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IMMIGRATION LAW PANEL
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Panelists:

JAMES ZIGLAR, distinguished visiting Professor of Law, George Washington University Law School; former Commissioner, Immigration and Naturalization Service
DANIEL SUTHERLAND, Officer, Civil Rights and Civil Liberties, Department of Homeland Security
GREG KATSAS, Deputy Assistant Attorney General, Civil Division, U.S. Department of Justice
TIMOTHY EDGAR, legislative counsel, Washington office, American Civil Liberties Union
DAVID G. LEITCH, Deputy Counsel to the President of the United States, moderator

MR. LEITCH: Good afternoon. I'd like to get us started relatively on time, because I know you're all busy and some of the panelists are busy as well.

I'm David Leitch, Deputy Counsel to the President. I'm glad to see all of you here this afternoon. I think we have an interesting group of folks to talk about immigration and the war on terror. I just have a few introductory remarks, then I'll introduce our panelists and let them tell you their perspective on this issue.

During the 2000 campaign, then-Governor Bush made clear that in his view "immigration is not a problem to be solved; it is a sign of a successful nation." Little could he have imagined when he made that remark in June of 2000 the horrific events that he and the nation would encounter during his first year in office. What's more, the terrorist acts of September 11, 2001 were perpetrated most directly by 19 immigrants who came to this country to live, to study, and work among us, and then attacked our institutions and killed thousands.

Even after the events of 9/11, however, the President has remained committed, as he said in October 2002, to welcoming a process that encourages people to come to our country to visit, to study and to work. But the dark events of that day made clear the need for an additional caveat. What we don't want, the President said in October of 2001, are people who would come to hurt the American people.

I think it's fair to say that most Americans share both aspects of the President's perspective on the issue of immigration in light of the war on terror. We are after all a nation of immigrants surrounded by a world of would-be immigrants. Despite the fact the events of 9/11 were perpetrated by those whom we welcomed to our country from other lands, I suspect that most Americans still embrace the sentiment found on the Statue of Liberty: "give me your tired, your poor, your huddled masses yearning to breath free."

At the same time, however, we also insist with a new and tangible urgency that we do close the door of our free society to the world's angry, its well-financed, its hidden conspirators yearning to snuff out the breath of freedom.

The question, of course, is how we calibrate the welcoming arms of a free society and the imperative to preserve and protect that society from those who would destroy it. The past two years have seen a host of new ideas and new programs which involved various means to regulate immigration to serve these twin, and some would say consistent, goals.

Like many things in Washington, these programs and ideas are accompanied by an alphabet soup that none of us had imagined two years ago: HSC, DHS, TSA, PATRIOT, BCIS, ICE, NSEERS, CAPS2, et cetera, et cetera. Of course, we also did away with one of the familiar and long-standing of the alphabet, the INS. The debate over the arguably consistent goals of immigration policy and the war on terror does not take place in a vacuum but is part of the larger debate in our society about protecting civil liberties while we protect our country.

On this point, too, the President has insisted that we pursue both objectives. As he said, we have a huge responsibility, and that's to defend the country while protecting our greater liberties.

The panel that the Federalist Society has assembled here today is going to share their views on how we're doing and their thoughts about the way ahead. We really are privileged to have such a very distinguished panel.

So far you've heard only from the person up here that knows the least about this issue, so I think it's time to introduce them and let them educate us all on the topic at hand.

Starting to my right, I'd like to introduce James Ziglar, who is the distinguished visiting professor of law at George Washington University Law School, former Commissioner, last Commissioner of the Immigration and Naturalization Service, and who prior to that had a long and distinguished career both in federal service and in the private sector.

He served as sergeant-at-arms at the U.S. Senate and Assistant Secretary of the Interior. He worked in the Department of Justice, served the Chairman of the U.S. Senate Judiciary Committee as an aid, clerked for Justice Harry Blackmun, and has had a distinguished career in the private sector before that. We're looking forward to hearing his perspectives.

Dan Sutherland, next to him, is the Officer for Civil Rights and Civil Liberties at the U.S. Department of Homeland Security. Congress insisted when it passed the Homeland Security Act that the office of civil rights and civil liberties be created. I know the Secretary, Secretary Ridge, is very personally committed to making sure that that perspective is observed in the department.

Dan came to that job from the Education Department where he was with the Office of Civil Rights. Prior to that, he spent 14 years with the Civil Rights Division of the U.S. Department of Justice. He's also a graduate of the University of Virginia Law School, a classmate of mine, and the University of Louisville.

To my immediate left here we have Greg KATSAS, Deputy Assistant Attorney General from the Civil Division. Greg has handled a lot of litigation for the Department

of Justice on issues that will be addressed by the panel and he brings a unique perspective and that sense of someone who's had to stand up and defend these policies in court.

Greg came before that from the law firm of Jones Day. He also clerked for Clarence Thomas and Judge Becker on the Third Circuit.

Last, but certainly not least, Tim Edgar of the American Civil Liberties Union. He's legislative counsel in the Washington office of the American Civil Liberties Union. He's responsible for defending civil liberties in Congress and the Executive Branch in the area of national security, terrorism, and immigration.

He graduated from Dartmouth College and from Harvard Law School where he was an editor of the Law Review. He served as a law clerk to First Circuit Judge Sandra Lynch in 1997-98. He then practiced with Shea and Gardner before joining the American Civil Liberties Union. We're very happy to have him here today.

So without further ado, I'll turn it over to the experts. I think they're all each going to go for about 10 minutes or so. Then we'll have a little discussion and open it up for questions.

PROFESSOR ZIGLAR: Thank you, David. I'm not looking for a job with the federal government but it will remain part of my (inaudible). I hope to take this opportunity to correct something you said, if you don't mind. Don't take offense.

The 19 people who came into the United States were not immigrants. They were non-immigrants. Immigrants are people who come here intending to stay and join our society. Non-immigrants are people who come here on B-1, B-2 visas and a variety of other work type situations. That's what these 19 were. They were non-immigrants. They had no intention of coming here. They had no intention of joining us. So I want to make sure that people don't confuse that, because that's part of the debate, the discussion we have going on today about this. I think there's an awful lot of confusion of what we're talking about.

I hope you didn't take offense to that, but that's an important point to me.

MR. LEITCH: You're exactly right. I stand corrected.

PROFESSOR ZIGLAR: Last night when Andy Card was talking about the President being sworn in, he talked about when he walked down the steps to go take the oath on the south side of the Capitol. Well at that time, I was sergeant-at-arms, and I escorted the President down to take that oath, and it was on the west side of the Capitol. Afterwards I could not resist; I grabbed Andy after and said, Andy, if you give that speech again, it's the west side of the Capitol.

I'm really pleased to have this opportunity to be here and to talk about a subject that has occupied most of my waking hours for the past two years, three years almost now. We're going to do this panel in some sort of sequence. I'm going to talk about the history of immigration, a very small slice of it obviously, in order to set the stage for the rest of the discussion that we will hopefully all engage in.

I have spent, particularly last year since I've moved into the academic world, attempting to really study history, the history of immigration in all of its many dimensions. It clearly does have many dimensions.

In doing that I've tried to also put it into context of today's world, of this world terrorism that we're engaged in at the moment, and determine just how it fits. I think

from that perspective it is important that we spend a few minutes talking about a small slice of immigration history in order to set the stage for our discussions in a few minutes.

Harry Truman once said, and this is maybe one of my favorite quotes, the only thing new in the world is the history you don't know. He's absolutely right, and that is certainly true in the context of the immigration history.

What I discovered in my reading and research during the past year is that every issue we are discussing and every challenge that we think we are facing de novo has been part of our national dialogue at some time in our past. Everything from assuming there is a nexus between immigration and terrorism or subversion or anarchy, to proposing to build a wall all the way across the borders in order to keep people out, to requiring advance manifest from vessels coming into the United States, to registering and tracking foreigners, to alleging that politicians have used the naturalization process to enhance their voter turn out. You can ask Ulysses S. Grant about that one. All of these things, and a whole bunch of others, have distant echoes in our history. Not one thing that I can think of that I dealt with as INS Commissioner has not been at some point in our history dealt with before.

If you're fascinated by immigration history, and it is fascinating, I want to recommend to you a book by Edward Prince Hutchinson. It's called *The Legislative History of American Immigration Policy, 1798 to 1965*. It's hard to find. It's slow going. But it is a fascinating read, and it's done without any particular bias that I could see in it.

The history of immigration law and policy has reflected, and indeed I think it's been a mirror image of this country's moods and its crises throughout our relatively short history. Historical revisionists have attempted, certainly in the post-9/11 era, to debunk or at least diminish the notion that we really are a nation of immigrants. But it's kind of hard to run and hide from our history.

In fact, I wonder how many of you in here, and all being lawyers I'm sure everybody knows this, that the suppression of immigration and the interference with immigration by King George was one of the things in the Bill of Particulars in the Declaration of Independence that caused us to revolt. In the Preamble to the Declaration, which was really the prequel to the Bill of Particulars, the signers noted that he, meaning King George, has endeavored to prevent the population of these states, for that purpose of obstructing the laws for the naturalization of foreigners, refusing to pass others to encourage their migrations hither, and raising the condition of new appropriations of land.

So immigration was real important at the very founding of this nation. Yet, notwithstanding this rich heritage, we over our history seem to be ambivalent at best and paranoid at worst about arriving immigrants or about immigration in general. In good times we've been very welcoming. In bad times we've turned a cold shoulder and worse.

When it comes to shouldering the blame for events that thrust the nation into crisis, it seems that immigrants have been among the primary recipients of that honor, as dubious as that is. It also seems that as a nation, if you look at our history, every time we evoke or react to immigration or immigrants, we have been remorseful and we have always gone back to try amend our ways.

But we're horribly alone in this naturally human instinct. This kind of anti-immigrant attitude goes all the way through history. There are some poignant examples of that in the Old Testament, if you're interested in doing Old Testament history.

Our own history is filled with a lot anti-immigrant sentiment. In fact, some of the very signers of that Declaration of Independence, such as Benjamin Franklin, demonstrated a real fear of arriving foreigners. For Benjamin Franklin, it was the Germans. In fact, he's got all kinds of stuff on the record about worrying about the Germans Germanizing America instead of America Americanizing the Germans. He was actually quite upset by that whole notion.

Indeed, from the very beginning of our republic, we have reacted to the presence of foreigners even though, frankly, many in our governing structure in the very beginning were themselves not natives. For example, in the late 1790s we had the alien and sedition initiative. There are a number of reasons for that, but by and large it was a fear of the French Revolution being exported here. It was also a fear of Catholics, particularly Irish-Catholics. It was used as a blunt instrument against Irish-Catholics. That act raised the naturalization requirements to 14 years, and it authorized the President to summarily expel or detain dangerous elements, where that was.

I also note that if you read the history of it, the federalist party—not the Federalist Society, the federalist party—disappeared as a result of its using the Alien and Sedition Acts to suppress political opponents, both aliens and non-aliens.

In the 1840s and '50s we had the anti-Catholic, anti-immigration movement that really grew out of a fear of refugees bringing anarchy or terrorism to our shores, or at least dispensing these anti-democratic notions. This all took place in the context of a rapidly declining stability in our country, i.e., we were heading into the Civil War. This crisis gave rise to this anti-Catholic know-nothing movement.

Of course, who can ever forget the fact that in our history we exhibited a visceral dislike for the Chinese and other Asians. It wasn't until the 78th Congress in 1942 that we repealed the Chinese Exclusion Act of 1882. That was in recognition of their helping us in World War II. Then, by golly, just to show how open we had become, we provided the Chinese with the magnanimous quota of 105 people.

The assassination of President McKinley in the early 1900s reignited some anti-foreign sentiments and particularly a fear of anarchists. The Immigration Act of 1903 was particularly punitive towards immigrants, including punishing speech if an immigrant or an alien happened to disagree with a federal policy.

The first Red Scare that occurred in the 1920s also accelerated what are the now-famous Palmer Raids. They didn't come (inaudible) until after 9/11, but they're now famous. That was as a result of a series of bombings that occurred in San Francisco, Washington, Wall Street, and some other places.

Palmer, who was then the Attorney General and was a man of great political ambition—he lusted after the presidency—used sweeps round up these Reds, primarily eastern Europeans, and deported hundreds of them with little or no evidence that they had been involved in any of these wrong doings, and also with no due process whatsoever.

Now during World War II we all know the tragic and disgraceful story of people of Japanese ancestry in America, Japanese and people of Japanese ancestry who were Americans who were being rounded up in internment camps. One of these research projects that I'm doing right now which is fascinating is that period during the War when this was all going on.

If you ever get a chance to look on the National Archives website, it'll take you there eventually. There was a conversation between General DeWitt, who was the

western division commander of the U.S. Army Western United States, and a fellow named James Rowe, who was a special assistant to the Attorney General. It's a recorded conversation and it ends up in a report in which this fellow, DeWitt, the general, wanted absolutely unquestioned authority, even overruling the President if you will, to be able to go out and pick up anybody who looked like, sounded like, acted like, or was known to have Italian, German, or Japanese connections, and put them into detention. So it's an interesting time in our history and an interesting attitude toward immigrants and people who would appear to be immigrants.

Finally, I would be remiss if I did not mention the Smith Act, or as it's known, the Alien Registration Act of 1940. As I'm sure most of you know, this act was enacted in the period right before World War II when there was great concern about the Germans and the Japanese and what they might be doing— (inaudible) — during that time was very rampant. Registering and tracking of aliens was thought to be a good way to prevent their nefarious activities. The authorities in this act, of course, were at least part of the basis for the so-called NSEERS program that I'm sure we'll talk about later.

But I'm sure that what most of you out there would be interested in knowing is that one of the primary movers of that legislation was none other than Senator Albert Gore, Sr., of Tennessee. So I just want you to know that historical tidbit.

In closing, I want to note that the 9/11 response to immigration, by comparison to other periods in our history, has been relatively mute. I think that says a lot about the goodwill of the American people. However, it doesn't mean that even in periods of national crisis that we should look the other way when injustices occur or when our concepts of fundamental fairness and due process are violated. Those are the principles, after all, that keep our freedom secure. Thank you.

MR. LEITCH: Thank you, Jim. Our next speaker is going to be Timothy Edgar from the American Civil Liberties Union. Tim was sick when we had our phone call coordinating all this, and he came by this afternoon and asked what we expected him to speak on. I said the topic he'd been assigned would be his view of the Administration and its treatment of civil liberties post-9/11. His eyes got wide. Thanks, Tim.

MR. EDGAR: Thank you very much. I wanted to thank the Federalist Society for extending this gracious invitation for us to speak. You know, people always joke when you're going into the belly of the beast as an ACLU lawyer to address the Federalist Society, but I know that beating stress in our President is no stranger to these gatherings, so I feel somewhat comforted there.

I just had to remark that that was a really remarkable speech that you gave, Mr. Ziglar, and I really appreciate it. The history that you gave is something that also inspires me when I do my work at the ACLU. One thing that I was thinking of as you were recounting that history and describing the Smith Act is when we're in coalition meetings with some of our partners discussing NSEERS and registration and similar issues, some of them said, well, you know, of course we're not talking about opposing the registration completely. We're talking about selective registration. I say, "Well, it wouldn't be consistent with our history to say that we don't oppose registration, since we did oppose the 1940 Smith Act."

It's something that's happened since September 11. We've come across issues that we haven't had to deal with as a country for 50, 60, 70 years. Some of these are some of the primary reasons that the ACLU was founded. It was founded in 1920 as a direct result of the first red scare, the Palmer Raids, and those kinds of infringements on liberty. So it's very much in our blood as an institution. It's something that has helped us in a real sense return to our roots in defending the civil rights and civil liberties of all Americans and visitors and non-citizens as well.

What I was saying is that one of the things we have to do is to make sure that our positions are consistent over time, or if we change our positions that we do so in a deliberative way. Usually that meant, prior to September 11, that we would look on the website and see what we said about the issue last Congress. After September 11, I was on the phone with our archivist in Princeton, New Jersey, saying, did we say anything about this law that was passed in 1932? In 1940? Did we say anything about detention of enemy aliens in World War II? And having to get those kinds of records.

I will take issue, I think, with some of the policies of the Bush Administration. I wanted to go through some of those with you. Our primary goal since the attacks of September 11 in the area of immigration is to ensure an open process, an open system of government. We have felt that that system came under attack.

Our other goal has been to ensure equal treatment of people, regardless of their country of origin, regardless of their ethnicity or race or nationality or religion. We have seen both of those values come under a significant attack.

The first thing that we saw after September 11 in the area of immigration was a mass arrest of what turned out to be 762 people on immigration violations and well over 1,200 if you include the material witness and criminal charges. People were arrested for preventative purposes. They were arrested not because the government suspected they had actually been involved in the September 11, but because there was some link to a link to a link to someone who had. They wanted to make sure that these people wouldn't do us any harm.

We, obviously, were concerned about these arrests. What we did was go to the government and say, "Please tell us who you've arrested, what you've charged them with, and we would like to make sure that we can organize volunteer attorneys to ensure that everyone has legal representation." They told us that they would not give us those names.

After well over a month of pressure by the media as well as us, they did release some information about the detainees, but still wouldn't tell us who they were or, if they were represented, who their attorneys were. We only then turned to lawsuits under the Freedom of Information Act to try to obtain this information. The problem with the Freedom of Information Act, as many of you may know through FOIA litigation, is that it's incredibly slow.

These people had been detained for months and then deported long before we even got a ruling from the District Court, a ruling that the Justice Department immediately stayed and appealed to the Circuit Court of Appeals.

So in a sense it's now an issue of principle of whether we're entitled to this information. I understand our cert petition to the Supreme Court is still pending. Needless to say, if we did win that case, it wouldn't really mean that much since they're gone and there's not much we can do about it.

In addition to that litigation, we were concerned because special procedures were enacted with respect to these hearings, procedures to close the immigration hearings to the press, the public, and even family members. In the ordinary process where the docket in Immigration Court lists the cases, the person would not be listed on this docket.

This created tremendous problems for the attorneys for those who did have attorneys, and certainly for public interest groups like ours who were trying to monitor the process. I should note that in these cases the entire hearing was closed. The name of the detainee was not available. The charge was not available to anyone outside the process. That was regardless of whether there was any classified information that would be discussed in those hearings.

We found this to be certainly a violation of the spirit, if not the letter, of President Bush's campaign promise to end the use of secret evidence against Arab and Muslim non-citizens in immigration proceedings. We agreed with President Bush's promise and disagreed with the Clinton Administration's policy in that regard.

As a result of the controversy, I think, around these arrests and detentions, the Office of the Inspector General of the Department of Justice conducted an investigation and uncovered serious abuses of the rights of detainees, including some actual physical abuses of people or threats of abuse by guards and others, as well as interference with their right to contact attorneys.

Part of the way this happened is people were put in the most restrictive conditions imaginable even though they were being held only on visa violations and other kinds of civil immigration charges. These conditions would involve getting a visit from a guard once a week saying, "Would you like to contact an attorney, or as the Inspector General's report said, sometimes just, "Are you okay?", which the detainee was suppose to know meant, "Do you want to contact an attorney." I certainly wouldn't know that that was what "are you okay" means.

Because they weren't currently represented, and because there's no right to representation at public expense under the immigration laws, they would have to use these outdated lists of pro bono attorneys to call. If you got one call and you got the person's voice mail, well, that's your phone call for the week. This happened in many cases.

We believe that this represented a fundamental flaw in the government's policy, that we needed an open process. If the government wants to accuse someone of being a terrorist suspect, they should go before an immigration judge or a federal court and accuse them of doing that, file charges, and allow the person to defend themselves. Instead, they were arrested on unrelated charges, held in extremely difficult conditions, and then not processed the way that an ordinary person in those proceedings would be processed. They were simply held until the government could do its own internal check, which in essence became an ex parte process for determining whether the person really was or was not a terrorism suspect. It lasted for months and months and months.

With most of these people the issue was not whether they would or wouldn't be deported. They had violated immigration laws. Many of them said, "Go ahead, please deport me. I understand that you've caught me. I violated my visa. I'd like to go home to my family now." The process of immigration removal is designed to achieve that. It is designed to simply remove a person.

If you want to punish them for violating our laws, you have to file a criminal case. Instead, people ended up for months on end languishing in detention, as the Inspector General found.

So the one thing I suppose we take some heart from is the fact that at our convention that we held earlier this year, Director Mueller of the FBI came to say to us and acknowledged that there had been some mistakes made in the treatment of these detainees and promised that he and the FBI would try to do better.

We certainly hope that that will happen. We are still concerned that the recommendations don't go far enough in addressing these problems, because they don't fundamentally change the strategy. They don't move us towards a public process of accusation and then a person being able to contest those accusations. Instead, they say we'll more quickly engage in our secret clearance process. That would certainly be an improvement, but I don't know that it would satisfy us.

Our basic goal has been to make sure that the war on terrorism doesn't become a war on immigrants and a war on non-citizens. In that respect, I know that many members of the Bush Administration share our goal, although we disagree often about particular policies. There are those, of course, who do not.

As Mr. Ziglar was describing the particular against King George, I was reminded of Congressman Tom Tancredo, the head of the so-called Immigration Reform Caucus in the House, and thinking "Aha, here's another thing I can charge Mr. Tancredo with. I can charge him with being King George III," something I usually do with President Bush.

The real concern here again is about making sure that the process is open. It follows essentially a process in classical liberal legality. It's something that we've seen avoided certainly by the use of these kind of protectionist inventions.

Another thing that we have been involved with since September 11 is in the creation of the Department of Homeland Security, where our good friend Dan Sutherland is the Civil Rights and Civil Liberties Officer. We had urged strongly when Congress created that department that there be strong civil rights and civil liberties protections for such an important department. We took no position on whether there should be or shouldn't be a Department of Homeland Security. We had some pretty debate about that in the ACLU. But we decided that these are jobs that government officials are doing. If they need to be organized in a different way, we don't see that there's a civil liberties reason to necessarily impose that reorganization, but we do think there needs to be strong civil rights and civil liberties protections.

So we're happy that the office was created. We wanted to have more authority, to have more teeth, to have more power, to have a place at the table to make sure that it's not just an office that says Office of Civil Rights and Civil Liberties, now everybody can be happy and go home. We know that there's somebody on the watch. We want to make sure that Dan here has the authority that he needs to change government policies or at least to ensure that the government follows its policies, something that would be, I certainly think, helpful.

One thing that we have done since September 11, and it's no secret, is to try to form as broad a coalition as we possibly can on civil rights and civil liberties issues. Sometimes that means working with people who are left. And if you think there isn't anybody to our left, I would invite you to some of the meetings we have.

We've had interesting debates about whether they should repeal the entire PATRIOT Act or just the parts of the PATRIOT Act that violate civil liberties. We thought "Well, why would you repeal the parts that don't?" But we've worked with people to our left, and we've worked probably more famously with people very far to our right, with former Congressman Bob Barr and the American Conservatives Union, with Grover Norquist, an important conservative leader who is trying to make the Republican Party and the conservative movement friendly for Arab-Muslim voters.

We don't care what your motive is. It might be just to get votes. We will work with you. One thing that we have found over the past couple of years is that whatever stereotypes we have about conservatives, if we ever had them, have been, I think, severely tested at least. Sometimes we say, "Well you know the conservatives aren't going to agree with us on these immigration issues. We can get them to work with us on privacy issues, or at least some libertarians. But they're not going to agree with us on that."

We've been surprised time and time again. For example, we have worked with conservative leaders on an issue that has profound implications for the immigrant population, which is this idea of deputizing state and local police officers to become agents of immigration enforcement. We've strongly opposed that policy on civil liberties grounds, because state and local police officers do not have the kind of training that the enforcement officers of the federal government have. So when that has happened in the past, there have been real problems of racial profiling by state and local police officers. You can't tell what the immigration status is of a person by looking at them. People who are well trained understand that. But sometimes people allow their stereotypes to take over, and that's been a real problem.

We've found that conservatives, Mr. Norquist and Mr. Keene of the American Conservative Union, much to our delight and some surprise, completely agreed with us on this. But they viewed it for a different reason. They said, "We don't want to create a precedent of having state and local police officers enforce a civil regulatory federal scheme. What's next? OSHA? The Clean Air Act? This is going to be a disaster for our federal system. We don't want to create a national police force that enforces federal laws without the kind of training that the regulatory bodies of the federal government have."

So we've worked with people on all sides of the aisle. I know that members of the Federalist Society, scholars at the Heritage Foundation, and others are not monolithic on these issues. I've found myself in the position of debating somebody one day, then calling them on the phone the next, and saying, "Well I know we disagree about this, but what about that civil liberties issue? Maybe we can work together."

So I think it's been an amazing two years. I hope that we have done something to preserve civil liberties in America. I hope that despite some of our differences that we'll be able to continue to work together to ensure that our constitution doesn't become a casualty of the war on terrorism.

Thank you very much.

MR. LEITCH: Thank you very much, Tim, for those reasonable remarks that will undermine some of the assumptions folks have about the ACLU. Thank you for coming to walk into the valley of the shadow of death.

The toothless tiger you described from the Department of Homeland Security is our next speaker.

MR. SUTHERLAND: I don't know where to start. You have seen history today. You did not expect to come to the Federalist Society convention and hear the representative of the ACLU, and I took notes so I had this exactly right, describe the Bush Administration civil rights appointee as "our good friend."

I also noted, and will duly pass along to whoever I can at whatever point, that the ACLU would like to see the powers of my office increase.

It is a privilege to be at the Federalist Society and to be on this panel. Dave and I have known each other for a number of years. Tim and I, if you can tell, are getting to know one another well. Mr. Ziglar and I are going to spend some time together soon. Greg, you're new to me, so if I'm not adding you in, this is not treat the heavy here.

I would like to start my comments with some general thoughts and perspectives, approaches that we have at the Department of Homeland Security on some of these issues. Then we can dive into some specific issues.

I represent the new kid on the block, this new institution, so I thought I might give you some sense of the general approaches that we have in our thinking through some issues, then we begin to talk through specific issues.

I'm going to start with a statement that has probably only been said somewhere around a million times, but it bears repeating in a context like this. September 11 was a turning point. It changed everything. As you know, it was one of the largest terrorist acts in the history of the world. It happened on our soil. It happened on our symbols of our society. It changed things. September 11 was not a single event. We now know beyond any doubt that there is a small but significant group of people who are claiming right now how they can kill you and me and my children. We are in a different world than we were before.

September 11 changed a lot of things in our country. Our military: things have been very different for them the past couple of years: deployment strategies, actual deployments, tactics, budgeting. Everything's different in the military world. A lot of things are different than the way they were.

Our intelligence services: completely rethinking how they go about business. Our airline industry: completely different how they're going about business, the economics and also security. You can go through nearly every sector of the economy and our country and say September 11 changed things.

One of the comments that I want to make is that our civil rights community also has to recognize that we're in a new world. There is a new context. Many of the issues we discussed today and that I discuss on a regular basis, that Tim has his meetings about, are issues that we have been discussing and debating year after year. But they're new now. It's a new context. And it's time for us to shake off the old style thinking, shake off the old approaches, and recognize that there are new ways we have to look at these things. We're in a new century; we're in a new context. It's time to be innovative. That, to me, is the key component in civil rights and civil liberties as an industry and a community.

Justice Louis Brandeis wrote, "if we would guide by the light of reason, we must let our minds be bold." So coming to these issues with the same old answers won't do.

As Tim said, you go back and look at your website. Well, we said this last year, so we'll say it again, doesn't work any more.

Harvard Law Professor Randall Kennedy argues that the "inherited debates" on race and civil rights have become increasingly sterile. He asserts that useful prescriptions for problems as complex as those generated by the imperituous of law enforcement in our large, rambunctious, multi-racial society can arise only from thinking that frees itself of reflexive obedience to familiar signals. I think that is a remarkably important comment. We have got to think these things through in a new way.

The Department of Homeland Security is committed to increasing the security of our country. Every morning at 8:30, I sit in a staff meeting where there is a representative from every component in the Department. We go around the table, and each component says what they're doing that day, just to give a heads up for everybody. You hear about improving security at the airports, and what the Coast Guard is doing in terms of interdicting migrants in the Caribbean, and things from ICE, the Immigration Customs Enforcement, increasing the integrity of our borders, and the FEMA people talking about natural disasters. We just go around the table.

The bulk of our work is to improve security. But in all of the work that we're doing, we're committed to this proposition, that in all we do to enhance security, we must accomplish our goals in ways that enhance our civil rights and civil liberties in this country. We are committed to pursuing strategies that will not infringe on our personal liberties. We're committed to that.

As a corollary to that, we are committed to improving the integrity of our immigration laws and strengthening our borders, while also maintaining a society that welcomes immigrants and recognizes the valuable contributions that immigrants make. That is a tough proposition, but it can be done. We're committed to following through on those two core convictions.

You've already heard about the President's commitment to these issues. Secretary Ridge says it over and over again. He said in one speech, "We will not, as Benjamin Franklin once warned, trade our essential liberties to purchase temporary safety." I actually have so many quotes from Secretary Ridge on this point, I don't know which one to use next. He repeatedly emphasizes this theme to us. We must proceed in this fashion. We must increase security but maintain our commitment to protecting constitutional rights.

Asa Hutchinson, who's one of our senior leaders and, I might add, a Federalist Society member, put it this way to the Senate Judiciary Committee this summer. He said, "Our core mission at the Department of Homeland Security is not just to protect America's assets, our buildings and our airports and our power plants, but to protect America and our way of life. We must protect those things that make us a shining city on a hill, like freedom of speech, and freedom of worship, and the right of dissent, and our personal property." So our senior leadership is telling our people, "Your core mission includes the protection of peoples' civil liberties."

So, how do we operationalize that commitment? I'm going to give you a couple of answers, then hopefully we can go to your questions and maybe spell that out some others over time. The first answer I have in terms of how do we operationalize that commitment, is a process answer. The answer is that the Administration has placed in the senior leadership of the Department of Homeland Security two different people whose

sole job is to look at civil liberties issues. Two people in the senior leadership who do nothing else than focus on these issues. Our first person who plays that role is our Chief Privacy Officer. Her name is Nuala O'Conner Kelly. She is the first statutorily-mandated privacy officer in the federal government. Her specialty is to advise the senior leadership on information and data issues: how do you collect information, how do you store information, how do you release information that protects people's liberties and complies with the Privacy Act?

The second person in the senior leadership is the person who sits in my role, the Officer for Civil Rights and Civil Liberties. My role is to participate in strategic planning with the senior leadership as we go through the immigration issues, and the emergency preparedness issues, and the intelligence gathering issues, to make sure that we're making those decisions in a way that's consistent with civil rights and civil liberties.

So I tell people I have the best job in government. It is fabulous to talk through some of these issues with people and give them advice on how to make them work. But we're talking about the issues that Tim brought up, the detention of aliens in a context like post-September 11 and if a situation like that were to happen again, the treatment of illegal immigrants who are unaccompanied minors. What do you do with kids at the border? The New York Times did an excellent article on this, a chilling article on this, last week about how we handle it. How do we deal to access to counsel for immigrants, and all sorts of immigration-related issues?

We're also dealing with our law enforcement academy and how do we strengthen the teaching that the law enforcement students get in terms of constitutional rights and civil rights and civil liberties. We're talking and thinking about racial profiling and how do we tell our guys and our women out on the street out in some canyon in Arizona that we are opposed to racial profiling, here's what that means to you and your situation.

So just a variety of issues. We're dealing with biometric identifiers and what does all that mean in terms of national ID cards. Where are we going on that sort of issue? All of those sorts of things.

So the first evidence of DHS's commitment to these issues is there are people who are assigned to be sitting there in this department thinking through these issues.

A second issue that I'll mention is the one that Tim talked about which was how we look at immigrants, how are we going to deal with immigrants who are suspected of involvement in terrorist activities such as the Pent Bomb investigation, the investigation that took place after September 11? If and when that happens again, how are we going to handle things?

As Tim told you, the Department of Justice Inspector General this summer issued a report that criticized the way the Justice Department and the FBI handled the arrest of aliens after September 11. The allegations in the report were that the people were not given charges or reasons they were arrested. In other words they were detained without knowing why they were detained. They weren't served any notices against them. They were categorized as part of the September 11 investigation in a haphazard way, according to the allegation. Decisions about how you get off the list were not made in a timely way, and there were harsh conditions associated with some of the people who were detained.

Again, I'm saying that these are allegations. I'm going to get to that in just a minute. I talked to a scholar or advocate who follows these issues closely, who has actually written a long report. She had a very interesting perspective on these issues. I

can't use her name, because I'm not sure she would want this for attribution, but here's her comment: In the months, the weeks and months after September 11, you can forgive almost everything. You know how difficult those days were. Then you had anthrax on top of it. From the immigration standpoint, we had detention facilities that no longer existed. One of the key goals or successes of the first week was we were able to get all the immigration detainees out alive.

You don't even know where the court is these days. So in the weeks and months, her comment was, after September 11, you can forgive almost anything. She said the true test of our society and our commitment to civil rights and civil liberties is once things calm down, will we engage in a period of reflection and reevaluation? Did we do what was right? And what are we going to do now in case something like this happens again?

I can tell you, it's my opinion, that we are passing that test with flying colors. The Administration, at all levels, along with Congress, and think tanks, Inspector Generals, commentators, are really using these last critical several months to do some reevaluation and rethinking.

We do not agree with all that was in that report, the Department of Justice Inspector General report, by any means. But we have spent the last several months trying to come up with new policies and procedures so that if that situation happens again, somebody's going to know why they're arrested, they're going to have access to counsel, and they're going to have proper detention facilities and conditions.

We've already put in place a number of policies and procedures that are going to resolve that. In the next few weeks we're going to announce some more.

I've taken all of my time. Again, there are a number of different issues that we could talk about, and I'm more than willing to, happy to, take your questions. One thing I'd like to say is we are the new kid on the block. I am interested in hearing from people over time. So if any of you have thoughts, comments, critiques, ideas, please contact me or people in my office. We'd love to have this conversation over a long period of time.

Thank you.

MR. LEITCH: Thank you very much, Dan. It's very interesting, and it must be exciting to try to put together a new organization.

Our last speaker before we open it up for some debate and questions from you all is Greg Katsas. As I mentioned earlier, Greg has the privilege of standing up in the courts of this country representing government and defending some of the things that it's done. He usually speaks to audiences of one or three, but I'm thrilled that you're here today for a larger audience. Thanks.

MR. KATSAS: I am not an immigration lawyer or expert, but I have been involved in some of the cases that we've seen in the Justice Department involving challenges to what we've done so far, so I thought I would talk a little bit about a few of the cases that have arisen. We haven't really seen cases yet, at least at the appellate level, involving the PATRIOT Act and some of the post-September 11 provisions. I suspect that we will.

But the first generation of cases really arose out of responses by the Administration and the Justice Department in the immediate aftermath of September 11 under pre-existing law, immigration and other law, of long standing duration. The

government did two relevant things in response to September 11 that gave rise to these cases.

The first was simply to engage in the vigorous enforcement of immigration law. Why? The answer seemed to be self-evident. We had faced a catastrophic event directed from abroad by hostile quasi-government entities, perhaps working in conjunction with hostile governments. Nineteen out of the 19 hijackers were aliens from abroad. And most importantly, in the aftermath of September 11, the government didn't know how many more aliens might be present in sleeper cells sent here by al Qaeda and so on to do us further harm. In response to that, the Attorney General, the Department invoked existing immigration authority both to remove aliens from the country, possibly dangerous aliens, and also to detain aliens pending their removal. That authority is long standing, and it does not depend on the government proving that the alien is in fact a terrorist. We've been criticized to the extent that not every alien detained is a terrorist. Well that's not a requirement in the law; it never has been, and it isn't today.

The next significant aspect of the government's response in enforcing immigration laws was also to control access to sensitive information about the terrorism investigation and about the immigration enforcement that arose out of it. Why did we do that? Because the senior law enforcement experts, both in the FBI and the Criminal Division of the Department, people in the government with responsibility for intelligence operations, the experts in the field, were concerned that in dealing with an entity of the size and with the resources and resourcefulness of al Qaeda, that such an entity can track an investigation, has intelligence gathering capacity, and most importantly, if they can track an investigation, they can adjust their conduct and their future attack patterns depending on what the government knows and is doing, and even more importantly, depending on what the government doesn't know and isn't doing.

In response to that kind of concern from the law enforcement experts, I think it would have been breathtakingly irresponsible for the policy makers in the Department to do nothing. They didn't do that. They responded. They chose to take this concern seriously. Then our job as litigators was to defend those decisions in court. That's what we've done, pretty much successfully so far.

The cases that arose in response to this I think Tim has mentioned most of them. The categories of information that have been at issue in the cases are the list of names of the aliens being held in connection with the terrorism investigation. The ACLU and various other groups filed a FOIA request for the list of every alien held in connection with the investigation, as well as other identifying information, such as where they were arrested, when they were arrested, where they were held, when they were let go, and so on. The Department refused the FOIA request under the law enforcement exemption because of the concerns from the law enforcement experts that I've mentioned. Suit was filed in the District Court. Judge Kessler agreed with our position with respect to identifying information, such as names and places of arrest. She credited our theory that that kind of information would be damaging to give out to people who track an on-going investigation with the intent of frustrating it.

She disagreed with us as to the list of names, ordered us to release that. We appealed that portion of the judgment to the D.C. Circuit and prevailed in the D.C. Circuit. I see Judge Sentelle has left. I would have said anyway it was a fine opinion. A couple of interesting features of it from our perspective: The court recognized the

importance for courts in dealing with sensitive law enforcement and foreign policy and terrorism related issues to give a lot of deference to the judgments of the experts in the Executive Branch who are responsible for making each and every one of us safe, or as safe as possible any way.

Private litigants tend not to be particularly good at making those judgments, with all due respect. Nor are the courts. To the extent anyone can make those very difficult calls, it is the people responsible in the Executive Branch and the D.C. Circuit. They struck a very nice balance between, on the one hand, recognizing the need for judicial review and compelling us to come into court and defend what we're doing, which we did, but at the same time, understanding that the concerns and predictions of harm are best made by the Executive officials responsible for protecting the country.

The court also recognized the validity of what we call the mosaic theory of harm, which is that there can be a lot of individual pieces of information that considered in isolation look pretty innocuous; for instance, in this case, location of arrest. It might not seem terribly significant that some particular alien was picked up on a particular date outside New York City. But it may be tremendously significant to a terrorist organization to know, for instance, that dozens or hundreds or whatever of aliens have been picked up in greater New York, let's say, and very few, for whatever reason, in Los Angeles. That's obviously useful information for terrorist groups trying to figure out what we know, what we don't know, where we're looking, and so on.

Finally, the court recognized, frankly, the enormous stakes of what we're talking about. I think September 11 did change everything. One of the things we learned was that the cost of being wrong in making some of these judgments can unfortunately be far more catastrophic than anyone had realized before.

We based another series of cases brought by newspapers making claims under the First Amendment seeking access to immigration hearings. The government had closed the hearings of aliens connected to the terrorism investigation, again essentially on the same rationale that those hearings could foreseeably provide information about the nature of the investigation and that there was no good reason to take the chance that harm could come from that.

The newspapers raised First Amendment claims under a case called *Richmond Newspapers*, which had held that criminal trials have to be open to the public except in rare circumstances. We said immigration hearings were entirely different. The case had a range of issues illustrating the overlap between immigration law, specifically issues of national security as such, and general administrative law principles.

We had arguments about the nature of administrative hearings generally. We had arguments about the nature of deportation hearings in particular. For much of our history deportation has been done very informally through the Executive Branch. That, under the relevant doctrine, would tend to support a conclusion that they need not be opened as a criminal trial would have to be opened.

One of the points we tried to make to the courts was it would be a perverse example of no good deed going unpunished if the government were forced to open hearings that could have previously been closed under the old information model because the government has voluntarily undertaken to provide aliens in deportation hearings with more protections than they are constitutionally entitled to. It didn't seem right to us that when the government chooses to do more than it has to with regard to procedures like the

right to a separate administrative law judge, the right to present evidence of record, and so on, that start to make something look more like a trial, that the price of that should be, being constitutionally compelled to make these administrative proceedings like trials in every relevant way.

We lost on these issues in the Sixth Circuit. In connection with the immigration hearings of one particular alien, the Sixth Circuit essentially analogized administrative hearings to trials, said that the framework governing criminal trials applied, which means that we would have to justify closure under strict scrutiny. The court recognized, obviously, the compelling government interest in fighting terrorism, but struck down the closure of all the hearings on the theory that maybe we could have tailored something a little bit more narrowly.

We prevailed on the issue in the Third Circuit, which adopted most, although not all, of our legal theories. They recognized that traditionally immigration hearings have been far different from trials in court. They recognized the perverse incentives point that I mentioned a minute ago. And they recognized a very important point, often overlooked in some of the cases decided under this line, that when you make judgments about the benefits of openness, everyone recognizes the benefits of openness. But to make the inquiry complete and fair, you also have to ask yourself questions about the costs. The court undertook that in reaching its judgment and ruled in our favor and upheld the policy of closing these hearings in order to protect the country.

Just briefly, I'll mention another litigation issue we're facing unrelated to this set of issues, but an illustration of the point that in the post-September 11 world a lot of questions of immigration law, what look like technical dry questions about obscure provisions in the INA, can have very significant ramifications for dealing with the terrorist problem in general.

We're facing a series of cases generally involving the question of removal to Somalia. The statute on point addresses countries to which aliens can be removed. It specifies about nine different kinds of countries, the country of which the alien was a citizen, the country where the alien was born, and so on. Some of the subsections talk about acceptance of the country to which we're removing; other's don't. The Ninth Circuit held that the statute incorporates an across-the-board acceptance requirement and that Somalia, precisely because the conditions in that country are so bad right now, not only has refused to provide acceptance, but is legally incapable of doing so. The upshot of that is that under the Ninth Circuit rule, the government presently cannot remove any of thousands of aliens to Somalia, including people who fail to qualify for asylum and withholding of removal and the various humanitarian programs that are built into the statutes precisely to protect deserving individuals from being removed to dangerous places. The basis for the court doing that was precisely the kinds of conditions that allow terrorism to grow.

We're in the middle of litigating these issues. We've lost in the Ninth Circuit. We've won that issue in the Eighth Circuit. It's pending in the Fifth Circuit. I don't know how it will all come out. But it does seem to me a good example of the point that in the world in which we now live immigration law in many respects intersects with the terrorism concerns that we all have. Thank you.

MR. LEITCH: Thank you very much, Greg. I'm sure none in our audience can imagine the Ninth Circuit adopting a broad, novel, and unworkable rule for anything, but thank you for your report.

I think that given the time we have left, we'll go straight to questions if that's all right, unless you have anything in particular that the others said that you'd like to respond to. Tim?

MR. EDGAR: Well, very briefly, because I see there are so many questions. I just wanted to hit a few of the highlights of the cases that we won since they were glossed over in that presentation.

Judge Kessler, that was actually a very interesting description of her. She basically ruled in our favor. She said that secret arrests are odious to a democratic society. Her view was that whatever techniques or methods the government needs to protect national security, arresting somebody and not telling us or not letting anyone know that you've done it is just not one of them in a democratic society. We certainly agree with that.

The Sixth Circuit had a very similar statement in its opinion which, as you just heard, was not overturned and remains the law, which is that democracies die behind closed doors. Again, our view is that when you're talking about the liberty of an individual, a person who has been deprived of liberty by the state, that you simply cannot keep that secret. That is not a novel position. That is the position of Alexander Hamilton in the Federalist Papers who said that the most dangerous engine or the dangerous engine of arbitrary government is the ability of taking somebody in jail and not telling anyone that you've done it.

So we think that if those arrests had been more open, if we had been given the chance to see what those charges were, what the names were, helped get attorneys, that many of these problems would not have taken place. I think that there is a difference between deference and abdication. Deference to the judgments of national security personnel has always been the government's position in times of crisis, and it has led us to make some very serious mistakes.

I hope that we can get away from the idea that the courts can't evaluate government policies to decide whether or not the arguments have merit. I think that they should evaluate them on the merits.

MR. LEITCH: Greg's chomping at the bit here.

MR. KATSAS: Yes, chomping at the bit. Can you all hear me? The FOIA request at issue was for the names of individuals held in connection with the terrorism investigation. Our concern was not with the fact of detention. It wasn't as if a jail keeper had been asked to release a log of everyone held in the facility. The sensitive information that we sought to protect is not the fact of detention, but the connection to a pending law enforcement investigation and the proposition that such connections are FOIA-protected information is very well settled.

MR. EDGAR: Now wait a second, you did oppose the release of the log. You proposed exactly precisely that thing in the New Jersey case, the release of a log of everyone who was arrested.

MR. KATSAS: The FOIA request was for people, individuals detained in connection with the investigation. Our concern was the latter half of that.

MR. EDGAR: The FOIA request was that, but the other litigation, they took the position -- I want to make it clear -- that they could remove the name of someone who was arrested on an immigration charge from the normal process that was used to show when hearings took place and so forth. They did not take the position that they could have all of these hearings and release the information the way they would about everyone else. This was not that everyone was treated as if they were in a normal hearing process and then we wanted to know secret information. This was about the fact of detention itself.

MR. SUTHERLAND: Objection, Your Honor, they're belaboring the point.

MR. KATSAS: We're belaboring the point.

MR. LEITCH: I have a feeling we're not going to work this out.

MR. KATSAS: I have a response, but I'll defer to the questions.

MR. LEITCH: Let's get to the questions, unless you all want to enter this debate. The record will speak for itself, I'm sure.

MR. EDGAR: Read the opinions.

MR. LEITCH: Yes?

MR. MITCHELL: My name's Sean Mitchell from the Colorado chapter, and I'd like to preface my question by thanking Mr. Edgar and any number of speakers from different points on the political spectrum for coming to Federalist Society events and making the discussion much more profound and introspective and reflective than might otherwise be the case.

I should also tell you, however, Mr. Edgar, that while I'm out in Colorado, I'm staying in the home of Congressman Tom Tancredo, and I bring you greetings from the royal court.

MR. EDGAR: Well, we can never give up hope, can we?

MR. MITCHELL: Actually I haven't discussed immigration with him, but he did tell me about a prayer meeting with John Ashcroft the other day. I hope you're enjoying your last few days of freedom.

MR. LEITCH: Do you have a question?

MR. MITCHELL: I do.

MR. LEITCH: Okay.

MR. MITCHELL: Mr. Sutherland made the point that September 11 was a turning point; it changed everything. I guess fleshing that out, what it might suggest is that reasonableness almost always needs to be judged in context. The mass killing that results from what our enemies have in mind for us suggests a different context. When a soldier's on the battlefield and returns fire, he doesn't go through a due process analysis about who's on the other side of his rifle. He fires because it's reasonable.

Similarly, when a cop is responding to a disturbance and sees threat, he responds to protect people. He does things that may or may not be consistent with adjudicating guilt and sentencing someone to incarceration. With that much of a preface, isn't it reasonable that in the war on terror, our government will do things in a protective mode that are different from or not necessarily the same as what they would do in adjudicating, pursuing criminals, and getting convictions in American court? In some cases, those kinds of things might be justified, as benign as an example as pay more attention to a young man from Syria than to a 70-year-old lady from Finland.

MR. LEITCH: That's your question for Mr. Edgar I take it?

MR. MITCHELL: Yes.

MR. EDGAR: Well, your question reminds me of an opinion that I read because it had to do with military tribunals, not something we're discussing here. But in the concurrence in that the government had basically made an argument that they could keep Hawaii under martial law, which had existed throughout World War II, throughout the Cold War. They basically said, "We're in an age of atomic warfare and everything has changed. We can blow up millions of people in an instant. We can't afford to keep our constitutional traditions." The Supreme Court rejected that argument, and Justice Frankfurter said that that was an excuse unworthy of our traditions, that we had an obligation to uphold our basic principles of justice, and that that would be true in this age of atomic warfare or perhaps at some future date when some other form of warfare was invented. It just struck me as being so prescient.

Obviously, there's going to be a balance between security and liberty. But the concern that I have is that this analogy of the war on terrorism just becomes the fall back position where it's used to make this analogy to the conditions on the battlefield where of course it's true that a soldier kills another soldier without any due process. Then they say, "Well then in areas where due process does obtain, we're going to modify what we mean by that." I think it's a very dangerous theory, and I hope that we can move away from it.

MR. LEITCH: Other thoughts from any of you on that question? Next question.

MR. LEVEY: Hi. Curt Levey, Center for Individual Rights. I also want to thank Tim Edgar, my law school classmate, for coming into the lion's den.

Tim, I actually am sympathetic with a lot of the issues the ACLU has raised since 9/11, including the very point you just made, which is it's too easy to just yell the word terrorism and say that that's enough to make exceptions to constitutional rights. However, it seems to me that one of the reasons that a lot of these, what we would probably agree are threats to civil liberties, have been so well tolerated by the American people is that there was the feeling among the American people that the immigration laws were just being completely flouted. The ACLU, wrongly or rightly, was seen as apologists for that if not active participants in it.

So I guess my question for you is, would the ACLU and like-minded groups perhaps be more effective if they said we're all for enforcing the immigration laws. We're against illegal immigration. We're against over staying your visa. Those things are, of course, illegal. However, we make a clear distinction between that and something that's completely unnecessary to enforce those laws, which is keeping people indefinitely in detention without access to lawyers, without charges, without really any sort of due process?

MR. EDGAR: Well, I seem to be getting all the questions. Basically, that is our position. We are not opposed to the enforcement of the immigration laws. We believe that people who are in violation of their status can be arrested and detained and deported by the government if due process is respected. We feel that immigration reform, whether it involves greater enforcement, or whether it involves amnesty of some kind, is an issue for Congress to decide. We think that it's important that access to the courts and judicial review and civil liberties of all people be upheld.

So I understand that there's a debate in this country about immigration reform. Our position has really been that however you choose to go as a society about enforcing the immigration laws, you have to respect basic constitutional rights and freedoms in doing so. I think it's an open question given our pluralistic society and our dependence on immigrant labor and all the other political pressures that exist whether it's possible for this country to deport all nine million illegal immigrants. We're not going to say that you can bend the constitution because it makes it easier for you to do that. We're going to say that it's something the government has to respect, these rights and constitutional freedoms, in pursuing whatever policies Congress chooses in terms of immigration, and if for whatever reasons Congress chooses to allow this situation to exist, it's no excuse for bending those constitutional freedoms.

MR. LEITCH: Next question.

MS. MARKOWITZ: My name is Crystal Markowitz. I'm from Oklahoma. As much as I enjoyed your speech, Mr. Edgar, my question is probably more directed to the two gentlemen on this side. It's about the California drivers' license situation.

I think we would all agree that drivers' licenses are the single most accepted form of identification, and because they're issued by a government, they lend an air of legitimacy to the person holding it. So it really bothers me that California is considering giving drivers' licenses to people who have snuck into our country, maybe for benign reasons, but maybe for malicious reasons. We don't know.

So I asked my congressman, "Is Congress going to do anything about this?" He said, "No, because drivers' licenses are a states' rights issue." So I asked my state representative, "Is Oklahoma going to refuse to acknowledge California drivers' licenses?" He said, "No because drivers' licenses have to be acknowledged under the Full Faith and Credit Clause.

So is anybody else at all bothered by any of this?

PROFESSOR ZIGLAR: I have a very negative reaction to any state, as a matter of policy, granting a driver's license to someone who is here in an illegal status. Just like I have a negative reaction to the consular matricular cards issued by the Mexican government. Two reasons: number one is because if that driver's license that is issued on the matricular card is recognized, that is in effect de facto status. I don't think that we ought to be granting de facto status, in other words, back-dooring it.

Secondly, if we do that, we are simply delaying the inevitable and making it much more difficult for us to bring some rationality into our immigration policies. Tim is absolutely dead right. Our immigration policies are so outdated, outmoded, they don't reflect the realities of the day or demand side of our economy that has created the problem we have with illegal immigration.

As you probably know if you've ever studied immigration history, immigration is the one area where the judiciary and the executive is the most deferential to the Congress. That's the area of immigration. Shame on Congress for allowing these laws to be like they are for so long, because they have driven us into this illegal immigration situation.

I don't think states ought to be doing that. I think it creates de facto status. I'm very much against that. That's my personal view of it.

MR. LEITCH: Dan, is this something the Department of Homeland Security is working on?

MR. SUTHERLAND: Yes, as a matter of fact, we are working on it. Since we are currently working on it, I probably shouldn't discuss it in any further depth than that. But your question, your general point was is anybody else concerned about this? Yes, a lot of people are very concerned about that whole issue.

PROFESSOR ZIGLAR: God, I loved it when I could say, we're thinking about it; I can't talk about it.

MR. LEITCH: Yes.

MR. FRIT: Adam Frit, University of Virginia School of Law. My question may be a little outside the scope of what was talked about during the panel, but I think it's interrelated and certainly relevant.

Mr. Ziglar made the distinction that the 19 were non-immigrants, not illegal immigrants, and while that may be important in some aspects, either way they got visas to come into the country somehow.

PROFESSOR ZIGLAR: From the State Department.

MR. FRIT: That's my question. I was hoping someone on the panel could address how the INS, or maybe the new Department of Homeland Security, is working with the Department of State to overhaul or make changes to the consular process of how people get into the country before they become an immigration problem. Thank you.

PROFESSOR ZIGLAR: I'll lead the answer on that, then turn it to Dan, because he's more current. Under the Department of Homeland Security Act the policy aspects of visa issuance is now under DHS. The execution of the visa process is under the Department of State. So the criteria, the questioning, the forms, the vetting, what level of security checks will be done, is all up to the Department of Homeland Security. So that's probably going to create, in the short term, some real disconnects and some real turf battles, but it's probably not a bad idea because the Department of State is much maligned, sometimes unfairly, sometimes fairly, but they have a different perspective on visas than others do. The thing is to find a balance between serving the needs of having people come into the country -- students, and our economy, and the cultural diversity, all those things -- and not PO-ing other countries because we're messing with their citizens on the one hand, and on the other hand the security concerns that we have about people coming in like the 19.

There was no information in the hands of the State Department or in the hands of the INS when they came through that border about any of those 19. As we know, there was some information out there in the hands of the CIA. But it had never been put into the IBIS system or in the TIP-OFF system until after these guys were already in the country. The real key to this whole thing is intelligence gathering, smart intelligence gathering, smart intelligence sharing, and real time analysis of it. That's the way that we're going to get to this problem, no matter who's in charge of it.

MR. SUTHERLAND: In terms of the State Department-Homeland Security relationship, if I can just do a little alphabet soup for a moment. We just signed a memorandum of understanding, an MOU, with the State Department about that process. We have opened an office in Saudi Arabia to help strengthen that effort in terms of screening at the initial stage.

There are a lot of issues about the integrity of the immigration system that we need to be addressing and are trying to. We've put in place a new system called CVIS, which is related to students, foreign students who are coming here. They need to register where they are -- theoretically all in one database. People must actually take the courses they said they were going to be taking, and they're actually at that place that they said they were going to be.

We're also working on a system called US VISIT, which is an entry-exit system. When someone comes into the country, you register; when you leave the country, you register again as you've left. There should be some integrity that will be felt in the system. So we have a variety of programs like that that we're trying to put into place to address the issue you're talking about.

PROFESSOR ZIGLAR: May I make one comment about CVIS and entry-exit or US VISIT? Dan said the whole world changed on September 11. I don't tend to agree with

that kind of global description of it. We have terrorism all over the world, and that change was a fact that we even now are joining the nations that were suffered for that. We changed because of our perspective on that.

But the fact is that the entry-exit system was mandated in 1996 IIRAIRA. The CVIS system was mandated in 1996 IIRAIRA Act, but was never funded by Congress. But the fact is that Congress had already looked at this as an enforcement mechanism and as a better way of keeping track of people coming in, probably to deal with the overstay problem more than anything else. But there was a terrorism element to IIRAIRA that was part of the entry-exit and the CVIS system.

So what happened was September 11 was like hitting the old mule in the head with a two-by-four. It got Congress' attention. Then they decided they wanted it done. Of course, the day after they appropriated it, they kept calling, is it done yet?

But the fact is that it was there before September 11.

MR. LEITCH: Next question.

MR. MASUGI: Ken Masugi, the Claremont Institute, picking up on this line of questioning of post-9/11. I think we've always had to deal with forms of subversion since 1776. I think we've had very effective ways of dealing with it, but unfortunately, some of the problem is that I don't think we have a reliable history of how we dealt with it. At any rate, I'd be happy to receive recommendations.

For example, the munitions explosion of 1960, and the answer to that and many of our reflections on this. The one episode I'd like to focus attention on is the relocation of Japanese during World War II. I think there's been a great deal of nonsense written on this subject, perhaps paralleling the nonsense that occurred while it happened. I think there were some very good reasons to have such a drastic relocation of people, such a drastic curtailing of civil liberties.

I'm certainly not justifying that. Certainly most of the people who were responsible for the relocation realized that most of the people they were relocating were perfectly innocent. But I think there was also some evidence, not just anecdotal, that a lot of these people intended harm to be done. It wasn't easy to distinguish who they were.

I think the more we are ignorant of the history of how we dealt with foreign subversion in the past, the less effective we're going to be, whether going too far in one direction or the other post-9/11. So I think what we need first of all is a good history of how we dealt with foreign espionage in the past as a means of dealing with it. Obviously the best way to deal with it is having a tough foreign policy.

MR. LEITCH: Anybody want to respond?

PROFESSOR ZIGLAR: I would respond to you and say a study of history, the Internal Security Act and Emergency Detention Act, the Subversive Activities Control Act and that whole period, will give you an indication how at least legislatively we responded in that kind of environment, to the of subversion. It's a pretty broad question to ask.

MR. MASUGI: Well, I think the resources we can draw on are pretty broad, the Civil War through the 1790s. So I think the more we portray that history as one of keystone

cops or racism, I think the more we need information in formulating an effective response.

MR. LEITCH: With respect to the gentleman in line, it's now 3:23, and I know some of our panelists have to leave, so I'm going to split the difference here and thank them all for coming. I'm sure some of them can stay to discuss some questions you might have afterward, but I know a couple of them have very tight schedules.

I think Dan said that he quoted someone to say, anything could be excused in the days and weeks after 9/11 so long as it was subject to reexamination and reflection. I don't know that everyone agrees with the first part of that statement, but I think we've accomplished a little bit of the second part today, and I thank you for coming.