feel strongly about this, obviously, because I was part of building the wall. I was at NSA. I thought the wall responded to an appropriate, reasonable worry -- theoretical but real -- about civil liberties and privacy and that we could have a wall and still have an effective response to the national security problems that we have. We wrote rules and we thought we had done a fine job of carefully balancing all of those equities. We obviously failed. We failed terribly.

And that failure I think reflects both a desire to constantly add to the protections even against theoretical risks to privacy that we have built into our system, and at the same time, not to spend as much time worrying about whether people will actually be able to do their jobs to protect Americans. Because what finally happened in this case was the rules might just barely have been workable if it were not for the fact that there was a privacy scandal in the FISA Court in 2000 and 2001, in which the court believed it had not been properly informed about contacts across the wall when it was given FISA orders to sign. It ordered a massive review. It threw out one of the principal FBI investigators who appeared before it and I'm guessing, though I don't know, that disciplinary action and maybe even a perjury indictment was considered for that fellow.

This was so bad that we dropped coverage on terrorism suspects in the United States in early 2001. So al Qaeda is preparing to kill thousands of Americans, we can't even keep up the wire taps that we have authorized in the past. It's a disaster. And it's a disaster because there was such an intent focus on preventing even the most theoretical privacy abuse. That's the lesson that I would draw from September 11.

I just would say one more thing. I'm very worried that we're going back there, that what we have seen -- I gave a speech once, I said, you know, we had two and a half years of serious failures. We had a major failure on September 11. We've had two and a half years to figure out what went wrong, who should be disciplined, and one person has been forced out of government, Admiral Poindexter. And the lesson that you can draw from that is, well, you can screw up pretty badly in protecting the American people, but if you get crossed wires with privacy lobby, you're gone. That is exactly the wrong message to be sending to our FBI and CIA agents.

And finally, I would guess I'd say if you look at what's happening in the Administration today, efforts to develop new and innovative tools are stalling and even the wall is coming back. My understanding is that within TTIC there are actually limits on what intelligence agents can look at by way of law enforcement information, despite our major effort to get rid of that wall and the terrible consequences that we saw from having it. So my fear is that we are re-establishing August of 2001 and that the real risk here is that just like last time, that August will lead us to September. Thank you.

MR. KEAN: Thank you.

Mr. Rotenberg.

MARC ROTENBERG: Thank you, Mr. Chairman, members of the committee. I think my purpose at this point in the hearing is to provide the cornerstones for the privacy interests. When we talk about privacy and liberty after September 11th, people tend to talk about it in the abstract, and they say we should not trade our country's precious freedoms and constitutional liberties for some sense of short-term security.

I believe it's extremely important for this commission to actually understand what the framework of privacy protection is in this country, because that is precisely what is being altered by the many proposals that have been put forward since September 11th, both to give the government new investigative authority and also to give the government new tools of surveillance, not only of people who may pose a threat to the United States but of citizens in the United States, people who participate in the political process, people coming to open public spaces to express their views. These are also the people who become subject to the new systems of surveillance we are establishing after September 11th.

But to understand this problem, I think we need to go back in time. I think we need to go back to the late '60s and early '70s, when the Congress undertook an extensive investigation of the surveillance implications of government-based data systems. And after almost eight years of hearings, Congress passed the Federal Privacy Act of 1974. And what that act did was to establish comprehensive safeguards for people in the United States against the misuse of their personal information held by federal agencies.

There was no dispute that the technology would play a critical role in advancing government programs, including law enforcement, nor was there any dispute about the need to establish appropriate safeguards that would ensure that the technology could be used for the benefit of the American public and the American government and still safeguard essential liberties. The Privacy Act of 1974 is the basic framework of privacy protection for the use of personal data in the United

States, and it imposes very significant obligations on federal agencies that collect and use personal data. It does this not to frustrate an agency purpose or to add additional burden but rather to ensure that when personal information is collected by federal government agencies, it is used for an appropriate purpose.

Now, the other key cornerstone to think about in assessing privacy protection in the United States is the Federal Wiretap Act. The wiretap statute was passed in 1968, following perhaps two of the most important privacy cases decided by the United States Supreme Court. One concerned the use of a tape recorder in a public payphone in the streets of Los Angeles and whether that new investigative method would require the use of a warrant, which is to say judicial approval, or whether law enforcement could be free to use any new form of technology without judicial oversight to gather evidence that could be used in the criminal prosecution.

And the court said quite clearly in *Katz v. United States* that this new type of technology needs to be subject to Fourth Amendment standards; not that it could not be used or that a prohibition should be established but rather that the traditional Fourth Amendment standards would be required for electronic surveillance. And the following year, in 1968, when the Congress passed the federal wiretap statute, based on *Katz* and the *Berger v. New York* opinion, it constructed an elaborate regulatory framework imposing significant oversight responsibilities on federal agencies that were using electronic surveillance authority.

Now, given the focus that the Commission has understandably undertaken over the last several months, of the mood of the country post-September 11th, I think it's reasonable to consider also the challenges that the United States faced in 1968, when both the Supreme Court and the U.S. Congress enacted such sweeping privacy safeguards. We faced powerful adversaries in China and the Soviet Union. Nineteen sixty-eight was the year of a presidential assassination and the slaying of a civil rights leader. There were widespread public protests across this country, unlike anything we've seen in over two decades. And yet at that point in our nation's history, the court and the Congress recognized the need to establish important privacy safeguards for our citizens.

Now, I'd be very pleased to speak with you about a number of the developments that have happened post-September 11th, to look at the Jet Blue matter, to look at CAPPs, and to look at total information awareness. But I would urge you at the outset to consider the important work that has been done prior to 9/11 to establish privacy rights for people in the United States, even during periods of significant turmoil.

MR. KEAN: Thank you very much.

Senator Gorton.

MR. GORTON: Mr. Rotenberg, since you've finished, I'll start with a couple of questions for you. As I read your written testimony here, on the last page you have four recommendations which seem to me more to be cautions about the way in which we make recommendations than substantive recommendations themselves. But on the assumption that one agrees with every one of those four cautions, does that mean that in your view, no additional legislation was needed after 9/11, either to strengthen the investigative and law enforcement powers of agencies in the United States or changes in the 1974 privacy law to which you refer?

MR. ROTENBERG: Well, let me say, Senator, first of all that I felt strongly that changes were necessary prior to 9/11 to make air travel safer, and there were a lot of weaknesses in the U.S. air travel system that were fairly well known, particularly by comparison to European carriers, and that had not been addressed. I think part of the problem that you face is understanding that preventing 9/11 may be more about preventing the exploitation of security flaws than it is about dramatically expanding surveillance capabilities.

Now, our panel discussion today focuses on expanding those surveillance capabilities, but I do need to say at the outset, I think even before we get to that issue, we have to focus on how we reduce the security flaws that any person who might consider harm against the United States is able to exploit. The question you ask, of course, is what changes might we make to the Privacy Act, or to the federal wiretap statute after 9/11. Those changes that were made in the USA PATRIOT Act, I do not believe have significantly contributed to the greater safety of the United States. Now, Stewart Baker and I may actually disagree about what was happening at the FISA court in 2002 at the time that a seven judge panel unanimously concluded that there had been mistakes in the applications for those FISA warrants. And it came as a surprise to many of us when the appellate panel reversed that determination and said that, in effect, this procedure that had been established to ensure that the lower standard used for intelligence investigations not become a back door way to bootstrap criminal investigations, which is now the concern of many in the civil liberties community.

I don't think significant changes in those two laws are required, but I do believe that a lot more can be done to ensure security.

MR. GORTON: Okay. So from your view, there was not a need, post 9/11 for any statutory changes in either direction, but simply a more efficient and more effective use of the statutes that were already on the books.

MR. ROTENBERG: Yes. And I think the way this could have played out is when the government was proposing to establish new systems of surveillance, and of course many have been proposed, and some put into place as I described on my testimony. It should have been the case that an effort was undertaken at the outset to assess how our current privacy rules would apply to these new systems of surveillance. I think that would have gone a long way to addressing some of the public concerns in the CAPPS system for example, which is the passenger profiling system. The TSA is proposing to go forward, but the required -- required by OMB, required by federal law, privacy impact assessment for that project, has not been completed. And so when civil libertarians and others, raise concerns about passenger profiling, they are saying in part, there are privacy obligations that that agency is obligated to fulfill, that it has not yet fulfilled.

MR. GORTON: With respect to CAPPS and airline security, do you have any critique or differences with a proposition for a voluntary system, under which if citizens who travel by air are perfectly happy to give up whatever is considered appropriate to get a form of identification which will allow them to avoid some of the security lines and go more directly to their gates, assuming that it's voluntary and not mandatory.

MR. ROTENBERG: Well, Senator, if that could be made to work, I mean it would seem a sensible solution, but I would be surprised, frankly, if those who are charged with protecting the security of the country would be satisfied by that solution. Now I remember a similar debate Stewart Baker and I had almost 10 years ago over the key encryption standard, the Escrowed Standard for encryption, and it was proposed at that time when there was strong public resistance. Well, maybe we should just make it voluntary at the outset so that those vendors that want to implement this standard that enables surveillance will be able to do so. Of course we realize, as law enforcement, that such an approach really wouldn't fulfill the mission that was underlying the effort. And I think you would face a similar dilemma here. The people who are likely to follow the voluntary path for passenger profiling are probably those that you're least concerned about.

MR. GORTON: Ms. Miller, in a sense, the same question to you as to Mr. Rotenberg. In your view, was the statutory regime prior to 9/11 adequate and sufficient both with respect to national security and privacy?

MS. MILLER: A couple of points, I guess, on that, Senator. First, I've said previously that I thought that the FISA Act could have been properly clarified. Whether you did it precisely as the PATRIOT Act did it or not, the observation I had while I was at DOD is that there was a myth built up over many, many, many years, through a number of administrations. There was a particular sort of ossified view of what that statute meant that occasionally got in the way of people just understanding and

being on the same page and being able to go forward to the court effectively. I didn't see, personally, any situation where we weren't able to get what we needed under the old statute, but I recognized that there was enough lack of clarity, perhaps, or confusion sometimes, in the minds of individuals trying to get authority under that statute that some clarification could be of benefit.

The bigger problem that I see right now is one that hasn't really been addressed by whether the PATRIOT Act or any other sort of proposed legislation or oversight that I've heard being discussed, and that is that, to the extent you wanted -- you were going back to the point of this panel -- to the extent you want to actually enable people to share information usefully in a proactive and hopefully preventive way, in a variety of contexts, beyond what we faced on 9/11.

I think, and I differ strongly with Stewart on this point, I think you have to put in mechanisms in advance to make the American public trust that technology. And it is not an undoable task, it just requires -- just is perhaps to light, but it does require oversight from the Executive Branch, oversight from Congress, a whole set of guidelines and discussions that can be done in public for the most part instead of behind the scenes, that will give the American public confidence that what we are doing as we use these powerful tools is designed to protect us, not to undermine our liberties. And I think that's something that can be done.

MR. GORTON: Mr. Baker, the pre 9/11 adequacy of both our security statutes and our privacy statutes. And your critique of the PATRIOT Act, too much, too little? What should be done?

MR. BAKER: One of the things that the PATRIOT Act did was try to knock down all of the most obvious legal bases for the law between law enforcement and intelligence, and since I think that was a major contributor to the disaster of September 11, I think that was a good idea. That mean getting rid of the restriction on sharing of wiretap information with intelligence, getting rid of the restrictions on sharing grand jury information with intelligence and getting rid of the principle purpose rule that had emerged from practice in the FISA court.

MR. GORTON: And we need the PATRIOT Act in each of those cases?

MR. BAKER: There's a kind of revisionist view that we got from the FISA court of review that said, gee, you really didn't need to do that, if people who had properly understood the law would realize that what the FISA court had been doing for 20 years was wrong. Well, they'd been doing it for 20 years, no one had appealed it, it was, as Judy says, ossified into the practice of everyone who touched the FISA court and that was not going to change, I suspect, without congressional intervention.

MR. GORTON: Go ahead, I interrupted you.

MR. BAKER: As far as security issues, I actually think there are some problems that we were sort of engaged in national security deficit funding on -- we have yet to recognize that once you have gotten rid of the wall between law enforcement and national security, you're going to run the risk that if you try defendants for terrorism in U.S. courts, as so many people seem to now want, they're going to start making Brady motions to examine the entire take of U.S. intelligence agencies to see if they can find something that might be exculpatory. And unless you can find a way to find a way to deal with the problem of whether Brady really extends that far, you're going to run the risk that at least the lawyers for, and maybe the defendants themselves, will get to see exactly what our methods and sources are with respect to the terrorism problem. That's a big problem.

I think we also, the court of review said go ahead and get this FISA orders against people, and we think it's constitutional to do it, even in a criminal context, but of course if we actually try them, they're going to be making suppression motions in courts that are not going to end up reporting to the FISA court of review. And if we don't actually struggle with the question of how we're going to handle that, we could end up finding we have a crisis about the FISA wiretap system within five years.

MR. GORTON: Would the solution to those problems require additional legislation?

MR. BAKER: Probably. I don't think the courts are likely to address that, although it's certainly possible to restrict Brady in particular, and perhaps even to understand the question of the -- well, the FISA quarterly review clearly came to the view that it was constitutional to use FISA in this context. I am not as confident that the Ninth Circuit will come out that way.

MR. GORTON: And in light of 9/11 and the particular challenges we face today, is there any appropriate review of the 1974 Privacy Act?

MR. BAKER: Actually, I don't think the 1974 Privacy Act as it's been understood and administered has proven to be a significant barrier, and I suspect it won't prove to be a significant barrier in the future to carrying out appropriate national security measures.

MR. KEAN: Richard?

MR. BEN-VENISTE: Good morning, and I'd like to thank you on behalf of my colleagues for your appearance here today. Let me start with a personal observation, and that is that those who are

vigilant in protecting our constitutional rights and civil liberties against overreaching in times of national crisis are every bit as patriotic as those who favor more extensive incursions in the name of national security, perhaps even more so because they are courageous in the face of what's seen to be a popular demand. Something terrible happens, the cry is we've got to do something different.

I would suggest that we did in fact have the tools available prior to 9/11 given the information we had, had there been a greater focus on the threat of terrorism within the United States. On the one hand, we know that we had within our intelligence community a communication to suggest that al Qaeda was going to strike within the United States and was going to use commercial airlines. On the other hand, we had intelligence that involved the identification of two members of al Qaeda we knew were within the continental United States, and I would suggest that had this information been pursued, we certainly could have found the two individuals.

The FBI had no restriction, even if they did not have the means themselves, from using private organizations which conducted data mining at the time, and there are a number of individual companies to which the FBI would have had access had they focused specifically on this. Of course, we're dealing with 20/20 hindsight, and we're all mindful of that, but when we discuss making wholesale changes in our civil liberties and protections of privacy, we have to keep in mind the effects of that on the body politic, on the public, where there's a tremendous apprehension now about individuals' civil rights and civil liberties being subject to more and more increasing government intrusion, and particularly in connection with the enormous amount of effort that is now going into data collection, data mining by various agencies of the government.

And although we have heard this morning some quotes from the Israeli Supreme Court and I think properly so from our other panel since the Israelis face in their democracy an enormous challenge, one that we could not begin to comprehend in this country even with the 9/11 tragedy, on a daily basis in that country and yet the supreme court's reaffirmation of the separation of power and the rights of individuals has been and presumably will continue to be of major concern and protection.

Going to our own supreme court, let me quote from two members, one a present and one a former member. In 1995, Justice Sandra Day O'Connor warned, "It can never be too often stated that the greatest threats to our constitutional freedoms come in times of crisis," and Thurgood Marshall, who in 1989 warned, "History teaches us that grave threats to liberty often comes in times of urgency when constitutional rights seem too extravagant to endure." The World War II relocation camp cases, the Red Scare of the McCarthy era, internal subversion cases are only the most extreme reminders that when we allow fundamental freedoms to

be sacrificed in the name of real or perceived exigency, we invariably come to regret it. Let me ask about the issues of data mining.

Mr. Baker, you've mentioned the TIA which was at first called Total Information Awareness and when the great furor arose about the name of that project, they changed it to Terrorism Information Awareness. But notwithstanding that, and notwithstanding Admiral Poindexter's dismissal from that position, which I think on balance was not all that controversial given what was going on, the Department of Defense has nevertheless continued to examine and expend significant resources on data mining.

I'd like to ask the question of this panel as to how many different agencies in the United States government are now in the process of amassing extensive, exhaustive data collection databases for utilization under different scenarios? Clearly we have the Department of Homeland Security, which through its various agencies including the Coast Guard and Naval Investigative Service have indicated that perhaps contrary to the initial conception of the Department of Homeland Security's function, it is not a passive consumer of intelligence, but is in the business now of actively collecting data. There is ICE, the Immigration and Customs Enforcement Agency, there is of course the FBI, there is TTIC, there are various state agencies that are combining to have regional data mining through various private companies accessible. My question is how many different agencies are now collecting this information, and is that the right way to go about business?

First, Ms. Miller.

MS. MILLER: I don't know how many agencies are collecting this kind of information right now, Mr. Ben-Veniste. This commission may have a better take on that than we do actually, but the point of my earlier comments and the testimony I submitted is that there probably is a better way. And without trying to repeat what the Markle Foundation Task Force report most recently said, I think we agree that it made some sense to have DHS be in the lead. I think that there's some confusion that's developed between the missions put forward under the executive order for TTIC versus DHS as an example.

But more important than anything is that, you know -- is a view that I share, which is that what you want to do if you're going to use this information is not have it focus just in the federal government and sort of driven by traditional views of how you gather data, which is I think what has been going on with the FBI and even TTIC. And instead you should take a step back and try to figure out how you want to have an enabled distributed network that can support decision-making and analysis across this country in an effective way with privacy guidelines in place.

And that matters because if you are -- you know, as you've said, data mining or data analysis is going on in the private sector right now. It goes on, I presume, in some instances in the federal government right now. It can be very both powerful and can lead sometimes to wrong results. And that's why you need to have guidelines about how you use it. I mean, the sort of two kind of -- two categories of data analysis that people typically talk about are subject-driven and pattern-driven.

In subject-driven, you just look to a person often and then say, all right, let's find out everything that person does. It's very much like law enforcement but driven by more powerful tools. And if you've got the right person, it at least allows you to focus in on that person more effectively than we have been able to do in the past. Pattern analysis is very different. We're not all that good at it yet. We don't have the technology, as I understand it, really to do it well. But if we do have it in place, as technology matures, to do it well, you can still end up with horrific results, not just -- in terms of coming to the wrong result occasionally as opposed to the right result. And I think you need to build a technology that takes those issues into account and has executive branch oversight so that you do not go through a kind of an ad hoc -- every agency that feels like it wants to do this just goes out and tries to do it. That is not a good idea.

MR. BEN-VENISTE: What restrictions are there on various agencies creating their own stovepipe data mining and collection?

MS. MILLER: Well, there's some restrictions that came about as a result of TIA with respect to Defense Department funding, as I understand it. And I suppose that that is an example, frankly, that would be out there at least to some other agencies to give them pause if they do think about -- thinking about an integrated approach to this that I've been trying to describe. But I -- you know, absent either -- I mean, I would not urge legislation, at least at the first step, because I think that's a somewhat blunt instrument for dealing with these issues. But it does require effective, active, thoughtful thinking and actual rulemaking within the Executive Branch. And if that's going on, it's not visible to the outside world.

MR. BEN-VENISTE: Well, let me follow up on your observation with respect to TIA and the Department of Defense. I think it has been little publicized but nonetheless important that we learn that NORTHCOM, the Department of Defense domestic protection agency, if you will, of the Department of Defense, which now has a domestic -- a definite domestic mission, is in the process of creating through its command at Peterson Air Force Base in Colorado Springs, Colorado a combined intelligence and fusion center where it has let out contracts for the creation of what they call actionable intelligence about a domestic terrorist threat, collecting and analyzing data from 50 different federal, state and local agencies.

Supposedly NORTHCOM does not collect data on its own but rather it analyzes and then disseminates data. What is the proper role of the United States military in this exercise as another of these entities creating, analyzing, disseminating data on United States citizens?

MS. MILLER: Well, that's a big question. Let me just maybe take one or two bites at it. Northern Command is not necessarily a structure that I would have put in place if I were sitting at the Department of Defense, but I understand why Secretary Rumsfeld and the President decided to do that, because there needs, I think they felt, to be more structure and focus within the U.S. military on domestic -- sort of protecting us largely from catastrophic consequences of a successful attack, as opposed to necessarily going out there and stopping the attack before it happens.

I think that if you -- in any military command you have an intelligence fusion center. They don't know how to do it any other way. I think, at least as I understand it, Northern Command has been set up, as you said, so that they are not collecting intelligence actively but simply getting the products of other --

MR. BEN-VENISTE: Buying it, as it were.

MS. MILLER: Getting it from other federal agencies from the most part. And I think it's a work in progress. I think that in the -- although it's a different subject than the one we sort of started out with today, I think that there has been a -- need to be a lot of hard thinking and guidelines put in place with respect to that entity, not that I expect it to do something that would not make us proud, but I think it's a new area for the military in today's world. And some of the same concerns that came up in law enforcement with the wall, so-called wall, will come up with Northern Command. They're going to get feeds from all the Joint Combatant Commands all over the world and they're going to mush it together with a lot of domestic intelligence, I would expect, and they need guidelines for what they do with that information.

And I think they're in the process right now of working it out, but oversight on that front is appropriate too because my own view is that the last thing we want is to have a U.S. military, which I think is so respected in this country, lose some of that respect if it's perceived as doing -- sort of crossing the line into law enforcement and sort of surveillance of Americans, which I don't expect them to do, but I think we need some sort of guidelines in place to make sure that people are reassured that that's the case.

MR. BEN-VENISTE: I agree with you.

Mr. Baker, do you have some additional agencies which you know about who are also in the data mining business?

MR. BAKER: No, I don't. I'm assuming that most of them have been brought to light in the intense coverage looking for precisely that in the last six to eight months. My sense, in fact, is that as that coverage has intensified and as the climate in the country has changed, that many people who had considered that, many agencies who considered that, are slowing or stopping their efforts to use information in ways that might help us to find terrorists, responding mainly, I think, to theoretical concerns about ways in which privacy abuses could occur, not to actual privacy abuses.

I think after September 11, the lessons from the wall and the well-meaning basis for creating that is that you better be pretty cautious before you say, in order to avoid some theoretical risk, I'm going to put in place real limits on what people can do to protect us. I am, however, very big on some of the technologies that would allow us to audit access to databases. There's very powerful technology that can impose a lot of accountability on people who do that. If we find actual abuses, we ought to take action then. I think a process of trying to write the rules in advance, as the wall has demonstrated, is bound sooner or later to create a disaster.

MR. BEN-VENISTE: Let me follow up on your observations with respect to pre-9/11, which I think differ from mine. What was there about the information that we had in our possession that would have precluded the FBI working with the FAA to put the two individuals whom they were looking for on a no-fly list, given the fact that we know that they were using their correct names and identification, and given the fact that we at least had some warning that some terrorist act involving commercial airliners was being planned?

MR. BAKER: I think the -- that is a possibility that could have been done. There was bad coordination and stovepipes throughout government. Part of that, however, was reflected in an inability for information technology systems to interoperate. That agent --

MR. BEN-VENISTE: Well, I'm not talking about --

MR. BAKER: That agent did what he thought was the right thing, which was to try and locate these folks using the tools he had ready access to. It didn't work.

MR. BEN-VENISTE: Well, we're talking about what was available and I'm not talking about interactive anything, I'm talking about somebody picking up the telephone, calling the FAA, saying there's two people who ought to be on the no-fly list.

MR. BAKER: He was trying to find them. We weren't actually focused, obviously, on exactly what happened on September 11. He was trying to find them, not keep them off of planes. If they'd been turned away on a plane, I wouldn't be surprised if he thought to himself, if we turn them away they'll know we're onto them and we'll never catch them. I don't know what was going through his head, but that's certainly a possibility.

MR. BEN-VENISTE: Well, being identified in an airport and being released and, quote, turned away, are two different things. Mr. Rotenberg, could you address the first question in terms of the number of agencies, to your knowledge, that are in the data mining business?

MR. ROTENBERG: Well, Mr. Ben-Veniste, again, I think some history is relevant here because you know for more than 30 years we've had a large, decentralized, computerized criminal history system in the United States called the National Crime Information Center, and that database is available, I think, to over 800,000 individuals in the law enforcement community. The information that's in that database has continued to expand over time, including material witnesses and others. It is already a powerful tool for when a person is detained to determine if there's an outstanding warrant.

Now, data mining, as I suggest in my testimony, raises a different set of problems because it is an attempt to integrate information from different data sets that aren't naturally related. I mean, to use sort of a trivial example, in the commercial realm, if you have purchased a sweater around Christmas time for the last two years, the merchant is probably making a wise move and suggesting to you this year around Christmas time perhaps you'd like to purchase a sweater. But you can make that extrapolation because you are dealing with similar data to produce a conclusion.

A lot of the data mining projects that were pursued under TIA are now still being proposed for CAPPS, attempt to suggest that you can take information from financial institutions and information from travel agencies and information from communication carriers and extract and infer conclusions. And I think that is a much more difficult problem. I think it would be a mistake to assume a correlation between the level of data mining that occurs and the level of useful information that is produced.

MR. BEN-VENISTE: Let me ask you whether, in connection with the military's involvement in analyzing the information to which it is gaining access throughout the world and -- with respect to United States citizens, whether you see a tension between the Posse Comitatus Act and the new involvement of the military in collecting this information.

MR. ROTENBERG: I haven't thought so much about that problem, but I will tell you that your question just a moment ago made me think of a famous Supreme Court case prior to the passage of the Privacy Act which was Laird v. Tatum. And the issue in that case concerned the collection of information on war protestors by the Department of Defense. And they alleged a Fourth Amendment violation, saying that this information was being collected without any judicial oversight. The court ultimately found against them because they couldn't find an actual harm.

But it was suggested by the court at that point in time that you could imagine a more elaborate system of surveillance that would raise significant Fourth Amendment concerns. And, you know, I have to say, as someone who responds to some of the comments that Mr. Baker has made this morning, I don't think adherence to Fourth Amendment standards is a theoretical concern. I think it is an underlying goal and obligation of the federal government. And many of these systems that are being discussed, raise significant Fourth Amendment issues as to their application.

MR. BEN-VENISTE: Thank you.

Mr. Chairman, while I have other questions I'd like to ask this panel, in deference to my colleagues who no doubt have other questions, I will suspend my questioning at this point with my thanks to the members of this panel.

MR. KEAN: Thank you. I've got one myself actually.

As far as private data sources, I've been given to understand that there are private data sources involved with credit card companies, magazine subscriptions and so on that are much more extensive probably than anything the government had and maybe has. And that had we wanted to look up Mohammed Atta, or a number of the other hijackers, we could have found them probably in an hour or two using some of those private sources. First of all, is this correct? And if it is, should there be -- why are we less worried about private sources having all our personal information than we are about government having our personal information? Anybody.

MS. MILLER: I could take one brief try at that, which is -- I mean, I do think that there is an obvious difference between privately held information as opposed to government access to that privately held information because government does bring with it -- and I mean, it's the 900 pound gorilla to put it mildly, and it does bring with it a lot of power over its citizens that private entities cannot typically exercise. So I do think there's an obvious difference that's driven by -- you know, we recognize that in Fourth Amendment jurisprudence and everything else. But I do think having access to private data -- I don't know if it would have helped, you know, I don't know the

details enough, the precise details before 9/11 -- of what you all know about the information that was available leading up to 9/11. But I do think that having access to private data can be useful and would be useful going forward.

I think again, it needs to be done in a responsible way, and by that I mean you don't necessarily have to import all that data into the federal government's network. You can leave it out there, you can touch it, you can use it in anonymous ways sometimes, before you actually get enough information to really focus in on an individual or individuals. So I think there are a number of steps that can be taken to leverage that data without making it seem that the government has got too much information with respect to every American citizen sitting in its files ready to be misused.

MR. BAKER: Let me add to that. They definitely had frequent flyer information, rental agreements, as I said, a California DMV ID, much of that was available to the private sector. The private sector had a better way of finding connections between the hijackers than the United States government did, and it's shocking. In part, one of the problems was that we wrote rules in advance to prevent theoretical risks like Laird v. Tatum. The FBI adopted rules that said, well, you can't gather files on individual American citizens without some very strong reason. The result of that anybody in al Qaeda could type in the name of anybody in the FBI into Google, print off the result and have a good intelligence file on that person. The FBI was prohibited from doing that.

This effort to kind of stop the direction of technology which is clearly toward more data and more coordination of data among databases and to say well, we won't let the government go there, simply means that private sector will go there and we won't have the advantage of it.

LEE H. HAMILTON: Thank you very much for your testimony. You folks all work on the, as I understand it, kind of the cutting edge of law and privacy and technology. And I'm just wondering what you think we should say as a commission to the American people about their privacy in the future. To go back a few years, when the electronic devices were first put in place in airports, I don't know just when it was, but it was a long time ago, there was an outcry among civil libertarians that this was an outrageous intrusion into the privacy of the airline passenger. And I suppose there were a lot of court cases, I don't know. Now we've come to just accept that, all of us accept it, grumble a little bit perhaps at the inconvenience, but we accept it.

What do we say to the American people about what's going to happen to them here with all of this fancy new technology coming along. Should we say to them, look, you better prepare yourselves for all kinds of invasions of your privacy because

that's going to be necessary in the world ahead with our concern for terrorism? Or do we need to say anything to the American people about the invasion of technology and of their privacy?

MR. ROTENBERG: Let me say, I think if you were to reach that conclusion it would be a very unfortunate outcome. It would seem to me --

MR. HAMILTON: What conclusion?

MR. ROTENBERG: Reach the conclusion that the American people should anticipate a significant loss of their privacy after 9/11. It seems to me that the challenge we face, both you as commissioners and as this country is how we respond to these new threats without sacrificing our basic freedoms, and my view is not a theoretical concern about the importance of liberty, it's also the belief that the government, the country is more robust. It is better able to withstand threat if the government is accountable, if the citizen's rights are protected. We can consider how effectively our governments respond that have adopted enormous secrecy, and in such worlds there's very little ability to assess which programs are working, where the threats are arising, what the new challenges might be.

MR. HAMILTON: Mr. Rotenberg, the question is, do you anticipate that the technology that is in the mail, coming forward, is going to represent a much further invasion of privacy in the American people?

MR. ROTENBERG: I don't think it necessarily has to, and that's why it's very important to distinguish technologies that promote security from technologies that enable surveillance. We have already done a lot since September 11th to put in place better technologies of security for monitoring containers and cargo entering the United States, for determining the materials that are aboard an aircraft. All of those decisions represent the incorporation of technology that helps safeguard the country. But what you're talking about today is a narrow set of technologies, the technology of surveillance and the attempt to try to determine a person's intent prior to when they act.

MR. HAMILTON: Well, I've been reading, and you have too, about this new technology that they're going to have at the airports that will strip you, in effect? Now that's a rather considerable invasion of privacy. Are you --

MR. ROTENBERG: I don't think it should be in place. I mean, this is the Orlando Airport, of course.

MR. HAMILTON: Mr. Baker, Ms. Miller, how do you feel about this possible invasion of technology and privacy?

MS. MILLER: Well, I think it's too easy to assume that we need to go back to maybe a theme at the outset here. I think

it's too easy to assume that we have to give up privacy in order to be safe. I think usually, if you look at it carefully it turns out that we don't need a given -- there are some technologies that we actually don't need, we have other ways of doing the same thing, or you can implement the technology in a way that's respectful of the privacy and civil liberties, and sort of the vim and vigor of our national character, which I wouldn't want to see lost because we have to give up all of our rights in order to stay safe. Often -- you can look at what we've done at the airports so far. People have raging debates right now about whether what we've done is in fact effective, and should we fine tune it in a different way. What I don't like to see is the sort of assumption that it's either or and that to be safe we've got to give up privacy when that's really not the case, and no one's made that case.

MR. HAMILTON: I recognize that, but do you see the development of technology progressing to the point where it will be a much greater threat to the privacy of the American people?

MS. MILLER: If it's not utilized properly, of course. There's a lot of stuff going on even right now that has nothing to do with security, like taking pictures on public streets all the time, whether it's for traffic monitoring or for looking at public gatherings. There's a lot of stuff going on that in the past I think people would have been skeptical of. My own personal belief is that we're going to get to the tipping point where people are just going to say enough, we're not comfortable with this.

I could be wrong about this, obviously, but we're not comfortable with this anymore, and we'll end up -- the point is to deploy these technologies smartly, so if you're going to -- think about it in advance. Is this really getting us anything, and how much are we giving up to get it? And can we use it in a way that minimizes the effect on individuals? And if you can't answer those questions and then also say there's going to be a payoff, if you can't answer all those questions in the affirmative, don't deploy it.

MR. HAMILTON : Mr. Baker?

MR. BAKER: I'd like to separate two points, which is, is technology going to take away our privacy, and what should the government's use of technology be? On the whole, yes. Technology is going to take away our privacy. You only have to look at Google. We would have been shocked at the idea that anybody who wanted to have a dossier on us and everything we've ever done or that's ever been in the paper or we've ever said publicly would be assembled for anybody who chose it 20 years ago?

Now it's a fact of life. Data is getting cheaper and the ability to process that data is getting cheaper as well, and the

consequence is going to be that we will no longer have the kind of anonymity that we've been used to for the last century. I regret that, I think that's an unfortunate thing. I don't think that the answer to that is to say well, the only party that can't take advantage of that technology is the U.S. government when it's pursuing terrorists. On the contrary, we ought to be able to use that technology and we ought to build in safeguards.

That's appropriate, and I've identified some safeguards in my testimony, but we need actually, I think, to have the courage -- I have a different definition of courage than Commissioner Ben-Veniste -- I don't think it takes any courage in this town to agree with the New York Times. I would suggest that you disagree with them and say that we need to use this technology. We need to build in the safeguards, but we need to use the technology because not using it has turned out so badly.

MR. HAMILTON: Thank you very much.

MR. KEAN: Congressman Roemer?

REP. ROEMER: Thank you, Mr. Chairman.

Mr. Baker, your testimony is very interesting and compelling and I happen to agree with most of it. I just want to be very clear as to your points and if you could just briefly answer these as yes or no and maybe a sentence to precisely clarify what you mean by it, but I don't want hopefully long answers to these questions. You say in your opening paragraph of your testimony before the 9/11 commission that the government knew the names of the two hijackers, not the private sector, the government knew the names of the two hijackers. The government knew that these were al Qaeda killers.

MR. BAKER: Yes.

REP. ROEMER: And the government knew that they had entered the United States of America?

MR. BAKER: Yes. I get that from the Joint Intelligence Committee inquiry.

REP. ROEMER: You also go on to state that these two people, Khalid al-Mihdhar and Nawaf al-Hazmi, were openly living in the country and using credit cards and other sources of information that would have made them readily accessible to the government apprehending them whether they were in California or Virginia or Ohio or some other part of the country, is that correct?

MR. BAKER: That's right.

REP. ROEMER: And do you also contend that two and a half weeks would have been ample time for this FBI agent to have said to somebody, listen, I'm not going to pay attention to this wall,

I'm going to try to break through this wall and share this information, you contend then that at least the flight number 77 that went into the Pentagon by Mihdhar and Hazmi if not the flight by Atta could have been forwarded or prevented?

MR. BAKER: I don't think that by himself he could have broken those rules. The FBI obeys rules and he couldn't have gotten cooperation.

REP. ROEMER: Hypothetically --

MR. BAKER: Without the wall, I believe not only could we have found those folks, but if we had just been able to check some basic data which they shared with the people, phone numbers, addresses and the like who we could have apprehended, we probably could have found most of the hijackers before September 11.

REP. ROEMER: Including Atta, who flew into the -- flew American Airlines Flight 11 into the north tower?

MR. BAKER: Yeah, and the fellow who took the plane into the south tower as well. I don't know whether we could have found the people in Pennsylvania.

REP. ROEMER: You also say that you believe that we did not have the proper accountability after 9/11, and only one person was held accountable in that. I'm not sure if you were being cute about Poindexter. Who else should have been held accountable?

MR. BAKER: I'm not looking for scalps or heads on the wall. I think it's an observation that the only people we felt we -- the only person we thought had to leave was someone who was trying to solve this problem, not somebody who was responsible for it.

REP. ROEMER: So you're not recommending to the --

MR. BAKER: I'm not.

REP. ROEMER: -- 9-11 Commission anybody that should be accountable?

MR. BAKER: I feel a certain personal accountability here. I was part of building this wall. I thought I was doing the right thing, that it was the best thing for the country. It turned out to be a disaster and I'll always regret it.

REP. ROEMER: Do you believe we know all the lessons of 9/11?

MR. BAKER: No.

REP. ROEMER: What might be the single most important one, looking back?

MR. BAKER: I think the failure to focus on what was happening on the FISA court, in the FISA offices, with the wall, where the actual administration of those policies is something that's really been overlooked, and we need to do more of that.

REP. ROEMER: And you say in the end of your testimony that you believe we have gone backwards since 9/11 to August of 2001, rather than forward to trying to mitigate future terrorist attacks. Can you explain that?

MR. BAKER: You know, Commissioner Ben-Veniste read some very moving and accurate and proper quotes about the importance of being alert to the risk to civil liberties in times of crisis. I think that's been the message from the beginning, not that we need to sacrifice civil liberties. That is what elite opinion has been saying all along, and the result of the progression of that from warning against risk to trying to find them in the USA PATRIOT Act has significantly deterred imaginative, creative, aggressive action on the part of the government to respond to the crisis that we're in.

REP. ROEMER: And my last question is -- we asked this to the first panel, about this 56-year-old National Security Act that separates our domestic and our foreign intelligence bodies from doing some of this cooperation. Do you think that we should have a seamless entity out there collecting intelligence at this point, one single entity to take us into this new era? What is your feeling on this?

MR. BAKER: I'm agnostic on that. In theory, if we could bring MI5 over here and plop it down, functioning properly, it might be the best solution. But the fact is the choice for that is either we're going to leave the FBI to try to change it's culture or we're going to ask DHS to take on that major responsibility in the middle of desperately trying to organize itself. I started the Education Department, and I tell you, it is not easy. And so given the choice between those real world examples, I think I'd give the FBI some time to get its culture in order, but I don't underestimate how hard that is.

REP. ROEMER: I don't know how much time you continue to give the FBI after that. Thank you, Mr. Baker.

MR. KEAN: Our final questioner, Secretary Lehman.

JOHN LEHMAN: Thank you. I would like to ask each of you to address perhaps the obverse of what we've been talking about, and that is the constitutional or the civic rights of the government employees that we have working on these issues. Historically, there's been a doctrine of sovereign immunity that has protected -- or state immunity that has protected government employees from

personal liability, except in the case of clear criminal activity. And where there has been abuse of people's rights, the government pays, and the government has always been -- except in the unique situation of military, the government has been liable to civil action for recovery.

All this changed during the '70s and '80s when a series of new pieces of legislation and some subsequent court cases greatly reduced the principle of immunity of officials. And as a result, there were some fairly high-profile cases of officials being sued privately where they were not defended by the government and subjected to financial ruin, in effect. That, we have been told and have a witness this afternoon who is going to tell us yet again, has had a very significant dampening effect on the willingness of government employees to pursue any issue that might infringe on privacy issues or civil liberties because of their own personal exposure.

I know when I was at the Pentagon, as a result of those court cases, an individual who was being sued had to go to the General Counsel and petition the General Counsel to defend them. And in the case of one naval officer who was in command of a weapons station, the federal government declined to do that. So my question is, do you see this as a problem? Is it a problem we should address? Because the people we depend on to try to enforce this new effort against our enemies have rights too.

MR. ROTENBERG: Secretary, let me just say, because we are involved currently in a case before the court concerning damages for Privacy Act violations, we do believe that the federal government should be held responsible when violation is proven. But certainly sympathetic to your concerns about employees of the federal agencies. And I'm frankly not aware of many cases, certainly not in the realm of the types of privacy issues we work on, where specific employees have been held liable. I think there was maybe a high-profile case a few years ago at the IRS concerning taxpayer records. But beyond that, typically fines, when they are assessed, and it doesn't happen very often, but they're typically assessed against the agency.

MS. MILLER: I think I would turn that little question a little bit. I haven't -- you know, Biven's actions, for example, have a constitutional basis, and so there's some things you couldn't change very easily unless the Supreme Court revisited some of this, its prior jurisprudence. But at least while I was at DOD, I did not find people being inhibited in their actions particularly with respect to civil liberties issues because they thought they were going to be sued personally.

Or I heard that expressed much more commonly in the context of environmental disputes. That's where, you know, base commanders would come in and be very worried that they were going to be held criminally liable if something didn't work out exactly right on the base. So I don't -- at least personally I didn't

find that to be a real problem. I haven't seen the testimony you're referring to for this afternoon. I do think, though, that individual employees, both currently and former employees can and do deserve representation from the Justice Department in specific instances where they are asserted to have misbehaved in one way or another and it's not clear that they have done so.

The other point I would make is that I think -- and this is perhaps a little bit where maybe Stewart and I agree sort of. I think that having -- one of the problems for employees in this world now is, you know, they look at TIA, they look at some of the other controversies, and there are no rules, you know. And when there are no rules, what you do is kind of go back into your corner. I mean, that's just self-preservation. And it's not unexpected and it's the way people are. And, you know, to the extent this commission could do anything, trying to provide -- at least urging people to sort of make some -- you know, grapple with some of these hard issues and come up with some rules that they then put out so the people know what they can and can't do I think will go a long way to making us safer and making the individual employee feel like he or she can be an effective government employee.

MR. BAKER: I do agree and I don't have anything to add.

MR. LEHMAN: Thank you.

MR. KEAN: Okay. Thank you all very, very much. It's a very interesting discussion. Ms. Miller, Mr. Baker, Mr. Rotenberg, thank you for all your help and we will reconvene again at 1:00.

(Recess.)

MR. KEAN: Okay. We'll call the hearing to order. Gathered to walk us through the myriad of issues associated with preventive detention and the use of immigration laws and enemy combatant designations to combat terrorism are Jan Ting, professor of law, Temple University, and former assistant commissioner of Refugees, Asylum and Parole, Immigration and Naturalization Service; Khaled Medhat Abou El Fadl, visiting professor, Yale University Law School, and professor and distinguished fellow in Islamic law, UCLA School of Law -- I'm sorry, UCLA School of Law; and David Martin, Warner-Booker distinguished professor of international law at the University of Virginia and former general counsel, Immigration and Naturalization Service.

Professor Ting, if you would start us off.

JAN TING: Thank you, Mr. Chairman and members of the Commission. I'm grateful for the invitation to speak today and discuss these issues with you and with my distinguished colleagues on this panel.

As the Supreme Court has stated, over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens. Our cases have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the government's political departments, largely immune from judicial control. In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens. The exclusion of aliens and the reservation of the power to deport have no permissible counterpart in the federal government's power to regulate the conduct of its own citizenry.

In the exercise of its plenary power over immigration, Congress has enacted the most generous immigration policy in the world. By direction of Congress, we admit each year to the United States more legal immigrants than all the rest of the nations of the world combined. But the number is limited through complex preferences that I describe as a pick and choose system. Those not chosen but who come anyway or who overstay their temporary visas are subject to removal.

Congress has delegated administration and enforcement of its immigration laws to the Executive Branch of government. Removal of illegal aliens is exercised administratively, with only limited appeal to the federal courts. Prior to 1983, designated officers of the Immigration and Naturalization Service itself ruled on the immigration charges brought by the INS and issued the removal orders. Only in 1983 were those officers transferred from the INS to a separate branch of the Department of Justice, where they remain today.

These immigration judges are not members of the judiciary. They work for the Department of Justice and for the attorney general. Removal of illegal aliens from the United States is not criminal punishment. Procedural rights of criminal defendants do not apply. Aliens in removal proceedings are not, for example, entitled to a jury trial. They're not entitled to lawyers paid for by the taxpayers. They cannot invoke the exclusionary rule against their removal.

Detention is a common part of the removal process and perhaps should be more common than it is now. Americans are no longer surprised to hear that there may be as many as 10 million illegal aliens in the United States. They are astonished, however, to hear that more than 300,000 of those illegal aliens have actually been caught by the INS, taken before immigration judges, who have ordered their removal, exhausted all their appeal rights and then simply absconded and remain in the U.S. despite the outstanding removal order. The explanation is that these aliens were not detained but were released on bond, pending the final resolution of their cases.

We're all aware of the June 2nd report of the DOJ inspector general on the treatment of aliens held on immigration charges in connection with the investigation of the September 11th attacks. The I.G. expressed concerns about delays in the issuing of charging documents, the FBI clearance process, actual removal from the U.S., the INS's no bond policy and conditions of confinement of the 762 detainees studied. The I.G.'s concerns have been accepted in principle by the Departments of Justice and Homeland Security, and negotiations seem to be continuing on the best ways to address those concerns.

As Professor Martin notes in his written testimony today, the Immigration Service's bond determinations have always been subject to review, and the government's ability to stay an immigration judge's bond determination has always been provisional, pending outcome of appeal to the BIA, the Board of Immigration Appeals. Professor Martin found the DOJ's initial response to the I.G.'s concerns to be dismissive, but I thought it properly noted the absence of any finding by the I.G. after careful investigation of any violations of law by the Immigration Service in the unprecedented and extraordinary circumstances following the 9/11 terrorist attacks.

It also clearly articulated the DOJ's legal positions: that the government can use the full statutory 90-day period to remove an illegal alien, that it can take more than 90 days if the delay is to investigate ties to terrorism, that release of an illegal alien on bond is discretionary and not a right, that experience demonstrates that illegal aliens who are not detained usually flee and avoid deportation.

One concern I had about the I.G.'s report was regarding the allegations of physical and verbal abuse at the Metropolitan Detention Center in Brooklyn, New York. If these allegations have substance, the dismissal and prosecution of the offending employees ought to be forthcoming. Exemplary punishments, if warranted, would serve to protect the rights of future detainees. The I.G. has promised a further report on these allegations.

The I.G. did not express concern about the DOJ's decision to conduct closed immigration removal hearings for special interest aliens charged with immigration law violations without disclosure of the information to the public. We have had conflicting decisions from the Sixth and Third Circuit Courts of Appeal on First Amendment challenges to this policy. I much prefer the decision of the Third Circuit, sustaining the DOJ policy, which found a basic tenet of administrative law is that agencies should be free to fashion their own rules of procedure and required consideration of the extent to which openness impairs the public good.

In the interest of time, I've tried to limit this statement to the use of immigration law to detain and remove illegal aliens after 9/11, but I can't let this opportunity go by without asking

the Commission, in pursuit of its mandate to make recommendations to prevent further terrorist attacks to also consider other national security issues related to immigration.

First of all, the need for more foreign language capability is well known now. Why isn't there a program in place to remedy the foreign language gap? In the 1960s and '70s we had the National Defense Foreign Language Act to encourage young Americans to study what were then critical languages, and I was one of those beneficiaries.

Why are our borders still as open as they are? Every night since 9/11, hundreds of illegal aliens succeed in surreptitiously entering the United States and we have no idea who they are. We read only about those who are caught or who die in the effort to enter. Why has enforcement of the law against employment of illegal aliens dropped precipitously? And I cite some statistics in my statement.

Besides considering what changes in law and policy to recommend, please also consider the extent to which simply enforcing the laws on the books can enhance national security and protect us from further terrorist attacks. Thank you.

MR. KEAN: Thank you very much.

Professor Khaled El Fadl. Or whichever one of you would like to.

KHALED MEDHAT ABOU EL FADL: Thank you very much for hosting me today. My comments are going to try to focus on specifically on American Muslims and some of the issues that 9/11 raised. It is well known that some American Muslims come to the United States in pursuit of economic dreams. They aspire to fulfill a sense of dignity that comes from a higher standard of living. However, as with all immigrant groups, many American Muslims bring with them dreams of liberty and justice as well. Many immigrant Muslims come to the United States with elevated expectations of liberty, justice, and for them, our country, this country, is a symbolic beacon of freedom in the world.

We must recognize that other than immigrant Muslims, there is also an ever-increasing population of native-born American Muslim citizens. For these Americans, the United States, with its values of liberty and justice, is the only country they know, and for this sizeable portion of the population, the moral and political values of the United States are not a matter of elective choice, they are an absolute imperative.

Muslims have succeeded in becoming a significant part of the fabric of the United States and contribute to progress and development in this country at every level of social and industry -- of society and industry. Despite popular perceptions, terrorists and fanatics are a small minority of Muslims in the

United States, and these extremists rarely emerge from the native American Muslim context. In most cases, they do not grow out of the natural processes of native American Muslim communities. Rather, in most cases, they are outsiders that exist on the margins of American Muslim society.

They cling in the margins of American Muslim society until they create the opportunity for terrorism. And terrorism, however, endangers the life and well-being of every American Muslim, as well as the population at large. Terrorism and its aftermath have the effect of dismantling and gradually obliterating American Muslim and Arab dreams of financial and political security, leave alone dreams of finding dignity and liberty in the United States. The primary effect of the frustration of these expectations and dreams is the sociopolitical alienation of our Muslim and Arab citizens.

That is why an important part of winning the war against terrorism is actively resisting and guarding against the alienation of any part of our citizenry, and we are the stronger for it. It is elementary that the more united our stand against terrorism, the more effective we will be. When it comes to the protracted war against terrorism, we can ill afford even the appearance that the United States has turned against a segment of its own citizenry.

It is worth emphasizing that the Muslim and Arab citizens of the United States are an extremely valuable assets in this war against terrorism, and while terrorists desperately seek to exploit the most alienated elements of this population in furtherance of their criminal conduct, we, on the other hand, must make every effort to draft and mobilize this whole population by consistently communicating to the segment of American society that they are an integral part of what defines us as a nation and as a people.

At a broader level, it is of crucial significance that we remind ourselves that our practice of democracy in the United States often has a defining impact upon the fate of democracy around the world. What we do here in the United States in terms of our democratic practices goes to the credibility of democracy at the international level. It is empirically observable that our own domestic laws and policies do promote or hurt the cause of democracy by demonstrating the willingness of the world's largest democracy to live by democratic principle even when seriously challenged.

If our conduct appears to betray the principles of democracy, dictatorships jump on this to impeach the credibility of democratic systems at large, and justify despotism. I have observed this unfold in international media venues. Typically, apologists for dictatorships produce a list of alleged civil rights abuses that take place in the United States and then use this list to argue that American demands for democracy around the

world and especially the Middle East are just hypocritical and politically motivated posturing.

That is why, in assessing the aftermath of 9/11, in the interest of time I will highlight -- and I elaborate in my report on this -- several areas of concern. One is the practice of summary detentions. I think it is fair to say that American Muslims understand that the immigration laws of the United States need to be implemented and implemented faithfully. In fact, the general feeling is that American Muslims are assured and rendered more secure by a faithful implementation of the immigration laws of the United States.

However, there is a perception in the American Muslim community that summary detentions are, at times, practiced against a category of so-called material witnesses, sometimes on unclear grounds, sort of motivated by an attitude of when in doubt, detain first and figure out the grounds later. I think this -- and I elaborate on this in the report -- is something that needs our careful attention. Second major area of concern is the use of secret evidence. As I talk about in the report, in several cases the use of secret evidence turns out to be badly in need of extra judicial scrutiny.

Sometimes the difficulty damages the credibility of the legal system by feeding into conspiracy theories and fears about religiously or ethnically-based persecution. At times, the mistakes in use of secret evidence are technical. In fact, sometimes silly. Like using -- for instance, relying on a wrong name of an organization like Jamaah Islamiyah instead of Jamaat al-Islamiyya. I'm out of time so I'm going to quickly summarize a couple of other areas of concern. One that emerges from practice, and that is the concern of moving detainees around without an apparent logic for this constant moving around of detainees. A practice like this has trouble with the American Muslim community because it cuts off these detainees from their support group, their family and also, we consider, ability to receive effective assistance of counsel, and adds to the image, to the perception that the government is mostly concerned about winning rather than achieving justice. Another area of serious concern that has left a huge impression upon the American Muslim community is the so-called practice of proxy torture or the refoulement of detainees to countries in which they would be tortured. This, of course, is in violation of our own obligations under treaty law, under both the Torture Convention and the Refugee Conventions.

However, as a well-publicized recent case that I worked involving a Canadian citizen who was sent to Syria and tortured for about a year before deported from the United States emphasized that practice has been devastating under credibility of the legal and political system, and is something that I think needs to be addressed. In conclusion, and there are several other points that I talk about in more detail, I fully recognize

that 9/11 and its aftermath challenged our society, and in fact the whole world in profound and fundamental ways.

There is emphasis, however, that the war with terrorism is a war of propaganda. Terrorists seek to contaminate the world with a sense of cynicism about all moral and democratic values. Terrorists, through acts of violence and provocation, seek to convince the world that democracies are not morally superior totalitarian and despotic systems that terrorists believe in and espouse. In the war against terrorism, we need to preserve the moral integrity and credibility of democracies, and we also need to ensure the loyalty and trust of all the segments that constitute the rich fabric of our pluralist society. Addressing the concerns raised in my report go a long way towards maintaining unity and liberty for all, and towards winning the war against terrorism itself. And thank you.

MR. KEAN: Professor Martin.

DAVID MARTIN: Thank you very much, Mr. Chairman. My prepared testimony addresses several questions concerning the use of immigration powers. In the interest of time, I will not address those here in my oral statement, but I will focus on the final topic addressed there, and that is this. The Administration has asserted broad authority to detain persons indefinitely if the Executive Branch deems them to be enemy combatants or unlawful combatants in the war against terrorism.

This practice began with persons picked up in the combat areas of Afghanistan, over 600 of whom have been transferred to the U.S. naval base at Guantanamo. Nearly all of these are aliens from many different nationalities. One of them, however, named Hamdi, was discovered to have been born in the United States and so to have U.S. citizenship. He was thereupon brought to the United States but remained under a strict detention regime.

The reach of the enemy combatant doctrine was then considerably expanded when a U.S. citizen named Padilla was picked up not in a combat area but at O'Hare Airport. He was soon declared an enemy combatant and has been held incommunicado in a military prison ever since. The government has also picked up one non-citizen in the United States and held him under similar conditions.

The government asserts the authority to hold such enemy combatants under the law of war until the end of hostilities, apparently meaning the war against terrorism, whose end of course is not anticipated for a very long time. The government has strongly resisted court review of such detentions, or failing that, has argued for an extraordinarily deferential standard of review. Moreover, it has asserted the authority to hold such persons virtually incommunicado as part of a stress and duress

interrogation regime meant to break down the person's resistance to providing information the interrogator seeks.

It has fought had to prevent court-ordered access to counsel for Padilla or Hamdi, although just last week the Defense Department decided to extend that privilege to Hamdi as a matter of grace and not of right. Furthermore, the President made a controversial blanket determination that all of these enemy combatant prisoners at Guantanamo, even Taliban fighters, were not entitled to prisoner of war status under the Third Geneva Convention. The government eventually did say it would provide core protections to them, but the core evidently does not include the treaty's explicit ban on coercive interrogation.

Now, the government today has prevailed in the Guantanamo cases in its view that no court has jurisdiction to consider habeas corpus there, but just a few weeks ago the Supreme Court accepted a Guantanamo case to consider precisely this question. Lower Court decisions in the citizen cases, in contrast, have recognized jurisdiction in habeas corpus but have provided highly deferential standards of review.

Now, what should we make of this practice? In my view, what is objectionable here is not the underlying idea that the law of war should be applied in some fashion to our struggle against terrorism after September 11th. I agree with that. What's objectionable is rather the extraordinary sweep of the government's asserted powers with regard to those labeled enemy combatants. We must now go beyond the law enforcement model, I agree with that, but model and structure our anti-terrorist efforts before September 11th because of the scale of the threat that we face. We should find ways to use the wide range of tools that a state of war brings into being, but there must be limits.

The most important tools for present purposes are two. First, war allows preventive detention of captured combatants without any need to prove criminal charges. Secondly, war privileges certain acts that would be considered murder or assault under other circumstances. We can target al Qaeda members without any need for warrants, indictments, trials or sentences. The key point however is that war brings into play a different set of rules, not the absence of rules altogether. The world community has gone through a painful evolutionary process over the past 100 years and more to try to refine the laws of war so as to avoid indiscriminate cruelties. The United States has participated actively in this development and U.S. military lawyers have been among the leaders in asserting the importance of these humanitarian limits.

The protections that are most relevant here are, first, the safeguards of the third Geneva Convention, applicable to prisoners of war throughout their detention, including important minimum standards for conditions of confinement. And secondly, rules requiring that privilege violence be directed only at

military targets and adversary combatants, carefully distinguishing civilians to the greatest extent possible. This is often called the "principle of distinction."

Unfortunately, the Executive Branch in our current struggle appears to want the added powers that would come with treating the anti-terrorist struggle under the law of war, but without most of these hard won restrictions or protections, even in some form -- and I emphasize this -- even in some form appropriately modified to take account for the different character of this conflict. That's a highly worrisome development: powers without protections. What we badly need now is a serious effort to wrestle with how to adapt the laws of war to the new kind of conflict we face but to modify them in a way that still balances powers and protections.

This will not be easy by any means and it will surely be controversial, whatever framework is developed. But the Executive Branch, in my view, should have taken the lead in trying to spell out such a new framework, probably in the form of legislative proposals that could receive full debate and consideration before Congress. That opportunity has so far been missed, but it is possible that the Supreme Court's decision in the Guantanamo case will help induce Congress to take up that issue.

In my view, the Guantanamo detainees should presumptively be given the full range of protections set forth in the Geneva Conventions for POWs until we work out an appropriate, more limited regime. I say this because I am quite concerned, as has been the International Committee of the Red Cross which has visited prisoners there, about the current conditions of their confinement. In addition, in order to honor the principle of distinction, we should offer an early opportunity for detainees to demonstrate that they had nothing to do with terrorist acts, that is to show that they're basically innocent civilians.

Applying these protections does not immunize detainees from punishment for their own crimes or violations of the laws of war. That's a highly important point. But punishment should occur only after a trial in which they're given a reasonable opportunity to defend themselves. Trial by military commission could be suitable for these purposes, but we must strive to make their procedures conform to the protections set forth in the Geneva conventions.

The Padilla detention, involving a citizen picked up on U.S. territory is far more chilling. The government's argument supporting his indefinite confinement gives little sense at all of how profound a line is being crossed in that case. If Padilla can be held, as the government asserts, we are all vulnerable to indefinite detention without any access to counsel or even to family on the mere say so of an executive official. This is not a question of current good faith, this is a question of the kinds

of powers that are being made available and asserted. The Supreme Court, in my view, should swiftly declare that that particular detention unconstitutional.

In conclusion, Mr. Chairman, and members of the Commission, we suffered a terrible blow on September 11, but it must not be allowed to obliterate the accumulated learning of centuries dating all the way back to Magna Carta about the dangers of unchecked, executive detention authority, or about the need to observe humanitarian boundaries even as we wage an armed conflict against the new and ruthless enemy. Thank you.

MR. KEAN: Thank you very much, Professor.

Governor Thompson.

JAMES THOMPSON: Thank you, Mr. Chairman.

Professor Ting, let me take you back to the two questions you asked and ask you for the answers to your questions. The first was, why are borders still as open as they are? Three points here, if you wouldn't mind commenting on that. Do you get the sense that there is a distinction between the resources and the manpower that we devote to guarding the southern borders of the United States, along the Mexican border, for example, as opposed to the resources we employ in guarding the northern border of the United States, our border with Canada? And is this a matter of policy? Is it a matter of money and does this have implications for the ability of terrorists, for example, to cross one border more easily than the other?

The second is, do you have the sense that the national security implications of border control policy have been subordinated to, let's say, drug control policy? That we're more concerned about people bringing in drugs to the country than we are about people entering the country and doing something here? And if so, is that a wrongheaded use of our resources?

MR. TING: Well, thank you, Commissioner. I think it's important to note that historically, Americans have always felt ambivalent about immigration law enforcement and border enforcement. I mean, obviously, we're all descendants of immigrants, we all pay tribute to our immigrant ancestors and the struggles that they went through and the hardships that they experienced. We're a nation of immigrants and we're all proud of that. But the reality is we are not willing to take everybody in the world who would like to come to the United States and that means you have to have a system of law enforcement so that the people who are not chosen get removed.

Now, why are our borders -- just to respond to your question, I mean, obviously there's a disproportionate allocation of resources, and there always has been, to our southern border rather than our northern border. But as somebody who grew up

along the northern border, I can attest that that border presents the same sort of issues that we have on the southern border. The border is largely wide open, and indeed, every night, every day of the year, people cross over from Canada into the United States and we have no idea who they are.

Is it a question of resources? Well, of course it's a question of resources, but it's mainly a problem of political will. There's basically a lack of political will in this country to enforce our borders for a variety of reasons. Business interests want the borders open and I think electoral considerations come into play, or the perceptions of tightening up the border and the electoral implications of that.

But, you know, why are -- this has just occurred to me, why are military bases allocated in the United States according to whose district is in the hands of a powerful member of Congress or a chairman of a committee? Why are bases allocated that way rather than in a way that makes sense for national security considerations? Why aren't they positioned more along our borders where they can add to our national security in that regard?

No one can argue that drug enforcement isn't a serious national priority, but I think in the context after 9/11 we all ought to understand that immigration, law enforcement and border security is part of our national security concern also.

MR. THOMPSON: Your second question about the enforcement of the law against employment of illegal aliens. Is the bottom line answer that employment of illegal aliens in the United States has become such an integral part of our economy that it would suffer harm were we to enforce the law?

MR. TING: Well, again, I think it reflects the national ambivalence over illegal immigration in the United States. I reject the contention that we hear so often, that illegal aliens do jobs that Americans don't want. I just think that's factually untrue. Americans are simply not willing to work at those jobs for the wages that those employers want to pay.

But I say in my class, if you pay me enough, you can hire me to pick your fruit, you can hire me to clean your toilets, you just have to pay me enough. Americans just want decent wages, that's the issue. So I think it's a complete misstatement to say as we always hear that Americans don't want to do these jobs. Americans will do those jobs for fair wages, but obviously political considerations come to the fore.

I think it's important to note that the drop off in work site enforcement occurred pre-9/11. It's not the case that we've simply devoted more resources to the anti-terrorist struggle and that's why work site enforcement has dropped off. It dropped off before 9/11.

MR. THOMPSON: Would you comment on Professor Martin's view of the Padilla case?

MR. TING: Well, I certainly agree that Padilla is the difficult case. I mean the reality is, there's I think a progression of concern. But I think the real cutting edge is between Hamdi and Padilla, and I don't think I'm the only one that has no problem with Hamdi. Hamdi was detained on the battlefield. If he had been detained in Afghanistan would there even be an issue? If you've detained someone in Afghanistan and keep them in Afghanistan, as there probably are people detained in that way now, is that an issue? It's become an issue only because he was brought to the United States.

I don't think that should make a difference. I mean during World War II, we brought lots of German and Italian POWs to the United States. That did not give them any more rights than they had when they were detained on the battlefield in Europe or North Africa. But the Padilla case is the most difficult case and I don't think anyone can deny that.

I do not find outrageous, as many people do, the government's assertion that the battlefield is here, that it's not limited to Afghanistan and Iraq. I don't think that's an outrageous assertion. But I appreciate very much the implications that Professor Martin and others have raised as to what the significance of that assertion leads us to. I do think that the Fourth Circuit's opinion in Hamdi was helpful. The Fourth Circuit rejected the government's assertion that there's no role for the courts to play in these cases. They said there is a role for the courts to play, we do assert jurisdiction over these cases, but it's a limited jurisdiction to whether the government is actually using the war power or not.

Obviously the Executive Branch has broad discretion in exercising its constitutional war power. If David Letterman is arrested for telling jokes about the First Lady and the government labels him an enemy combatant, I don't think that's an exercise of the war power, and I would rely upon the courts to step in and insert itself in that situation. So I think it is a tough issue. Is the arrest of Padilla at O'Hare Airport a legitimate exercise of the war power or not. If it is, then I think the Executive Branch has a strong argument that it's entitled to discretion in how war is going to be waged under the Constitution.

MR. THOMPSON: Is it your notion that the Fourth Circuit opinion would not allow the courts to examine the weight of evidence or look at the evidence that the Executive Branch is assessing in deciding whether or not to declare someone enemy combatant?

MR. TING: If I were on the court, I would be very reluctant to put the court in the position of second guessing the decisions the Executive Branch and military are making as to proper conduct of the war. I think it is very appropriate for the courts to ask, is this an exercise of the war power or is it something else? But if it is an exercise of the war power, do we really want the courts stepping in and saying, you know, in exercising the war power, I think -- I have a different opinion, you know. I think the war power should be exercised this way rather than that way. I would hope for some deference on the part of the courts to legitimate exercise of the war power by the military.

MR. THOMPSON: Could a court examine whether or not the war power was being exercised without examining the sufficiency or the existence or the weight of the evidence?

MR. TING: I don't know. I'm not sure that I would have any objection to the court wanting to have as much evidence as can be brought to its attention in making its determination as to whether this is or is not a legitimate exercise of the war power.

MR. THOMPSON: But as you understand the government's position in Padilla, they would object to having to bring any evidence before a judge?

MR. TING: I think the -- I don't want to characterize the government's position in Padilla. Maybe David can help out here. But --

MR. THOMPSON: Professor Martin, can you do that?

MR. MARTIN: I think the government position was --

MR. THOMPSON: Here's an example. The President gets it into his head this afternoon that Lee Hamilton is an enemy combatant and has him arrested and put into military custody. What remedy, if any, does he have to challenge that custody? Right to counsel? Right to have a court review the evidence? Right to talk to his family? I mean, what does he do, what's the -- if Padilla is sound, can't they do that to Lee this afternoon?

MR. MARTIN: The government's position has been that there is no right to counsel in those circumstances. About as far as they've gone in saying there's an evidentiary inquiry is to say, look at the affidavit submitted by this Defense Department official and essentially, I guess, absent total contradictions or idiocy in that kind of a statement, which you would never see, the courts are supposed to defer to it. That's what I think is quite disturbing.

I do agree with Professor Ting that as we work out a new body of doctrine to deal with these new circumstances, there should probably be a distinction between pickups on the field of battle, and I mean something fairly -- a fairly obvious

battlefield like Afghanistan and those done on U.S. territory. There is more call for deference in the battlefield situation. But certainly on U.S. soil, we can't accept a situation where suddenly every location in the country is a battlefield for purposes of allowing executive detention of anybody.

MR. THOMPSON: Well, if they picked up Padilla on the site of the World Trade towers, is that a difference, between the World Trade towers site and Chicago?

MR. MARTIN: I don't have a completely worked out system for how you define the boundaries of the battlefield, but I would still suggest, even in that setting, if it involves a U.S. citizen, there should be an inquiry that goes a bit farther than the Hamdi case allowed, and that is you should allow the individual counsel and allow the individual to be heard in person on the matter, even if the ultimate test that's applied is considerably deferential to the military or to the executive authorities.

MR. THOMPSON: Professor El Fadl, there was an interesting article in the paper, it was either yesterday or today, that talked about the impact of the battle against terrorism on the political reactions, both the Arab community in the United States and the Jewish community in the United States, and it seemed to suggest that the Jewish community would move away from the Democrats and over towards the Republicans because of the Bush administration's support of Israel and that the Arab community, which had been Republican in the last election, would move away from the Republican Party and towards the Democrats because of the concern over treatment of Muslims since 9/11.

Putting that political context aside, is there a basis for saying that the totality of law enforcement actions since 9/11 has resulted in a widespread feeling in the Muslim community in the United States, whether native or immigrant, that religious profiling is going on, that the policies are going too far, particularly the immigration detentions? And does this have an impact on the ability of our enemies abroad, whether it's al Qaeda or something else, to make hay?

MR. EL FADL: I think -- Commissioner, I think you're identifying exactly my concerns. I think it's a dangerous -- it's dangerous to look at our war against terrorism as if the only relevant context is the United States, and as if the only relevant time is the moment that we live in. A couple of things. When I say that -- this is -- the war with terrorism is really a war with propaganda or communication or message. And it's really a war of moral message versus moral message -- in this case, really moral message against immoral message.

I don't mean it rhetorically, and I know that it's very easy to take this language as some rhetorical, dogmatic posturing, but the concrete results are felt materially and immediately and

directly. Al Qaeda is extremely adept at emphasizing -- and in fact, their whole instrument, tool, is the claim of American hypocrisy. And if they concede that the United States offers its people and those who accept its way of life, a good life, a moral life, they would lose the battle. So what they claim, however, is that the United States is insincere about what it says it offers humanity.

So every -- and I wish -- this message is emphasized for me every night as I watch the Arabic channels, the various satellite Arabic channels, because I see how -- and, in fact, I also do make a visit to some of the Persian channels and some of the -- what people in Malaysia and Indonesia are saying. I mean, satellite dishes are a wonderful thing and maybe I have too many of them. But you see how our actions and our ideology and our practices are translating to the world and the extent to which the world believes that -- listen, when we were challenged, we caved in just like everyone else. I mean, we're not, for all our tough talk, we really -- the only difference between us and a dictatorship is that a dictatorship has confronted a lot of violence and broke long before than we did but we just have been lucky and we have not been confronted with that much violence. But if we would have, we would have broken a long time ago.

The only thing is that I -- as an immigrant, as someone who grew up in a dictatorship, this talk about designating enemy combatants and the executive having this type of power, I'm going to be honest with you, is sending chills down my spine. Maybe I don't understand the extent of institutional guarantees in the United States that will forever differentiate the United States from dictatorships in the world, but my experience in life is that human beings gravitate towards oligarchy and despotism very, very easily and they often do it with the best claims and best intentions.

And the story of success that I read in American history is a story of restraint on executives, not a story of deference to the executive. That's the story that we spend time studying in law school. If it was a story of deference to the executive, it would be a very short law class. It would be wrapped up in, you know, one week.

MR. THOMPSON: Of course, if you accept the notion that everything is relative, nothing is absolute, can you think of a place in the world, any other country in the world which would deal with issues of terrorism or the preservation of national security in a pure, cleaner way than the United States has thus far? I mean, it's hard for me to imagine such a place. If you start with the Muslim countries, for example, many of which are dictatorships or oligarchies, if you look at Great Britain, where police powers are greater than they are in the United States, if you look at the countries of continental Europe where the same is true. Indonesia -- it's hard for me to imagine a place that Muslims could point to and say, here, in the world, there is less

hypocrisy in the enforcement of these laws when you get into the area of national security. Is that a valid notion?

MR. EL FADL: I don't think so. One, when we talk about Muslims, we're often talking about Muslims -- as I said, this is the only country they know and so their frame of reference is not what's going on in Egypt or what's going on in Syria. Their frame of reference is the United States they learned in high school and the United States they know today. So that's one, but the second point is that there -- you know, one can do as some scholars do -- they undertake comparative studies between what the Israeli Supreme Court has said about individual rights in light of terrorism or what the Swedish Supreme Court has said or New Zealand or Denmark or France or so on. There is a material difference, though, and that is the remarkable power -- the remarkable position of leadership that the United States occupies.

In fact, I'll go further. If we assume, arguendo, that Sweden's, let's say, track record is better than the United States in some aspects, I think that when you take the moral position that a country like Sweden plays compared to the United States, whether their track record is better or worse really is irrelevant. What is relevant is whether when we say that democracy really matters when the going gets tough is whether we really mean it or we mean it as long as it involves someone else getting hurt but not us.

MR. THOMPSON: Thank you, Mr. Chairman.

MR. KEAN: Vice Chairman Hamilton.

MR. HAMILTON: Professor El Fadl, just picking up one some points you were making there. I've been sitting there, asking myself, okay, you've got a large number of Americans, Muslim Arab Americans who are deeply alienated from the system and so I ask myself what do you have to do to break down this enmity and hostility between American intelligence and American law enforcement and that significant community in America. And maybe one answer -- I want your answer -- but maybe one answer would be that you've got to have some kind of a predictable and orderly process that deals with those tough cases that we've been talking about here, and what strikes me is that we don't have it.

The Congress has not given us the framework to deal with this new phenomenon of terrorism and, so far as I can see, the Executive Branch has not either. And so you get these results of people being held for very extended periods of time without counsel, without -- incommunicado, with some suggestions at least that they've been physically abused, some suggestion -- I don't know if it's true or not -- that we've deported some of them to countries that commit torture. It just seems to me that you have a lack of a framework, a lack of a system. I don't know where

this phrase "enemy combatant" came from. I mean, all of a sudden, it's become -- it's blossomed.

Well, I've raised a number of things, but I guess the key question is what do we do about this relationship with all of these people that are alienated now.

MR. EL FADL: I want to emphasize and actually try to --

MR. HAMILTON: I'd like the others to comment on my observations as well.

MR. EL FADL: I try to make this point in the report as well. I don't think we've reached a point in which we can say that the American Muslim community overall is alienated. The American Muslim community played a very large part in the last elections and whilst I think played a key role in getting President Bush elected, and we are really talking about trends and orientations, I don't think we have yet got to the point where we can say that the American Muslim is alienated or feels completely alienated or feels like an insular minority or an oppressed minority or something like that. I think the American Muslim --

MR. HAMILTON: Is it okay for the American government to do nothing?

MR. EL FADL: No. This is actually the part where I completely -- in fact, not only the existence of a framework, which I completely agree with you about, not only the existence of a framework, but I think that it would do not just the American people but even would do the American Muslim community and Arab community a great good if we are extremely serious about the enforcement of something like our immigration laws. I don't think this state of confusion where we have laws that we enforce at times and not enforce at other times does not actually help this community figure out the rules of the game and so that they can know what do they have to do to stay safe and what type of conduct would get them into trouble.

MR. HAMILTON: And have we overemphasized the immigration system as a counterterrorism measure?

MR. EL FADL: I think we have -- we tend to overemphasize it conceptually, but we are woefully lacking in applying our immigration system as we actually talk about it.

MR. HAMILTON: Most of the people that have been detained have been detained under the immigration law, have they not?

MR. EL FADL: Yes, except for those detained as material witnesses, they're American citizens and outside the purview of the immigration law.

MR. HAMILTON: Professor Ting and Professor Martin, I'd like you to comment on this question of a framework and any other thoughts you have about the things that Professor El Fadl and I have been talking about.

MR. TING: Well, I'm gratified to hear Professor El Fadl say that the American Muslim community is not in fact alienated. My hometown is Dearborn, Michigan, which has the largest Arab American community in the United States. It's certainly my impression that people are not alienated. I have to say that, in my view, the success of the American experiment speaks for itself. That there are always going to be foreign enemies of freedom who are going to pick away and criticize the way in which we do things, this or that. That's always going to be the case and there's frankly not a whole lot we can do about it. If we fix this, they'll criticize something else.

So I don't think, you know, we need to tell the world that we're perfect in every regard. We're not perfect. We are, after all, a republic founded on slavery. So we've got plenty of bad experiences in our history.

MR. HAMILTON: Mr. Ting, are you not worried about the fact that the power of government can hold someone indefinitely until the end of hostilities?

MR. TING: I'm not worried --

MR. HAMILTON: That they do not have access to counsel and that they're held incommunicado, doesn't that bother you?

MR. TING: I'm not worried because the system of checks and balances established in our Constitution will come into play. We will have considered judgment on that very issue. And, you know, I concede it's a difficult issue, but that's why we created a court system, to hear these difficult issues. Mr. Padilla will get a day in court. His case will be heard. And, you know, wise jurists, in accordance with the Constitution, will tell us what they think ought to be done in this situation. So --

MR. HAMILTON: The system will eventually work.

MR. TING: Yeah. The system of checks and balances, the two party system is all in play here, I think. And so I have confidence in the system. I have confidence in the Constitution. These issues are going to be raised in due course.

MR. HAMILTON: Mr. Walker. Professor Walker. (sic)

MR. MARTIN: Yes. I fully agree with the need for a clearer framework, both in this area of applying the laws of war to an anti-terrorist struggle and in the realm of immigration law. That's really what I was trying to address in my comments. We would be in a lot better position now, I would be less concerned

about the occasional use of these kinds of detention powers for, quote, enemy combatants, if the Executive Branch had made an effort to try to spell out an overall framework for when that power is authorized, what are the limits, what are the checks, where do they apply. We really haven't had that. We've had instead, pretty much all out defense of complete authority in the Executive Branch. I don't minimize the difficulties in working that out, and modifying rules from other situations --

MR. HAMILTON: The Congress has not done it either.

MR. MARTIN: Congress has not done it either, no. Well, yes, it would be good for Congress to do it. It probably would have been best for the executive branch to make a proposal and put it in the form of a proposed bill. In the immigration area it is -- one of the bases for seeing some of the uses of immigration powers after September 11th as illegitimate was that they are powers that are not very widely used, not resolutely used in other sorts of settings. It's not that they were illegitimate in themselves, but there seemed to be a sort of picking and choosing in that way.

I mean, I detect a real agreement among all three members of the panel on how we would be better off as a society if we were more thorough in applying immigration controls generally more resolutely and beefing up enforcement of all kinds, not necessarily for its immediate impact on the war against terrorism because that would be a better scenario, that's probably not totally characteristic of people who teach immigration law in law schools today, but I think that is very important. And then we would be in a position to feel that the occasional use here was justified.

I would say one other thing. I think it's a mistake to look to immigration powers themselves though as a major part of the war against terrorism. They can be employed, but usually when information has been developed through other means, better intelligence in particular, then among the things you may do with regard to someone who is identified as a terrorist may be to use immigration authorities.

MR. HAMILTON: Let me ask you another question. I'm working now in an institute of advanced research. And one of the things we do is bring scholars in from all over the world, quite a large number of them in the course of a year, not unlike, really, what a lot of universities do. We've been having a lot of trouble with visas, getting certain people here, we hear the stories about scholars who want to come here -- not scholars but maybe highly trained professionals who want to come here for additional training. They're having difficulty getting into the country.

We hear stories now about scholars from -- particularly in the Middle Eastern countries who prefer to go to London or some other country for their education. And all I have at this point

is kind of anecdotal evidence and I don't know really what's happening. And I know that our government is concerned about it. But I just wanted to kind of get the sense that you folks have. Are we in this situation, denying ourselves access to these highly qualified individuals in a variety of fields? Is it something that we need to be worried about or is it not? Will, as Professor Ting says, the system correct itself without us doing anything? Is it a problem?

MR. MARTIN: I believe it is a problem. It's not an insurmountable problem. I think there are correctives that are in the works and I'm not totally pessimistic in the long run, but we need to keep that kind of risk in mind as we design additional safeguards to apply in the immigration screening system. A lot of new systems were employed after September 11. Some of them have gotten off to a kind of rocky start, they take a long time, there's understandable confusion about exactly how they operate. And I think that's been the source of at least some of the discouragement that people have felt.

Now we could get to a tipping point and people will start looking in much larger numbers to other countries as the place where they want to go. So we need to be mindful of that. But there have been some improvements in those systems, if they can be worked more into a kind of smooth routine of immigration processing it won't be such a big issue, but we really should think about that. Some efforts -- well, in this whole realm, it's a matter of tradeoff.

We still have very strong interest as a nation in facilitating immigration, students, tourists, scholars, for business purposes. And to the extent that we expand screening mechanisms, we will discourage some of that. We needed to, and we have, improved it to some extent. But we need to keep very much in mind that kind of tradeoff.

MR. TING: I fully concur on what David has just said. I will only add that what was clearly unacceptable was the situation that we had before 9/11 where we had students coming into the United States and we had no clue whether they were in fact enrolling as students, we had no clue whether they were dropping out and doing other things. We didn't know whether they were, in fact, taking courses or not. And I think you know --

MR. HAMILTON: In things like pilot training.

MR. TING: Pardon?

MR. HAMILTON: In things like pilot training.

MR. TING: Yeah, in things like pilot training. So I think that the steps that Congress has repeatedly directed be implemented are in the right direction.

MR. EL FADL: My experience, at least direct experience, has been -- the most troubling thing is that part about inconsistency, and I think the key word is confusion. Recently, for instance, there have been several individuals in their 50s or in their 60s -- typically university professors have traveled, delivered papers in England and all over Europe, recognized specialists in one field or another. And then it comes as a real surprise, and some of them, in fact several of them, had already come to the United States several times for conferences and so on, and then they're denied a visa.

And my experience is that this inconsistency in practice and the inability to sort of say, well, this criteria -- I can rely on these criteria or I cannot rely on these criteria is still very much not just an earmark of the system but it's become much more so after 9/11. And I don't have the same trust as Professor Ting does in the system. I don't think the system corrects itself. I think it's invariably human beings who create the system, who correct the system, who constitute the system.

And I just want to say that quite often, you know, if you think about cases like the Chinese exclusion cases or the Japanese internment cases, or even the more recent cases, the cost that we pay is extremely high before we can claim a correction. And that's fine for the people who are not directly involved in paying the cost. But, again, it's a mind frame that I am extremely uncomfortable with when we are willing to sacrifice, as long as it's on someone else's dime.

MR. HAMILTON: Do you believe we're profiling Muslims now?

MR. EL FADL: In what context? I mean, I --

MR. HAMILTON: In immigration and granting visas.

MR. EL FADL: Most certainly we have applied a different sets of criteria and standards to the admission of Muslims and to the consideration of visa applications for Muslims. All you have to do is go to the American Embassy in any Muslim country and you'd feel this. One of the things that had struck me, I was speaking to the -- I asked the American ambassador in Egypt about this and he confirmed that visa applications to the United States from a country like Egypt saw a sharp drop, but it's a sharp drop from the wrong type of people, the people that we would actually want to encourage to come to the United States because of their accomplishments, their achievements, so on and so forth.

And the perception is there's no point in applying because we don't want Muslims. And I don't think it's a completely unjustified perception. I think we need to set our criteria very clearly, our immigration laws very clearly, and we need to send a message to the world that we are dead serious about applying both our criteria that say welcome and our criteria that say we don't want you in this country.

MR. HAMILTON: Thank you.

MR. KEAN: I have a question just to follow up on Congressman Hamilton's. It seems that we are doing a number of things to keep out people who it is in our best interest to allow in, such as distinguished scholars. I've got a lot of anecdotal issues of the University President dealing frankly with Chinese scholars, not Muslims at all but another part of the world. So we're doing that. At the same time, Dr. Ting said there are people coming across our borders on a regular basis, every day, hundreds of people, we have no idea who they are.

We've learned that when we're finding people who are illegal immigrants, we lose them again very shortly and have no idea where they are or what they're doing. And what I think I've heard you all suggest basically is we need more consistency in the system and perhaps some tinkering to make it better. It sounds to me like that's not enough. It sounds to me like this is a system which just simply isn't working in our national interest. And if so, perhaps we need more than tinkering. Would you care to comment on that?

MR. TING: Well, if I could just say, it does strike me that perhaps the wrong people are getting in and some of the people who we might want have come in are not. I've always favored an immigration system that was skewed more in favor of young people rather than older people, people with education or skills I think. And I think too much of our immigration system does not reflect what I would think would be our major priorities in deciding who comes into the United States. So I've written a piece I think in my written testimony which suggests some ways in which the legal immigration system might be changed for the better.

MR. MARTIN: Mr. Chairman, I think we need some perspective here. Overall our immigration system has done a lot of good things for this country. I think immigration has been a source of a lot of the richness and accomplishments of our society, and we've all benefited from them. And most of the people who come, come through fairly routine processes, they come here, they stay and leave according to their terms. I tried to run a very rough estimate of it. Ninety-nine percent of the people, I believe, don't overstay their visas, they don't come and use a non-immigrant visa as a temporary stay to come in and establish a long-term residence.

Now, there are some problems and we need to address those. But I think we ought to keep it in the context of the great values that immigration, both permanent and temporary immigration, has provided for our society. That's where the tradeoffs need to come. I mean, and maybe -- it's probably more than tinkering, but I don't think we have to just throw out the whole system. And also I think we have to be aware of really how

massive the system is and how challenging it is to design effective techniques to control it. A lot of things that sound good in very sweeping comments, when they have to get broken down and translated into precise steps to take on the ground, they become very difficult. You can't do all of those at once. You need to pick your targets and figure out which parts you emphasize first of all.

So I think we need some serious steps but we need to keep in mind that the overwhelming majority of people who immigrate do so for perfectly valid reasons and they enrich our society, and we don't want to kill that off in the course of worrying about those whose presence is not valid and may be quite dangerous in some instances.

MR. KEAN: Commissioner Gorelick.

MS. GORELICK: I have one question for Professor Martin. You were general counsel at the Immigration and Naturalization Service in the -- for a number of years in the '90s, during a period of time when we had various political paroxysms over immigration. One of the responsibilities of this commission is to look at the interaction between the Executive Branch and its execution of its various responsibilities under the law, and the laws that are passed by Congress, mandating certain conduct by executive branch agencies, and the oversight.

So my question to you is this. Could you comment on the nature of the mandates that were placed on the INS, particularly with regard to the apprehension and detention of immigrants who had in some fashion or another violated the law or who had overstayed their visas, and the capacity of the INS to carry out those mandates?

MR. MARTIN: Well, let me start out by saying there were a number of important steps that were being taken throughout the 1990s to improve overall enforcement, including the efforts to have better systems to deal with aliens with criminal records. The key to that, the key to the successes which were required was enhanced funding and some efforts to provide thoughtful designs for ways to do it, through better arrangements with local jails, with the prison systems and so forth.

That was going forward but that wasn't quite enough to -- it wasn't quite visible enough I think to satisfy the political demands that we saw, particularly in the 1996 elections. And that was kind of a carryover from California's experience in 1994 with Proposition 187. There was a big outcry about immigration enforcement. The steps that were being taken through -- the quieter steps that were being taken I think were likely to be much more effective.

Instead, what we got into was kind of a bidding process for tougher legal provisions that were embodied in the 1996 law,

detention mandates, elimination of various kinds of provisions that allowed someone who had a criminal conviction to say, Well, nonetheless, look at the way that I've reformed or my other ties to the community and allow me to remain despite my commission of this offence. That was an over tightening. That has overloaded the immigration authorities with some of those particular mandates and made it harder to focus strategies in way that I think might be the most productive.

I guess what I'm really trying to say is the challenge for better immigration control is largely a matter of resources and careful strategies and not just toughening up the legal provision themselves. We might want to rethink some of those overly strict provisions adopted in '96 so as to free up some resources and time and effectiveness with regard to other measures that may be quieter but might provide longer term payoff.

MS. GORELICK: Would it be fair to say then that you were experiencing -- your experience of our immigration system through that period of time is that, if prudent policy making is politicized, it can end up backfiring. So that you get a perverse result rather than the one that is intended or would be good policy.

MR. MARTIN: That can definitely happen, yes, and I think we did experience some of that. Not all of the '96 Act, the immigration legislation reform was of that character. There were some steps that were useful and made a lot of sense. But it did tend to get carried away with some of that and I think there are ways to walk back prudently from some of those measures and free up some time and energy for more effective strategies.

MS. GORELICK: Thank you.

MR. KEAN: Our last questioner is Secretary Lehman.

MR. LEHMAN: Thank you. (Off mike.) -- questions. One, recently, the Commission visited JFK Airport to review INS procedures in the wake of 9/11 and the consolidation under Homeland Security. We were amazed to find that those illegals that were able to successfully get through the two screens, first the INS screen and then the Customs screen, and make it through the sliding doors were home free, in that New York City and the Port Authority police and all other police forces are essentially prohibited from cooperating with INS. And similar municipal laws are enforced in other places, particularly in the south and west.

Do any of you have any recommendations about what we should recommend to deal with this real anomaly? I mean, you can argue that laws may be too tough but if the laws in one jurisdiction prohibit the enforcement of federal law and immigration, that creates a breakdown of the rule of law. So what would you recommend, if anything?

MR. EL FADL: I just want to make a comment. I used to feel very strongly that state and local police should basically help enforce immigration laws. When I lived and taught in Los Angeles, I had an opportunity to come to know some of the Los Angeles area local police and some of the policymakers there. What I would say is, before making any recommendation in this regard, it's really important to listen, to seriously consider what local police has to say.

What I frequently heard was that enforcing immigration laws comes at a cost and that we are left footing the bill for -- in other words, the federal government does not help us carry the cost of the extra manpower and energy and resources that would go into inspecting alien status and making immigration law type enforcement decisions and achieving the amount of training that would be required to do the job effectively and so on.

So often the practice is that if there is a situation where the police officer, at least from Los Angeles, encounters someone who they suspect is an illegal alien, they will simply hold them and call INS and just let INS deal with it. And that's the extent of their involvement and there is a lot of resentment -- at least that was expressed to me -- about having to say things like, are you legal here? Show me your immigration papers, et cetera, et cetera.

So I think it needs a more -- my sense is it needs a more comprehensive treatment if we're going to impose any additional duties on local police we have got to make sure that there is the funding and there is the training that they seem to badly need in order to be able to perform this additional function.

MR. TING: Commissioner, there's one proposal out there that I personally very much support and I think it comes from the Administration and that is the notion that at least the names of the absconders and the criminal aliens whom the government is seeking ought to be put into the nationwide database and that we ought to mandate that, when our local, state and local authorities bring someone into custody for any reason, such as a traffic stop and they run the name through the database anyway, that they be mandated to hold the individuals when they get hits on that database.

And it seems to me that would be a very productive step forward and again it would not put the state and local police in a position of having to interpret immigration law for which they may or may not be qualified but simply to mandate them to, when they get an immigration hit against this database, they have either a criminal alien that we're looking for or one of the absconders for whom there is already a removal order in place, that they be obligated to hold that person for the immigration service. I think that could be done and I think it would not put the state and local police in a position of having to interpret immigration law.

MR. MARTIN: Yes. I think the issue calls for some subdivision here. There are ways in which we ought to promote more cooperation between local police authorities and the immigration authorities and other ways in which it probably makes sense to have some division of labor there. My fellow panelists have addressed some of those.

I think the reason is, from my own conversations with local police authorities, they don't want -- they want to encourage cooperation from among all residents of the community to give them information about crime that's going on. If it's believed that they have a mandate that whenever they think even a complaining witness is illegally in the country, they run to the immigration authorities, then that may dry up some of that kind of information. And I don't think we want that. We're not at a point where we need that.

On the other hand, there are other very well designed targeted ways in which better cooperation could work out. The use of the NCIC system for absconders from removal orders is one way. I think if we had a broader comprehensive policy which I would favor to do more about internal enforcement of the immigration laws and beef up those parts of the immigration machinery to be better equipped for that. We give most attention to the border. We should give more attention to interior enforcement. If we did that, then we might find ways to have a more productive interrelationship with the activities of the local law enforcement.

But there are some very specific initiatives that have been pioneered, for example, arrangement with local jails. As part of their own booking procedures, they will find out whether someone is foreign born or not. Many of those maybe turn out to be naturalized citizens, but we were working out arrangements when I was at INS to arrange for either INS officers to interview several of those to see if -- for the INS to make a determination whether they seem to be in the country illegally or, even better, to arrange for a video hook-up so it can be done without INS officers having to spend a lot of travel time to different jail facilities.

I think that's a very productive, cooperative way that focuses on those for whom there is a least probable cause of criminal activity and it could be advanced. And actually, I would say, there is a wide variety of these non-cooperation policies that local municipalities have adopted. Most of them, if you look at the fine print, they do allow for cooperation if there is an indication of criminal activity. So we should address that some more. The Commission could probably make some useful recommendations along those lines. The strong non-cooperation policies go too far but we should be careful about exactly the forms of cooperation that we design and they should

include careful training and a well-stated agreement about who does what in those circumstances.

MR. LEHMAN: That leads to my final question. There have been proposals -- in fact, there are half a dozen at least bills still lying here in the Congress -- to approach the problem from a different angle and to legalize and document illegal temporary workers that have a regime similar to that in the European community, where you could have everyone that is in the country, legally or illegally, come and register. They don't become citizens, they don't get green cards, but they get work permits.

And by recognizing the force, as you had in your testimony pointed out, of the private companies and the many economic forces that depend on illegal, particularly south of the border temporary workers, why not recognize the problem, document them and then allow an INS enforcement activity that doesn't target those that have the political clout behind them and perhaps, not only economic, but moral high ground. And that would require a significant legislation. Do any of you disagree with that, and if so, do any of you think it's practical?

MR. TING: I disagree with that, Commissioner, for at least two reasons. First of all, I don't think that is going to do anything to solve the problem of illegal immigration in the United States. If anything, it's going to aggravate the problem. It's going to legalize a lot of people here into the infrastructure, kind of the support structure.

It's kind of what happened after the '86 amnesty, that suddenly you had a much greater support base in the United States for illegal immigration. There were people now prepared to receive illegal immigrants openly. And unless something else is done on the enforcement side, plus the fact that it's rewarding people who have gotten in here illegally and the thought is, well, gosh, maybe we better get in there now so that we can catch the next amnesty that comes along.

Secondly, and perhaps more importantly, we have to recognize, having just talked about mandates, the enormous burden that another amnesty program of this sort would place on the immigration surface, because people have to be qualified in order to participate in this program. And everybody is going to try and get qualified for that program. And someone is going to have to make the yes or no decision as to whether you're qualified or not. We're going to have another wave of lawsuits, as we did after the '86 amnesty, as to who's qualified and who's not, who's been intimidated and who wasn't.

So I'm very apprehensive, having talked about how overburdened our immigration services already are, to say, well, let's put one more gigantic burden on them. Let's make them rule on who's qualified for this new benefit or not, in addition to everything else that they're already doing.

MR. MARTIN: There are basically two kinds of proposals that are floating now that meet the objectives you're talking about. Some of them would have a registration procedure, an adjudication procedure, so the people would get temporary status. It's a kind of guest worker provision and some sorts of rules for how they would have to go back for at least part of the year to wherever their home country is.

Other ones would have a more complete amnesty, like we had in 1986, a legalization program where people would eventually get full lawful permanent resident status. I think we have to be very skeptical about both those as to whether they would really solve the problem. Guest worker programs basically have not worked. The history of them throughout the world is they don't work. The intention is that this will really make this truly temporary. It doesn't work, at least not without enforcement way beyond what is contemplated in these proposals I've seen or that other countries have really been willing to provide.

Now, a broader amnesty in light of -- for people who have been here for a long time, maybe at that point that would be part of an overall solution. But to me, the real question for those programs is what kinds of new enforcement measures is that being coupled with, because you have to have an effective new set of enforcement measures in place to make that sensible to make sure you don't get in the same soup again a few years later. In fact, maybe the momentum would be increased because people might think, well, this would be the second amnesty in 20 some years, I better get there because maybe there'll be a third one coming down the road.

So I think the key is to show that we -- to adopt some carefully thought out resolute and well-financed techniques to improve interior enforcement. And once we've shown some real progress along those lines, then we might think about amnesty or other kinds of legalization programs as a part of the overall solution.

But I just -- the problem is most of those are proposed as though there's a static population there, if we take care of that they'll all be registered, we'll know where they are. It doesn't ever stop there. There will be people coming the next time around and we have to have something in place where you've thought about what do you do about that next wave of migration.

MR. LEHMAN: Thank you very much.

MR. KEAN: I want to thank the panel very, very much. It's been a good panel. You've informed us and helped us. Thank you very much and we appreciate your help.

Could I ask our next panel, if they're here, to join us at the table?

(Recess.)

MR. KEAN: Bring the hearing back to order. If I could, our final panel on government organization and domestic intelligence consists of William P. Barr, vice president and general counsel, Verizon Communications, and former attorney general of the United States; John Hamre, president and chief executive officer, Center for Strategic and International Studies and former deputy secretary of Defense; and John MacGaffin, director, AKE LLC, and former associate deputy director for Operations, Central Intelligence Agency.

I understand, General Barr, we begin with you.

WILLIAM BARR: Thank you, Mr. Chairman, members of the Commission. It's a real honor for me to have this opportunity to share my views with you. I guess this leg of the hearing's focus is on organizational issues, and obviously as you can tell from my prepared statement, I have very strong views that the suggestion of separating domestic intelligence out of the FBI and creating a separate MI5 type agency is a very bad idea, and I'll be glad to answer any questions the Commission may have about that topic or in fact any other topic that arose during the day.

When we make organizational decisions or judgments in the national security arena, we frequently create dichotomies and fissures that really are artificial and create difficulties. And obviously one of the fundamental decisions we made was separating foreign and domestic intelligence. Well, in the area of terrorism or in the drug war and in many areas we face, threats do not emerge in tidy categories of domestic threat or foreign threat, they're integrated wholes. There are foreign terrorist organizations that are attacking us and trying to insinuate themselves into the United States, but they don't neatly fall into either category and we frequently spend a lot of time once we make these divisions, trying to surmount the institutional difficulties by reintegrating them in some form or another.

And I think looking back at 9/11, I think one of the foremost structural shortcomings we had in our counterterrorist effort was this separation of law enforcement and intelligence and the idea that they can be easily cabined and carried out in separate domains. And I think this is obviously a false dichotomy. Terrorist organizations don't present themselves to us either as a law enforcement matter or a national security danger, they are both at the same time and they're just different sides of exactly the same coin. And if we have to approach them as both national security threats and law enforcement threats.

I think the primary lesson to be learned from 9/11 organizationally is the need to tightly integrate our law enforcement activities and our intelligence activities in the area of domestic counterterrorism. And I think the FBI is in

fact uniquely situated to provide the kind of integrated approach that's necessary by conducting both sets of activities in tandem. Clearly there were problems at the FBI, at the CIA and many of the agencies that contributed in one way or another to our failure to detect the imminent attack from al Qaeda.

Now, my own view is that the genesis of this is not so much some kind of institutional incapacity to handle national security and law enforcement at the same time. In fact, historically through World War II and well beyond, the FBI did view itself and did a fairly good job in both the national security arena and law enforcement. I really think the genesis of the difficulty came more from external constraints placed on the FBI and the societal expectations in the '70s and '80s and even into the early '90s. But whatever the source of the problem, the fact is there were problems.

And I think that Attorney General Ashcroft and Director Mueller have made major strides in addressing them. They clearly have reoriented the FBI and made it very clear that the mission is preemption or prevention of terrorist attacks, not the ultimate prosecution of a case. And on the intelligence side they have proceeded -- Director Mueller has proceeded to create collection capabilities at the FBI to create the capacity to diffuse and disseminate intelligence with all other sources of information and creating an analytical capability within the FBI, but also fusing and coordinating and contributing to other analytical infusion centers in the intelligence community.

And on the law enforcement side, we've heard a lot about the disperse case approach that the FBI uses and that was a problem, as it affected intelligence collection and national security activities. But we see developed within the FBI now an approach that allows the extraction of information from the criminal justice side that has intelligence value and its dissemination and ultimately its fusion with all other sources of intelligence.

In thinking about, you know, the institutional locus for intelligence collection, I think one thing to bear in mind is that intelligence, I think, should be carried out with reference to the end game. Intelligence, at least this kind of intelligence collection, is not an end in itself so we collect intelligence to act upon it, to do something with it. And within the United States, that is domestically, our end game is usually going to be a law enforcement response. And to me that means that intelligence activities designed to intercept threats within the United States have to be carried out with a view toward all those law enforcement options. An awareness of those options and an approach that keeps all those options on the table at a moment's notice.

For example, there may be a requirement to, at any given time, to pursue evidence, so we may have enough from an intelligence standpoint to satisfy ourselves that a particular

group is up to no good, but in order to have something stick against those individuals we may have to develop some evidence. So that effort has to be carried out with a view toward developing the evidence that could serve as a predicate for a criminal case. Or we may have to develop an alternative source, alternative evidence, in order to protect intelligence sources and methods, or we may need to develop a charge on a technical violation, simply to find a basis for holding somebody.

These are all things that are dynamic, that take place in the course of learning more and more about a group. And it seems to me that what that suggests is that in a domestic realm it's really impossible to separate out and handle on separate tracks, the collection of intelligence from the law enforcement context, which in most cases will be the group that's called upon to apprehend and hold the terrorists within the United States.

So those are just some general views on these organizational issues and I'll be glad to answer any questions the Commission has.

MR. KEAN: Who would like to go next?

(Laughter.)

JOHN MacGAFFIN: He always wins when we have these conversations. Chairman Kean, Vice-Chairman Hamilton, distinguished members of the Commission, it's an honor for me to speak to you today.

Neither the American people nor our federal, state and local governments have yet been able to fully understand the long developing crisis in national security which suddenly revealed itself to us on 9/11. Consequently, it should be no surprise that we have not yet been able to set a clear course for the future and to determine what steps we must take to increase the likelihood that such disasters can be prevented in the future. Attacks by those who carried out the events of 9/11 have continued against American interests since that time, although none as yet taken place again within the United States itself, but that's just a matter of time.

It falls to the Commission to provide the clearest possible view of the causes of 9/11, both the motivations and passions of those abroad who are consumed with hatred for us as well as understanding the workings of the national security elements of government which served us well before 9/11 and those that did not. It is only with this information that you will be able to judge the adequacy of those changes which have been put in place since September and to highlight those things still to be done. It's a difficult task but one in which failure is not an option.

All Americans have personalized the ways in which the attacks of 9/11 came home to them. For me it was the awful

understanding sometime during the night of September 11 and 12 of the magnitude of my failure and that of my colleagues at the FBI, the CIA and DOD to fully implement those systemic changes to our national security structure writ large that could have prevented this attack. It's harsh but true. The tragedy is we had the vision but not the will.

So is the problem domestic intelligence collection or is it one of analysis? For instance, last July, John Hamre and I and five of our colleagues collaborated on an article that was published in the Economist and entitled, "America Needs More Spies." It focuses on the critical requirement to improve the collection of intelligence domestically. We asserted that the harsh facts of the 9/11 tragedy are, and I quote, "Secret members of a conspiratorial foreign organization operated clandestinely abroad and in this country for almost a decade before September 11th, to plan, lay the groundwork for and successfully carry out a surprise attack on the United States. The activity was conducted by the leadership in Afghanistan, by plotters in the shadow of a Hamburg mosque, and by operational travelers from abroad and by an established al Qaeda support structure based in this country," unquote.

The bulk of the criticism of the national security establishment's performance before 9/11 has centered on a failure to, quote, "connect the dots." While I concede the lack of analysis and interagency communication might have contributed marginally to the intelligence failure, the main cause was a lack of effective collection against al Qaeda, both domestically and abroad. There simply were not enough of the right dots that would help us truly understand the plans and intentions of the enemy attacking us.

My remarks today address this issue in the context of domestic collection. Under current ground rules, domestic intelligence collection is primarily, if not exclusively, the responsibility of the FBI. Before proceeding further, we must clarify a distinction which sometimes unwittingly, and sometimes intentionally I think, has clouded this debate for years. That is, we must make the critical distinction between collection and gathering as it pertains to intelligence. While the FBI correctly highlights its unmatched ability to gather evidence, and with it information, there is nonetheless a national security imperative which distinguishes intelligence collection from a similar but different function found in law enforcement.

Gathering, which is not driven and informed by specific focused national security needs, is not the same as intelligence collection, as the DCI and the intelligence community understand that term. This collection is accomplished not incidental to law enforcement, but by a conscious, specifically targeted operational clandestine espionage activity, whether technical, human or a combination of both. Collection, as I will use the term today, means those intelligence activities which are

dictated by, coupled to a policy-driven, strategically determined set of collection requirements, and this is accomplished by a focused, clandestine operational activity. Tom Powers, the biographer of Richard Helms, described this focused, proactive effort as an effort to determine where the danger lies. That is, what we have to have in domestic collection rather than a more reactive approach to people who have broken or are about to break our laws.

So what are the essential elements and solutions to domestic intelligence collection which protect the country, and at the same time protect our constitutional liberties? First, I think we must recognize that domestic intelligence is critical and is the missing element of the national security system. Second, I believe we must acknowledge that the FBI has failed to establish an effective, nationally directed domestic intelligence collection organization, despite claiming counterterrorism and counterintelligence as its number one and two priorities.

Ironically, it is very well positioned geographically and resource wise to perform domestic intelligence collection missions. It has thousands of special agents, thousands and thousands of recruited assets, surveillances, court authorized electronic intercepts. We do not need significant new authorities, but we do need to use better those authorities we already have.

In order to establish an effective, nationally directed domestic intelligence collection capability -- capacity, the FBI must establish a national security entity responsible for all domestic intelligence collection against individuals and organizations who threaten our core diplomatic, economic and national intelligence interests, whether they be terrorist organizations, intelligence service or other foreign elements.

The new organization must be a career service with the attendant recruiting, training, operational and administrative structures and priority emphasis within the larger FBI organization. It should comprise approximately 60 percent of the total FBI support and special agent personnel, consistent with the prioritization of counterterrorism and counterintelligence on the top of the FBI task list.

For over nine-tenths of the FBI field office special agents in charge to have no national security, counterterrorism or counterintelligence experience, does not communicate in practice or in fact that counterterrorism and counterintelligence are the bureau's top two priority areas. For the bureau's award program to recognize, as it did last week in the Presidential Rank Awards, predominantly criminal law enforcement accomplishments indicates that either the bureau's counterterrorism and counterintelligence accomplishments are inadequate -- and if so, there should be consequences -- or the bureau's statement that

counterterrorism and counterintelligence are the top two priorities is not accurate.

I've provided in my statement a fuller description of what this organization, this national security entity within the bureau, should comprise. I agree with Attorney General Barr that the MI5 solution that's widely seen around this town is wrong for lots of reasons. First of all, we don't need a British system with British antecedents and its roots in British history and British governance. What we need is an American system rooted in our needs. But we also don't need to continue not doing the business of domestic collection that we've got now. So I do believe that the MI5 issue is often held up as a red herring here to divert attention to the problems of MI5, which are significant. So I stress I don't believe we should do that, but I also stress that we cannot continue on the path we are.

I have provided at your request a list of questions which I believe will help you better understand the several policy, operational and administrative areas that need to be transformed in order for the FBI to succeed in its domestic intelligence mission. Domestic intelligence collection, as opposed to gathering, must be part of and synchronized with national foreign intelligence collection. National foreign intelligence is driven by a national security requirements process. The domestic intelligence collection activity must also be driven by the same national security requirements process. The National Security Council, the DCI and the attorney general must provide validated collection requirements to the FBI and hold the FBI accountable for producing and disseminating domestic intelligence.

In conclusion, if the FBI can make this truly significant change and no longer cling to the law enforcement centered traditions and approaches which have served them and the country so well against another set of adversaries in another time, then we should all get firmly behind their reform efforts and bring the resources of our country to bear to ensure they succeed. If, however, the FBI cannot fully make this transition -- and this will be clear to you as you approach the end of the Commission's deliberations -- then I believe that you will have no choice but to propose some even more radical solution which places these responsibilities for counterterrorism, counterintelligence in another perhaps new organization. The stakes are just too high and the time too short to do otherwise. Thank you.

MR. KEAN: Thank you.

Mr. Hamre.

JOHN J. HAMRE: Governor Kean, Vice Chairman Hamilton, thank you for inviting me. Let me begin by saying how grateful I am that all of you have agreed to serve on this commission. I know over half of you well from personal previous professional exchanges, and I know you sure as heck didn't need this job.

(Laughter.) But the fact that you were willing to do it on behalf of us, on behalf of the country, addressed one of the biggest issues that we've got. This is really a testament to your patriotism and I want to say thank you, I really do. I'm grateful that you're willing to do it.

The good news about being able to go third on a panel is that everything has been said. The bad news is that everything has been said. And so I will be very, very brief. I, in my prepared statement, listed the three primary underlying factors that I think are causing great limits to our capacity to get actionable intelligence today. As Attorney General Barr said, one is the great divide that separates foreign intelligence and domestic intelligence. Obviously the bad guys know how to take advantage of that great seam in our constitutional democracy and that we have to overcome that.

Second, as Brother MacGaffin said, this bias towards collection at the expense of analysis, it's plagued us for years and it's plaguing us now, and I'll say just a minute where I think we have a particularly unique problem in the area of homeland security in this regard. But this is also -- it's an historic problem. We've always had this problem. And the third are the series of both official and unofficial ground rules that are tying the hands of law enforcement, especially with the FBI.

You know, I think a lot of it was put in place through explicit rules. Frankly, it's even larger in the sense of unwritten culturally understood rules. Don't do X because you're going to get in trouble. It really substantially constrains the inventiveness and the imagination of our law enforcement, and so these cultural dimensions are even bigger problems. We've got to deal with it.

Now, I think these under the underlying problems and, frankly, since September 11, I hate to say it, I think we've gotten off on the wrong foot on a lot of this. Because we had 19 folks hiding in our midst planning for a couple of years to attack us, we've gotten off on the mode that we've got to collect just about every bit of information on everybody. And it is just -- that's the core of the great growing anxiety Americans are feeling about the loss of their privacy as we try legitimately to get our arms around homeland security.

There is no solution to this problem other than a much stronger domestic intelligence program, surveillance. But unless that starts with a much stronger dimension of protecting privacy in the process, we're going to fail. And we can't afford to fail. We can't afford to fall back on comfortable rules, which is what we did with law enforcement, you know, in the '80s and the '90s: to tie their hands. So that they wouldn't get innocent people in trouble, we tied their hands so that they couldn't help us find the bad guys.

So we've got to address the privacy issues upfront. And we make it worse when we start with all the innocents and when we try to work our way in to try to find the guilty. For crying out loud, let's start with the people that we already are suspicious about. We went a full year before we committed ourselves to getting an integrated watch list. And I'll tell you, talk to people privately who are working on these things in the government, they say it's years away. The energy behind that isn't anywhere commensurate with its payoff.

We ought to start with the problem -- the likely problem people and build our way out, rather than start with a vast population of innocent people and work our way in. And we're just off on the wrong foot. And we've got a chance to fix this, but we really do have to change it. And it just scares Americans to think that before they get on an airplane there's a computer some place that's going to give them a red, yellow or a green color code, you know, before they're allowed to get on. When instead we ought to be tracking the 70,000 or 80,000 people who we know have ties with problem institutions, and then work our way out from that core.

We have a lot better chance, frankly, of dealing with the privacy issues if we start that way, and I would argue have much more actionable intelligence in the process. And we're going to have to go out and create actionable intelligence. This was what John and I argued in our little piece. You know, we're looking for the needle in the haystack, but we're spending all our time adding hay to the pile, okay? We need to find the needles. And that means we have to kind of create the dots.

We've got to use our intelligence capabilities to go out and find the problem people, the bad people, and that's going to take covert operations inside this country, and we're very nervous about that. Rightly so. I mean, you know, this is something that scares people. Most Americans came to this country from their home country because they didn't want to be around a government that spied on them, okay? So we understand the kind of impediments that we're facing that we want. That's part of our culture. That's what we value. But we're still going to have to overcome that.

Now, how do you organize to do that? Well, you know, I mean the -- and I'll use shorthand. You know, the CIA clearly is competent, but people don't trust it to spy domestically. The FBI was good at it in the past, but frankly the last 25 years has shifted it dramatically over to very much a constrained law enforcement culture. I completely agree with Attorney General Barr that Director Mueller is really working hard to change that, but we're a long ways away. I mean, I serve on his advisory board. I want him to succeed and I'll do anything I can to help him succeed, but we are a long ways away from having a transformed culture inside the FBI that would make that happen.

And the Department of Homeland Security was cobbled together with people that don't have an intelligence starting point. So what do you do? I mean, we're all wrestling with this problem. In our little group we opted for the view that it ought to stay inside the FBI, but that this frankly is a provisional case. I believe we need to start there because I strongly believe any domestic surveillance must be under the supervision of a constitutional officer of the government. I don't believe you can ever convince Americans to trust a system that isn't overseen by the attorney general.

Can the FBI make that transition? Frankly, we were somewhat divided. As a matter of fact, we were very divided. I think all of us have the hope that it would work. Not all of us had the conviction that it will and we made a few recommendations that we thought might strengthen the chance that it would. One would be to bring in direct management from the intelligence community that has analytic experience -- inside the FBI, a free standing entity, subject to the FBI's and the attorney general's oversight, but that has management leadership that has strong analytic skills.

Now, if that works, then we've got the best of all worlds. If that doesn't work, you at least have the prototypical starting point for a new entity if you need to spin it off and to create it, if you don't believe you can grow it inside the FBI. I want it to succeed inside the FBI and inside the Department of Justice. But if it doesn't succeed, you at least have not wasted a couple of years on an experiment that might fail.

Again, let me conclude by saying the only reason -- I may be too narrow. But the only reason to study history is how it informs our view of the future, and that's really what I think you're doing. I think these hearings are just crucial and the country really is looking to you, so I'm grateful that you gave us a chance to come today. Thank you.

MR. KEAN: Commissioner Gorelick.

MS. GORELICK: Thank you, Mr. Chairman, and thank you to the three of you for being here today and for sharing your thoughts with us. We have a fair amount of fire power on this panel. And I have a lot of questions but I know my fellow commissioners do as well, so I'll try to pick the most important ones from my point of view.

I was -- and this is a question for all three of you. I was struck, Attorney General Barr, by your very strong defense of the bureau as the appropriate agency to have the lead. And you say in your prepared statement that there are three basic criticisms of the FBI, which it is addressing. The one that I was struck by was the middle one, where you say that the FBI failed to exchange information with other elements of the intelligence community, and that it is addressing that failure or that criticism. But

what I hear from Mr. MacGaffin and Mr. Hamre is that they wouldn't say that that's the right question.

And so the second part of my question is to the two of you, because the way you pose the question it is not did they share the information they had, but did they cooperate with others in setting the strategic goals of collection and go out together with the other relevant agencies, primarily in the intelligence community, to seek out the right information domestically? And so my first question is whether the three of you would comment on that, that is: What is it that is the failure, if you will, and how are we going about addressing that failure? And if you could be brief, because I have a number of follow-ups, I'd appreciate it. Thank you.

MR. BARR: Well, I do think one of the failures was the failure to have in place, develop, foster intelligence collection as a function distinct from building criminal cases with criminal predicates. And I also think it was a failure not to have an analytical capability. And a lot of the sharing problems were caused by, in my view, ill-conceived constraints on law enforcement and the sharing of intelligence information.

In terms of the setting of the -- it's true that intelligence collection is different than gathering and it should be focused, and there has to be some agreement as to what the end is. But I also think we can get a little carried away here because a lot of this counterintelligence -- counterterrorism intelligence domestically within the United States has a somewhat of a tactical flavor to it. In other words, it is focusing on groups and elements. It's not sort of sitting back and saying, where's the next threat coming from and, you know, is this a breeding ground for terrorists over here in this part of Africa, or what have you. That's the CIA's function. But the function of sort of protecting the homeland when groups get into the United States has a certain operational, tactical flavor to it and I'm not sure that -- you know, it's the same as sort of doing national intelligence estimates and sitting around figuring that -- you know, I don't think it takes that long to figure that out, frankly.

MR. MacGAFFIN: I certainly agree that the failure to share is not the heart of the problem or the most egregious problem. There was, to follow my argument, not very much to share in any event. The problem is that there still two years later is not much more to share. I'm told, for instance, that the disseminated -- the information that is produced by the FBI's 56 field offices to be disseminated to other parts of the government has -- the good news is it's increased fourfold in that two-year period. The bad news is that that's -- it now averages four pieces of disseminated intelligence a day, in distinction to 450 by DIA or some of the others. So numbers are the wrong way to look at it, but there's a problem here.

But it is a failure: not the failure to share so much as the failure to acquire the right information. And while I agree with Attorney General Barr that the national estimate approach, you know, where's the next bad thing going to come from, ain't too hard, that's not the kind of work -- it's hard to get right, but it's not hard to sort of say it's going to come from that disadvantaged part of the world or another. But the work that has to be done is not that sort of intellectual. It's hard tactical penetration work to have your spy sitting next to the spy in the bin Laden mountaintop and in the bin Laden cell in Cincinnati, if you will, over long periods of time. So I don't accept that it -- I don't agree that it's tactical in the sense of we get a little snippet here and there and we'll put them together. It's long-term, hard work to get the right people in the right places to obtain over time the right information about those who wish us harm.

MR. HAMRE: Very quickly, September 11th really transformed this world so dramatically. I mean, the willingness of the intelligence community and the law enforcement community to share information is really unprecedented compared to my recollection. I mean, I've been around 25 years looking at it and it's unbelievable how much stronger the sentiment of collaboration is right now.

On September 12 I was asked to go up to an emergency meeting of an advisory board for one of the intelligence agencies that I try to help, and I can remember at the time we said we only had one, maybe two pieces of intelligence in all the files that we thought were relevant. Six months later we had lots more information, and what that tells me is that the way you change your filters that we look at the data gives you a sense that there's a lot more or a lot less that you're looking at. And, of course, an event tends to change your perception of what you're looking for. You want to proactively anticipate that and try to properly tune your filters before something happens rather than after it happens, where you have 100 percent certainty.

That's a very problematic question, of course, how to do that. But I do think it is a matter of mindset and I think we clearly missed September 11 because, for whatever reason, our collective policy intelligence minds weren't tuned to look the right way, even though there probably should have been plenty of evidence that we should have. I think we collect a lot of information. I think a lot of it is, frankly, pretty useless. We could probably extract a lot of intelligence out of the information that we have that we aren't currently processing, again because our filters aren't designed right -- our mental filters aren't designed right.

After you go through that process then you say, but where are there gaps that I think we should intentionally go out and create facts? And that, I think, needs to be a joint process. I think the spirit of collaboration is now present like it's never

been before, but that frankly the competencies and the mechanisms of cooperation don't really yet exist.

MS. GORELICK: Well, let me follow up on that because it seems to me that the central theme that we have heard over and over again is that there is not a common strategy between domestic and foreign law enforcement. And while, Attorney General Barr, I take your point very well, particularly given my own experience in the Department of Justice, that there are big dangers in separating out the people who do domestic collection from the prosecutors who might have to act on it, nevertheless what we now see is a proliferation of coordination points with no one discernible to us that can be identified as setting the strategies.

So you have the counterterrorism centers at both the FBI and the CIA, both of which have members of the other, you have the Defense Department with its own unit, you have the new TTIC that's been stood up, you have the terrorist screening function newly at the FBI, and then you have the Department of Homeland Security also standing up its own function. And so my question to you, if you will, old hands is would you structure it this way? And if not, how would you structure it? I understand, Attorney General Barr, you view -- the notion of an MI5 is not a good one. But what would you do with this proliferation and seeming lack of direction? And I'd like all three of your answers on that.

MR. BARR: Well, I don't know about seeming lack of direction. I assume that the director of Central Intelligence would be providing overall intelligence direction. But I don't necessarily think proliferation of fusion centers or even analytical centers is necessarily a bad thing, because sometimes intelligence has to be reworked, repackaged, reexamined from the standpoint of the operational mission of a particular agency. For example, Homeland Security I view as a static defense agency. The FBI in my view is dynamic.

That is, the FBI's job is to proactively go after and dismantle and destroy these groups as they come into the United States, whereas the Homeland Security is static defense of infrastructure, borders and so forth. They may need to take a look at the intelligence from the standpoint of what it means for them to have to do, whereas the FBI, launching attacks against these organizations, may want to take a look at the intelligence from its mission. It's very much the -- we have a CIA but that doesn't mean we take intelligence out of DOD. It doesn't mean we take -- we may have, you know, DIA but it doesn't mean we take intelligence out of the Navy. So I'm not disturbed by the proliferation of fusion or analytical centers.

MR. MacGAFFIN: I agree that there is a question of who's in charge of the common strategy, and I think that despite, as Dr. Hamre says, the willingness to collaborate and cooperate is

infinitely greater than it's been before, the actuality is of it is not there, number one. And what makes it even harder is that -- and why you have to have someone in charge, and it straddles this divide we're talking about of law enforcement and intelligence, isn't as neat as it's in the United States, therefore the FBI will deal with that.

For instance, and this will be perhaps a bit questionable, but the notion of the fellows in Lackawanna who -- the six alleged terrorists who were arrested there, the decision that was made to proceed with arrest and criminal prosecutions of those six. My personal view is that, you know, their most serious infraction was they went to the wrong summer camp. They should have gone to Lake Winnepesaukee rather than Lake Tora Bora. They were not truly terrorists.

But leaving that aside, the right resolution instead of six in prison was probably four of them sent to their rooms and two of them somehow sent back to the Yemen to spy for us within that organization, the al Qaeda organization, to find out what's about to happen to us. That decision is -- because, going to your point of no one in -- how are we in charge across this divide -- not that no one is in charge, I don't mean that, but across this divide that decision is not made. What is in the national interest? Send them to their room and back to the Yemen, or send them to jail?

MS. GORELICK: So your view -- just so I can understand with some clarity here. Your view is a decision to prosecute in that circumstance, or one analogous to that circumstance, should not be made at the Justice Department because the Justice Department's tools, if you will, are focused on prosecution, but rather jointly across the national security spectrum because one of the things you might want to do is re-infiltrate someone like that?

MR. MacGAFFIN: Right. That's exactly correct, and I --

MS. GORELICK: And that would be analogous to the way we would treat a spy, for example?

MR. MacGAFFIN: For example. And I think that recently the trend with the more active involvement of AUSAs in the terrorist task force, joint terrorist task forces, that decisions on the ground tend to be the weight of their presence pushes things to the law enforcement side of the boat, making it very difficult for the FBI agent and these special agents to make the decision to develop long-term, difficult penetrations of these organizations that will do us harm. And it's just the weight of -- they're on that side of the boat and the boat is tipping in that direction, and that's not how you get at this problem.

MR. HAMRE: I'll be very brief. My worry is not that we have no direction, but that we -- our only direction is to

prevent exactly the same circumstances that caused September 11. I mean, that's what's tying us up in knots right now. I think we need to separate the issue of gunsmithing from marksmanship. I mean, I think what we're really lacking is a coordinating mechanism for the marksmanship questions.

What are we trying to stop? What are we trying to hit as a goal? What are we trying to stop? And what we've created for mechanisms of coordination are gunsmithing mechanisms. You know, how do we get the FBI and the CIA to share databases, and the TTIC? I mean, the TTIC is a -- I support it, but I think it's not going to do what we really need to have done, given the way it's currently constituted. There needs to be a coordination at a much higher level government-wide that represents the strategic thinking of the government about the problem, not the tactical manipulation of the boxes inside the government.

MS. GORELICK: And who should do that?

MR. HAMRE: Well, my personal view is that this is -- I do not agree with the notion that there is a domestic security that's separate from a national security. I don't think that it makes sense to have a National Security Council and a Domestic or a Homeland Security Council. I think that makes no sense. I think there is a national security imperative with a venue that it's a foreign sector and a venue that's in a domestic sector. I would put it under that rubric and I would, frankly, have the analytic leadership come from that quarter, with the intelligence community under the DCI leading the strategic question. But always the mechanism of action has to be under the supervision of the attorney general, in my view.

MS. GORELICK: So the overarching direction would come from the intelligence community, and the execution --

MR. HAMRE: Through the National Security Council.

MS. GORELICK: -- geometrically would come about in the -- somewhere within the Department of Justice?

MR. HAMRE: Yes.

MS. GORELICK: Mr. MacGaffin, you draw a somewhat -- well, strike "somewhat." You draw a bleak picture of our capacities, both from the data point which suggests that even today, in terms of distributed intelligence, very little of it relative to what is being distributed is coming from our domestic agencies, to are not honoring our intelligence officers within the FBI, to the failure to create an intelligence career track. In your heart of hearts do you believe that the Bureau, even with the energy that is being applied to this effort by Director Mueller, can do this? Can do what needs to be done?

MR. MacGAFFIN: I'm not sure and I spent, as you know, six years as senior advisor to the director and the deputy director. I found the similarities between the CIA and the FBI in terms of, you know, type 'A' point end of the stick guys who really want to get it done. I mean, I desperately want it to work that way, but there have to be some significant changes in the way it goes about its work relative to this very issue. So it's got everything going for it. It's got the -- I believe we have sufficient authorities, it's got the tools, but we've got to somehow turn this corner that we've all been talking about here and concentrate on penetration of those who would do us harm. The Tom Powers' analogy of the job here is to determine where the danger lies seems to be the most important part, and we're not doing that appropriately.

MS. GORELICK: Secretary Hamre, you said that your confidence, if you will, that the FBI can do this is provisional. How long is provisional?

MR. HAMRE: Well, there's no question that the director really has made it his priority. He's certainly communicated that to the Bureau. There are some small but very bright shining lights inside the Bureau that are starting to emerge. I think it's -- you know, the prevailing day-to-day culture is not -- does not embrace his vision. You know, clearly there needs to be an assessment -- an objective assessment about how well he's doing. I think this is very hard because he's very confident it's going to work because his vision is right, and I think his vision is right.

I remember being in government. I mean, you are so isolated when you are in government because the first thing you hear in the morning when you walk in is somebody saying, boy, you had a good day yesterday, Mr. Secretary. And the last thing you hear is, boy, you really kicked butt today. You know, I mean everybody around you is telling you what a great job you did and really your situational awareness of your own organization is really quite limited.

And trying to find a way to help the director get a sense of is this working or not, and is it really getting at the cultural imperatives that really motivate your average special agent who comes in every day, that's I think a harder question. I'm not -- I'm new to the law enforcement community so I would not want to render judgment about how to do that. I know how we do it in the military, but I would not know how to exactly do it here. But I think that there needs to be a very supportive but self-critical look at how well this is going.

MS. GORELICK: General Barr, you supervised the FBI as deputy attorney general and as attorney general for as long as most, if not all, of your predecessors, and you detail in your written statement and as well as in your testimony the number of regulatory and legislative and cultural barriers to the FBI being

the kind of organization that Mr. MacGaffin and Secretary Hamre are describing as necessary. What is your level of confidence that the bureau can do what needs to be done?

MR. BARR: I have a high level of confidence that the Bureau can evolve into precisely the kind of counterterrorism agency we need domestically. But let me just say that I think we're going to be attacked again, and I think we're going to be attacked probably several times very successfully, and we can't do anything about that. I think every employee of the United States government acting in absolute good faith and acting very competently, and still the nature of this danger and the problem we face as such that we're not going to be able to catch every terrorist that comes into the United States to do us harm. And so, you know, I think that we shouldn't underestimate the magnitude of the problem we have here.

And the other thing is, you know, I think we're actually getting a little bit too down on the FBI here. Yes, they -- in my view because of external restraints -- did not develop the kind of domestic intelligence collection that we now want them to have, and didn't sit around setting up analytical centers to analyze intelligence about people within the United States. And there was a time where if they tried to do that, they would be slapped down in good order. Now we want them to do it and they will develop it and do a good job on it.

But the fact of the matter is that before 9/11 the Justice Department was developing a lot of information about al Qaeda and Osama bin Laden. Developed more information than MI5 had. Developed more information and gave it to the British than MI5 had about Osama bin Laden's activities in Britain. So, you know, the Department wasn't doing that bad a job. Other agencies had problems as well as the FBI. If we're going to penetrate these organizations, they're not going to be penetrated initially by the FBI in the United States. They're going to be penetrated overseas, as you say, on a mountaintop in Afghanistan or somewhere. That's not the FBI's job. That's the CIA's job.

So, you know, our intelligence agencies have failed occasionally. They didn't get it right necessarily. The FBI has problems and we're trying to fix that. But we also shouldn't raise the bar here to a degree that -- and create expectations that we're going to be able to stop every terrorist that tries to kill Americans. We're not going to be able to do it.

MS. GORELICK: Thank you for your testimony.

MR. KEAN: Secretary Lehman.

MR. LEHMAN: Thank you. I'd like to ask you all to focus on just one overarching set of issues in framing the questions I'm going to ask and that is the genetic or cultural issue that underlies this debate about whether FBI should be the domestic

intelligence agency. What is the problem we're talking about? Well, sharing is certainly one manifestation of that. One very senior intelligence official has told us that he did not learn about the connections of three of the principal actors in the '93 bombing on the World Trade Center until years after when the trial was finally finished and they released the grand jury evidence. And we had this morning the former deputy attorney general tell us that one of his proudest accomplishments was his 6th August 2001 memo notifying the FBI that they must bring in the prosecutors immediately when they're beginning a case.

Time and time again, we've had witnesses that we've interviewed, including another one this morning, that have said, Well, I'd prefer not to answer those questions because this matter is in the grand jury or this matter is now in litigation. We got that answer time after time in pursuing issues around the Moussaoui case, for instance, but there were many others. Now, that's understandable perhaps before 9/11. But after 9/11, one would have expected that that mentality, the prosecutorial, the forensic, rather than the preventive mentality would have changed.

Yet, as late as last June 18th, a witness before the House Appropriations Subcommittee, in explaining how the FBI was pursuing or thought to be pursuing the terrorist issue, testified as follows, in part. "When we do our intelligence in the FBI, it should be forensic intelligence. It should be based on evidence. It should be based on fact. It must bear the scrutiny of law that can be looked at by a jury and a judge." And she went on, "We need to know what is reality, what can be proved and not based on simple assessments and projections." And on, "Well, other recourses may seem expedient, it is only through careful and aggressive case work that we will rid ourselves of the foe and maintain the cooperation of the American public."

Well, I've never read a more perfect articulation of anti-intelligence work than I could find. It reflects very well why the FBI is the best police force in the world, but it could also suggest that it could be the worst intelligence force in the world because intelligence is looking forward and sharing and not protecting evidence to get convictions. The situation or the question I'd like to pose to you assumes certain things. As Mr. MacGaffin has rightly said, the MI5 issue has, I think, been repeatedly dragged out as a red herring because MI5 is certainly not the alternative here.

A far better, closer potential alternative is the Canadian Security Intelligence Service which has many more analogies and interestingly, reading the debate in the 80s that went on when this was created, the exact same arguments that General Barr has educed here were made by the Royal Canadian Mounted Police and rejected. I think most observers within the Canadian government believe that real cultural problems were fixed by getting

intelligence functions out from under the police and the Justice Department, in effect.

My distinguished colleague, Jamie, earlier described very succinctly what the Justice Department has as its mission. Number one, to prosecute criminals and miscreants and, number two, to protect the rights of citizens. Well, both of those things are really at odds all the time and intentioned with intelligence collection and analysis and that does not mean that it can't be done, but it is certainly a major tension. Indeed, you can argue that the problems that have been discussed earlier in testimony about the threats to civil liberties by the PATRIOT Act and by powers before that and the corollary, the overreaction in bending over backwards as in the Moussaoui case, not to tread into that territory, is precisely because we try to do two incompatible functions, police work and intelligence in the same agency.

With that brief preamble, I'd like to ask you all to consider four options. Now, all three of you, in one form or another, have said that you favor essentially the status quo. More resources, the FBI should run faster, jump higher, do more language training, get better, more intelligent professionals in it but, basically, you're all three arguing for the status quo and just make it better. Now, I understand all of us have been laboring to acquire the same skills of collegiality that in your article in The Economist and sitting, as you are, as a panel, that you don't want to disagree too directly but I'd like to ask you to sort of leap out of that collegiality in your answers here.

First, I see four potential options that I'd like you to comment on. I've already commented on the first option, more resources, do better and give them a chance. Give Director Mueller time to do what he has set out to do and he's made significant changes. That begs the question, how do we know that he's succeeding? Do we have to wait for another 9/11 or, in its absence, we say he's succeeding? Or other metrics or measures that we can apply so as not to give this an indefinite tenure until it's proved its failure through another catastrophe? So, how about commenting on that? I mean, I suspect there's at least one closet CSIS sympathizer there, but let's see.

MR. BARR: I think it's analogous to the MI5. It's been a bad experiment for Canada. They're spending a lot of their time right now trying to patch up that relationship and reintegrate these functions. The Royal Canadian Mounted Police have had to create a lot of redundant functionality because of that split up. So I would say that I would not look at the Canadian system as an exemplar and I think, you know, your litany was really, I think, unfair.

First, you talked about the prosecutorial mentality because in fact they are prosecuting a case. Once a decision is made to

prosecute a case -- and the Moussaoui case was that decision was not made just by the Justice Department, it was made by the President to move down that tract -- then it is a prosecution and when it is a prosecution, you don't share grand jury information and other things and that's the law. So it doesn't surprise me that they weren't sharing it with you. That doesn't mean that it wasn't being shared within the Executive Branch.

The examples you gave in the past were precisely the problem as to why we needed the PATRIOT Act because of the limitations on grand jury information and because of the limitations on sharing intelligence with law enforcement and those have been addressed in the act. This culture thing is way overdone. You know, prior -- as I say, prior to the '70s, the FBI was well into domestic intelligence. They viewed themselves as wearing two hats, national security and law enforcement.

The problem with the FBI, as most people would have said then, was they were collecting too much intelligence about domestic matters. They knew too much about civil rights organizations, about anti-war organizations. They had the field pretty well covered. They knew how to collect information. If you look at certain other of their functions, like organized crime, that's an intelligence effort. That's not rushing in early and prematurely just to prosecute people. They know how to penetrate groups and keep those penetration agents in place for a long time and learn information and take down -- build intelligence on organizations and take them down. They've done that in the counternarcotics area, they've done that in the counter intelligence area.

So this notion that they're just prosecution bent and that's their culture and they can't do anything else is just hogwash. Now, what we've had is a period of time in the, you know, '70s, '80s, and '90s, where people didn't want them in that field, and they put a lot of restrictions on them. And you'd ruined your career if you stepped out of line at the FBI and started snooping around domestic matters too much. And now we've had an epiphany. Since 9/11 we want them to get back into that. That's the real story.

Now, you say that these are fundamentally incompatible, that's wrong. They're not incompatible. They are compatible activities. In fact they have to be carried out together because they both involve collecting information within the United States, and the tools and the resources are the same resources. That's my reaction.

(Laughter.)

MR. MacGAFFIN: I certainly can't associate myself with the run faster, jump higher approach, more resources, that's not at all what I'm recommending, and I think that's wrong. I think -- to go back to a question that was asked of John Hamre, I think

time is running out to get this right. I do not believe -- and I hope the formal statement I've submitted makes this clear, I don't believe that the changes and reforms that are in place are sufficient or adequate to the task. I don't believe they'll get us there. I'm hoping that your efforts and our efforts jointly to focus on this very issue will change, will add to and add an urgency and a significant change course correction in what Director Mueller and the others are doing. I do not think the path we're on now will get us there because I don't believe it really makes the distinction between gathering and focused collection, which is the heart of it.

The advantage of having Attorney General Barr is he's got the recollection to say what it was like, but today the FBI cannot rent 5,000 square foot of office space without getting advanced permission from the Congress. Operationally, the cultural environment they live in and the oversight they live in, which I think is unproductive, is dramatically constraining their imagination of what they think they can do. And I support -- wanted to give them the tools of the PATRIOT Act and there's great controversy about the PATRIOT Act. Frankly, what's been accomplished since they got it is modest.

In a large measure it's because of this culture. Granted, they had a history, but this is 25 and 30 years ago. I mean, there are five members of Congress that trace themselves back to that history. So I mean we really have a very different environment that we're working with now. Again let me state I want them to succeed, I want this to work. It isn't that I'm after the status quo. Plus this has to change, but I start with a premise of wanting competence under a constitutional oversight and I think the best place to ground that is in the FBI. I'm not confident it's going to work, but I want it to work. I'm hopeful but not optimistic. That's where I am personally.

Now, on that note let me say I think that there -- I'm a chief operations kind of guy, and there are things you could do to help them. This dichotomy between law enforcement and analysis is, I think, false, because intelligence doesn't spring out of just wise people sitting around a room thinking, it really springs out of facts that are presented to people who are then integrated into a framework and then tested against the hypotheses of other people. It really is grounded on collection. And for years we've not had the capacity to translate cases into intelligence input. You know, and the director is addressing that.

We need to start buying the capacity at every field office, people that can take a case and then extract out of it the intelligence that can be used and shared without violating the internal integrity of the case itself. We do that in the military world. We have analytic officers placed at tactical intelligence units, not to report on what's going on with that unit per se, but what are we now seeing about new tactics that

are being employed with radars, for example. We need the same kind of skill. But if you look at the grade structure in the FBI, what does it take to become a, you know, senior person. You ain't going to make it to be an analyst, you'll make it if you get to be a special agent, and you're on a different track. So you can solve this, but there's some real, serious gunsmithing questions internal to the FBI we need to tackle in the process.

MR. LEHMAN: I'd like to get each of your comments on the two most prominently discussed alternatives to leaving the functions in the FBI. Not the straw men that float around but the option of taking the organization that has been built and placing it somewhere else. And the two options that have most currency are -- and, by the way, all of them involve judicial oversight, not letting them run free. But taking them out from under the attorney general and the executive oversight, which I think is the real failing of the MI5 system, trying to apply it here. But have judicial oversight when they have to go to request a wiretap, it has the same or even stronger protections. Plus there is not the concern of the police power being collocated with the intelligence, analytic and gathering.

And the second common thread is that wherever it resides, it would collocate in the regional offices of the FBI, analogous to the way the CIA operates out of embassies abroad and other cover. So the two options that seem to be most current are to take the current domestic intelligence function from FBI, perhaps augmenting it with some of the other existing -- not creating a new organization, but taking the domestic intelligence function and placing it under number one, the director of Central Intelligence, as one option, or putting it in Homeland Security as another option.

So just limiting it to that option of a clearly overseen entity that is collocated with the FBI, has, as General Thompson said, rapid and open communications to prosecutors, but not as subordinates to the prosecutors who decide to make it a case and run for Congress or something. And this is the option that I'd like you to address, putting under the DCI, putting it under Department of Homeland Security.

General Barr.

MR. BARR: I think they're both ridiculous options. You know, who's going to collect -- analysis is centralized, collection is dispersed. You need resources to do it in the United States. It's different collecting intelligence and information you can act upon within the United States than it is in Afghanistan. You need feet on the street. You need the resources and the expertise that already exists in the FBI. And, as I said, it seems to me it has to be coordinated with the end game. You know, I'm all for shooting hellfire missiles from drones and knocking off people once we decided we found them in

Yemen. We don't do that in the United States. So we need an end game in the United States, and the DCI doesn't have an end game.

Putting it over to Homeland Security, you know, just boggles my mind. Those are law -- would you rather have a Customs culture influence these people? I mean, I don't know what you accomplish by that, except seemingly taking it out. You know, the object seems to be to remove it from the law enforcement function which is collecting a lot of information on its side of the house. In the United States where do we get the information from mostly? We actually get it by threatening people with prosecution. A lot of the information that's been developed has been developed by law enforcement side, by threatening punitive action against people, okay.

Now, maybe overseas we catch them in compromising positions and take photographs of them or something like that. But over here we collect information in different ways.

MR. LEHMAN: Next.

(Laughter.)

MR. MacGAFFIN: The problem is that the organization that has been built, that part of the FBI that you -- we're now sort of moving around the table or nailing down to the FBI the way General Barr would, doesn't do domestic collection. So the first and most fundamental thing is we've got to do it, and the point of whether the reforms currently in place will get us there or not, let's leave that aside.

I certainly agree with the notion of if you had a domestic collection capacity to really collect it domestically, putting it at the Department of Homeland Security doesn't make a lot of sense to me either, for a variety of reasons. Putting it under the DCI as has the first problem, the one John Hamre raised, and then during General Barr's, his attitude that, you know, who would trust the CIA to get it right. So for a lot of reasons you can't put it under the DCI in an organizational sense but you can't separate it from the notion of what is the whole picture we're trying to fill in here.

As we've all said at the beginning, you can no longer separate foreign and domestic in the sense that it goes from the shadow of the Hamburg mosque to Cincinnati, you've got to make this connect, and the DCI is -- and the intelligence assessment of the whole picture has got to be what guides domestic collection internally. So I don't think that to my mind the Department of Homeland Security is not an issue. There's got to be a DCI/NSC component for the kinds of issues at an operational level. We discussed about what happens to the kids up in Lackawanna and it's got to be relative to where are we going to put our time, Mr. FBI? What parts are you -- you can't just decide that on your own in the FBI where you're going to have

domestic collection, it has to be driven by a broader construct and we don't have that construct and we don't have domestic collection, and we don't do compromising photographs.

(Laughter.)

MR. HAMRE: Mr. Secretary, I mean I think, you know, in every case here you're always trying to design your government structure to accomplish two goals. One is to make it competent and the other is to make it controlled, so that it only does the things that you, an appointed officer of the government, want it to do. I think the problem we have here with the FBI is that we've got good control functions in place now. The case with the CIA, we've got good competency functions in place, but not necessarily the control as far as domestic acceptability. And Department of Homeland Security, I think we're still working on that.

I think from my standpoint, I think to address your specific question, I would want to look at the structure of oversight and whether it gives you competent control over it. I think that becomes the overwhelming sense of the long-term viability of this to the American public. And oversight, there are three levels of oversight. There is environmental oversight, how do we connect it to me, the citizen? You know, I do that through elected representatives, I do that through the President, I do it through constitutional officers that have to get confirmed.

We have structural oversight, where you set up structures such as ombudsmen and inspectors general and, you know, this sort of thing so that you've got a system to check. Then you have transactional oversight, you've got to get a FISA order if you're going to do something. And where do you best engineer most optimally those elements of control? Again, you could move them to the other organizations and you'll have other problems that you'll need to engineer.

I personally come down on the mode of saying I think right now you've got the better chance of accomplishing your goal if you start building out from where you are now with the FBI, but I would give it a different direct management oversight, I would give it more analytic management oversight and bring a DCI kind of person to do that and try to reward the analytic skills that you want in the law enforcement community, not just simply the transactional skills.

If you can do that, and then you raised the key question how do you measure success, how do you know you're succeeding in doing that? And that frankly takes -- there's no statistical thing, you just have to have smart people who are sincerely committed to helping the FBI do that who come in and just tell them God's truth of what they really understand is going on and ask a directorate to take that on sincerely and to look at it.

MR. LEHMAN: Thank you.

MR. KEAN: We've got very little time, and three commissioners who've asked to be heard, so if we can keep our questions and answers as short as possible.

Commissioner Ben-Veniste?

MR. BEN-VENISTE: Thank you, Mr. Chairman, and thank you both for meeting with us privately, sharing your views, honing those views as I hear today, and providing for a very lively and informative discourse. I particularly want to observe my agreement with the notion of targeted, focused, intelligence collection which is, or should be designed, toward achieving a particular goal, rather than the diffuse collection of every available scrap of information about every American citizen which is being discussed in other quarters.

I think the reasons for that are obvious. They deal with the problem for which the enhanced capability should be directed and they do not stir up unnecessarily the emotions of the American public with regard to its government spying on them. It's very basic, and I commend you for those observations. And without taking a lot of time I would suggest that the proposals in Mr. MacGaffin's statement here today, which are very specific and very directed toward a framework within the FBI of bifurcating the law enforcement functions from the intelligence functions, are those which we ought to very seriously consider in our recommendations as a commission.

The question I have is whether you gentlemen think that they can be accomplished without legislation, a legislative framework essentially reorganizing that part of the FBI that will deal with the recruitment of people who are most proficient in what it takes to analyze data, whether it is necessary to essentially legislate an individual function within the FBI that is charged with directing the collection of information, and whether it is necessary to establish a framework for measuring and promoting the individuals who would be selected for this intelligence function within the FBI. And I'll stop there.

MR. MacGAFFIN: Thank you for the endorsement of some of the work we've done on this. With regard to the question of is legislative input required, on a technical level, quickly reviewing the things that I wrote, I would think only the provision that the head of this new entity be -- the way in which he be selected and the term to run concurrently with or for the same duration as the director of the FBI's term, I think that probably would require it, I agree. Other than that, not only do I not -- can I quickly not think of anything that would require it, I would hate to do it because it's only going to work if everybody, if the whole process is, oh yeah, I got it, we've got to do this. And we've all been there where, you know, this part

of town is legislated and we said, oh yeah, we're going to do it my way.

So, it's got to come -- I don't think legislation helps other than those, other compulsions got to be put to it, but not legislation.

MR. BEN-VENISTE: Thank you, and I'll defer to my colleagues' questions.

MR. KEAN: Senator Gorton.

MR. GORTON: (Off mike.) Mr. MacGaffin, I'm going to follow the compliments of Mr. Ben-Veniste. I look at these 11 points as the most precise and substantive and --

MR. KEAN: Microphone --

MR. GORTON: I look on these 11 points as the most thoughtful and decisive and pointed suggestions that we've had to solve a very real problem. They've taken a great deal of thought and effort on your part and are the result of a great deal of experience. Generally speaking when you get a compliment like that before the question, there is a but, and this is the but: I go through this with great care, I listen to all three of your brutal criticisms of doing something like MI5 and now I want to ask you how this differs from MI5?

It seems to me that what you have created, what you've created here is two essentially separate entities. Maybe housed in the same place, but you will have a head that is appointed by the President, and really when you get right down to it, he's going to be picked by the President and he'll consult with these other three people in doing so for a fixed term. His personnel are going to be separate from the other FBI personnel. You're going to start with 60 percent FBI people but they will be trained and will go through a career entirely in this intelligence function.

And you don't get together at least until you get to the level of the attorney general, though I see little supervisory authority on the attorney general here, and now -- and I look at what we've learned about MI5, well, it's separate from the constables and law enforcement in Great Britain. They finally reach a point at the home secretary level is the first place that there's a real contact between them, who in turn is a creature of the prime minister. So, and with all respect, except for the fact that you call these people FBI agents, you know, my first question is how it differs from a separate entity such as that in the United Kingdom or in some other place?

I strongly suspect that you will have at least some sharing of information challenges between the old FBI and the new FBI. That's number one. Second, there's been, you know, bitter

criticism here of saying that you might have exactly this same kind of function except maybe that it works up through the CIA to the President, rather than through the attorney general, you know, to the president. But what we have from a point of view of communicating with one another and solving the fundamental problem is, that here in this situation housed in the FBI, however you do it, you are mixing an intelligence function with a law enforcement function and a cultural clash that you have testified to only too eloquently.

If you were dealing with a domestic CIA, you wouldn't have a culture clash, you'd have to have an entirely separate organization like this one because the rules would be so different. But it would be intelligence, intelligence and the problem of communicating with law enforcement. Here you have an intelligence and law enforcement mixed and still nothing to increase the communication between the present CIA for intelligence overseas, and the domestic intelligence that this new group is going to take with the fact that the terrorists move back and forth across the borders with a relative degree of ease.

So it's sort of a long speech, but haven't you given us an MI5 just simply with a different name, and is it so totally out of even our line of consideration that we should have all intelligence with two separate sections under one head, rather than have that split between domestic and foreign, faced that split between intelligence and law enforcement?

MR. MacGAFFIN: First, and this is going to sound like I'm ducking it, and I'll come to some of the other issues later. The first and most important part is the fact that it is in the FBI as our first proposal serves to root it in the tradition of America, in the great tradition of getting John Dillinger and whatever, the great confidence the American people have in their fate.

MR. GORTON: That's a good point.

MR. MacGAFFIN: That is a very, very important thing. Something that I learned about but I didn't appreciate in my 31 years at CIA but came to appreciate in my six years at the FBI, terribly important. So the fact that it's there is, number one, a very important difference, it's not a new organization, it's what's new is it's going to go about doing its business differently in a different form. It's going to truly do intelligence collection that it doesn't do now.

The comment on the relationship of the AG to this. You alluded to that in your remarks. There is an analogy in the Executive Order 12333 which essentially guides how in my old world of the CIA, how -- what is the approved and appropriate practice in regard to, in this case U.S. persons, the guidelines themselves were crafted and approved with full input by the

attorney general, but on a day-to-day basis are administered by the DCI and the deputy director for operations.

I can't tell you how many times I had visitors have come out to John MacGaffin in Beirut or Baghdad or wherever it was, and gave me and my staff, you know, here do you really understand 12333 with regards to -- I think that we need to do the same here, some version of the same thing here. To John Hamre's very well taken one, the attorney general has to have a firm foot in this, but not necessarily in the day-to-day management of what collection is done, but certainly has to set up and we've all got to be satisfied that the constitutional protections are there when the collection is done, if I make that point.

The communication, the last point you made was how do we, how does this deal with the question of communication across the intelligence -- across the great intelligence/law enforcement divide. You know, again while we've made progress in that since 9/11 with a club over their heads, the level of non-communications within the existing FBI across criminal and intelligence, national security sides is unbelievable at times. I mean, literally I was present when the person responsible for doing Russian organized crime met the person in the Bureau responsible for the national security side of pursuing the Russians, and I knew them both -- you know, what's this all about.

So it's not that there is this great free flow of information across the internal workings of the Bureau as it exists now, that's a fallacy. It should be, I mean, the Bureau ought to be built on all the information that's appropriately available where it needs to be, but it doesn't work there now. So I guess that'd be my third point is that it's the ability to build this communication across law enforcement intelligence. The intelligence community would welcome and work with an organization like this embedded in the FBI that was clearly doing collection work, because then it's easy to say, here's the problem, it's al Qaeda, I'm going to do Paris and something else and you're going to do, you know, and that'll work. And when we've done that between the two, you know, it's a winner, and when we haven't you get what we got.

MR. GORTON: One brief question, Mr. Barr, do you buy into the MacGaffin formula?

MR. BARR: Not completely, I do think ultimately this will evolve into two directorates within the FBI. I think it's a far different situation than having a separate agency, because I don't think Mr. MacGaffin expected these two entities to be hermetically sealed. They would be interacting and coordinating in the field, in the field offices all the way up the chain. One thing to remember is, again, collection in the United States relies on law enforcement assets.

You know, during the first Gulf War when I was responsible for American counterterrorism, a lot of it boiled down to tracking people, figuring out where people were in the United States or where they were going. And that required a lot of stake outs, it required a lot of traffic stops, it requires, you know, going into stores to find out where certain apparel was bought. It requires going into hotels to check records in an entire city. Very intensive, requires feet on the street, law enforcement people.

An MI5 type agency, I don't care how many agents you put in it, it's not going to -- you know, you're going to have to have, you know, 20, 30, 40,000 agents running around the United States if they're specialized and dedicated, or it's going to have to be integrated with law enforcement assets in the United States. The FBI today has those assets, it is integrated with state and local law enforcement, 650,000 police, and they do a lot of the work necessary to track down terrorists.

In sharing information, any division even a division within an agency will create sharing problems. It happens at the much ballyhooed CIA, but in fact if it's in the same agency, the risks are lower, you usually get more sharing of information. The coordination with the CIA is something that happened, the FBI is part of the intelligence community and that coordination has to occur. And in that case, it's with, you know, entities outside the Department of Justice. But I don't think we should compound the problem by creating another fissure, this artificial distinction between law enforcement and intelligence --

MR. GORTON: What part of MacGaffin's recommendations do you disagree with?

MR. BARR: Well, I'm not sure I would be so prescriptive. In other words, from my experience institutions will evolve over time and develop appropriate cultures. For example, take the CIA. When I was first there, there was, you know, some distinctive culture between the DDO, the Directorate for Operations and the DDI. And yet, you know, most of the career intelligence people in through the CT program, they got the training of the covert people even though they might ultimately end up over in the DDI. That's not to say there were other ways for people to come in.

So I think, you know, there will be some things where you may want some overarching program where you get some basic law enforcement orientation for people, but I think eventually you will end up with two directorates. But I don't think we should necessarily make them hermetically sealed against each other, some cross fertilization is a good thing.

MR. GORTON: Thank you.

MR. KEAN: Last question from Congressman Roemer.

REP. ROEMER: I want to begin anyway where Dr. Hamre started his remarks and that was thanking the panel here. We want to thank you for your advice and your counsel here this afternoon, but more importantly, Mr. Barr, for your service to an administration a few years ago, doing a very good job. Dr. Hamre, another administration doing an excellent job as well. Mr. MacGaffin, 30 years in the CIA serving your country.

I'd like to shift a bit here from the FBI to what Mr. Barr referred to as the much ballyhooed CIA. Given your service there for 30 years as an officer and a deputy director of Operations, you have quoted Thomas Powers a couple of times, and he has written a very interesting book of essays on the CIA, and in one of them, Mr. MacGaffin, he talks about a very difficult endeavor to undertake in any organization, and that is doing an internal assessment of when you make mistakes.

And he interviews somebody at the end of his essay on the 9/11 failure, and he's talking to somebody with vast experience at the CIA that really finds it difficult to go through this internal assessment of where the CIA has made mistakes, and that it may be too bloody, it may be too difficult, we may not be able to do this, but we cannot fail to do this, we must undertake this assessment and this damage plan, and how we go forward with some vision in the future.

I'd like to press you very hard, because we get many of our most candid comments from people after they've left government service, and ask you in your remarks you're pretty explicit about the magnitude of the failure of 9/11. You say, and I quote, "The magnitude of my failure, the colleagues at the FBI, the CIA, the DOD, to fully implement those systemic changes to our national security structure writ large that could have prevented this attack." Unquote.

I just want to be specific in what do we need to recommend at the end of the day to see that these great talented people at the CIA that have done a wonderful job over 50 years in so many ways but may have been slow to get onto this new target of al Qaeda, what do we need to do specifically there at the CIA as an institution to see these changes made? What two recommendations would you make to us?

MR. MacGAFFIN: Unfair at the end of a long, tired day, but as you will note in my statement, I made very clear that while the issue here was domestic intelligence collection and we were going to spend a lot of time talking about the problems of that, that there are extraordinarily important issues that have to be addressed for the foreign side, for CIA and NSA particularly. In very short hand on the NSA side, getting out behind the technology curve, they're so far behind they can't get in front of it. For the CIA, I think it's getting back to the same

criticism I make of the FBI, getting back to real focused penetration operations against the most difficult targets.

It's really hard work, and unlike -- I happen to live in places that now make you say, hmm, like Beirut or Baghdad or Riyadh. But when I lived in Beirut, you know, it was terrible, my sail boat sunk one day, but other than that it wasn't too bad. The places where you have to do this work now are terrible, and so getting people who are willing to do this work in those places and take the risks, everyone as we have to do, get behind the FBI to make it do what it's got to do and let them know we support it, we've got to do the same thing too for the CIA.

And the kinds of things the between General Barr and Dr. Hamre talked about were people in the FBI say, yeah, go do that and get yourself in trouble, you get held out to twist in the wind. The same thing is true for operatives in the CIA. We've got to let them know that we support and encourage that, and that still hasn't happened.

REP. ROEMER: But be more specific, I'm not letting you off the hook with that. We've heard that over and over and over, that we need better human resources and better penetration in terrorist targets and better language skills and analytical capabilities and better strategic analysis of the information that comes in. How do we do that? We've been talking about these kinds of things in the intelligence community for several years now and some of these things have just not been done. How do we focus on those two or three things and how do we implement and achieve those?

MR. MacGAFFIN: Okay, and I didn't sign up for all of those, although we could do better on all of them, I focused directly and specifically on human source and technical -- human enhanced technical penetrations of those hard targets. And how do we do that? We do it through the recruitment of people who can -- who can understand and reach into the Islamic communities and can deal in those languages. But it's got to be the constant focus of the oversight committees, of the Administration, of how are we doing?

I mean, we're really good now, I understand, you know, from everyone's favorite source Bob Woodward, that the President has a thing in his desk drawer, that he pulls out and when Mr. Tenet goes down, they sort of cross off, you know, how many bad guys have you got that are still at large? Let's turn it around, and even though this is a terribly sensitive issue, and keep everybody's nose to the grind of how many sensitive penetrations have the FBI and the CIA and the NSA together working jointly given us in all these places because it's the only defense against the terrorists and the other organizations to do us harm. You're not going to do it with satellites, you're not going to do it any other way. And until we keep -- that's the only payoff,

is count them. Just as you count them when we take them out, let's count them when we bring them on board.

REP. ROEMER: Thank you, Mr. Chairman, thank you again.

MR. KEAN: Thank you very, very much. I want to thank you all. This has been a very interesting and a very valuable panel. I want to thank all the witnesses today for their time, we're greatly appreciative of the insights we've gotten. And while we've heard a diversity of opinions on each panel, we have also I think discerned some very interesting themes. First of all, the choice of security or liberty is false. Such thinking invites the pendulum swings of the past, going too far one direction then going back too far the other.

Instead we need creative thinking about how to live in a more dangerous world, how to make security and liberty into partners, not rivals, that creative thinking is in very short supply. But we heard witnesses today who helped us approach this challenge and do it constructively. In intelligence gathering we need guidelines that tell people what they can do, yet other ways to hold them accountable when there are abuses, that the wall between intelligence and law enforcement in place prior to 9/11 may have faithfully impeded investigation of the future hijackers.

And if the United States is to prevent terrorist acts before they occur, sharing information between law enforcement and intelligence is vital. We heard that the PATRIOT Act, debate swirls around symbols as much as substance. But the Commission must think about what Congress should do when the key provisions of that act expire at the end of 2005. We heard that preventive detention of terrorists may be necessary, but witnesses thought that we do not yet have the institutions or rules in place that will make such measures sustainable in the long haul in our democracy. As one witness put it, changing the rules is better than having no rules at all.

We heard testimony about the importance of a clear framework for immigration law decisions and designations of enemy combatants. Such a framework simply doesn't exist today our witnesses testified. We heard testimony about the importance of consistent enforcement of the law, both for those who we welcome to our country and those we do not. We heard about the importance about working with the Muslim and Arab American community as a critical part of our antiterrorism work. We heard testimony that we should not appeal to foreign models for addressing security issues, but we need a model for domestic intelligence consistent with American values and our own system of government.

We heard a very good airing of views about the future of the FBI and the critical question that came out is this: Does the combination of law enforcement and intelligence compromise

devotion to the intelligence mission? Or is that combination instead essential for the integration of collection and action in the field operating within the law? This is all very important to our mission. We need a strong, informed public debate about the U.S. government's new powers in fighting this war on terrorism. And I certainly hope, and we all do, that the Commission's hearing today contributed to that debate. Thank you all, very, very much.

End.