

Transcript

Intelligence Collection and Law Enforcement: New Roles, New Challenges

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Panel 1 of 3

Intelligence Collection by State and Local Law Enforcement

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Faiza Patel:

Thank you all for being here today. We've now had our keynote speeches and we're going to turn now to the panel portion of the day. The first panel, which is this one, will be looking at the role of state and local law enforcement agencies in intelligence collection. We have a very, very distinguished set of speakers for this panel, and they represent a variety of perspectives.

I'm going to introduce them each just as they're about to speak, and I know we have a great audience here as well so we're going to be sure to

leave some time for questions at the end. I'm going to keep my remarks really brief since we're a little bit late, and I know we all want to hear from our panelists. Just two things that I wanted to point out. One is that since 9/11 we have seen a paradigm shift in two ways.

One has been the increased focus on intelligence collection, which we've all talked about and heard about earlier today, and the second has been the recognition that state and local law enforcement are really – are frontlines in the battle against terrorism, and this sort of makes sense when you look at the numbers.

State and local law enforcement comprise 200,000 agents compared to the FBI's 13,000. The New York City Police Department alone has 1,000 agents dedicated to counter-terrorism, although that is the largest in the country for municipal forces, and the other thing – the other reason why this really appeals to people is because state and local law enforcement tends to have deep relationships with the communities it polices.

So that is thought to be an added benefit for purposes of counter-terrorism work. The second thing I wanted to do is just list quickly some of the forms of cooperation between state and local law enforcement and the federal government has taken in the past.

The first one, I think, is the one that we're all familiar with which is participation in the FBI's joint terrorism task forces, which are operationally focused teams made up of personnel from federal and from state and local law enforcement agencies. There is about 100 of these JTTFs today. The second is the DHS funded state operated fusion centers which serve as clearing houses for information collected around the country.

The last statistic I could find was that there were 72 such fusion centers but Kara might correct me on that. The third thing is the Suspicious Activity Reporting System, which many of us call SARS, and this is a system by which state and local police departments collect information both of a criminal and a non criminal nature, which is fed into a local database, is vetted by a fusion center, and then is available more widely to the intelligence community.

Finally, you know, we've had anecdotal reports that state and local PDs have reconstituted the intelligence capabilities that were dismantled after the 1960s and, sorry, '50s and '60s, and we'll be talking more about this history over lunch with Fritz Schwartz who was counsel to the Church Committee which investigated some of these abuses back then.

So to talk about what all of these developments mean for our security, for our civil liberties, and perhaps even for our federalism we have a remarkable panel of experts and practitioners. Our first speaker is Professor Matthew Waxman of Columbia Law School. Matt has had an illustrious career. He started by clerking for Justice Souter on the Supreme Court, and he served in key national security positions in Washington, including at the State Department and at the National Security Council.

He's since moved to New York where he teaches international law and national security law at Columbia Law School; and in 2009, he published an excellent piece on the very topic that we're talking about in the *Journal of National Security Law and Policy*, which I hope all of you will read. Matt?

Matthew Waxman: Well, thank you very much, Faiza. Thank you for inviting me and thanks to the Brennan Center for hosting this event. I'm going to kick things off on this panel with four general points that are of interest to me, and I hope to learn something from the other panelists about these issues. My first point is about the nature – sort of the future structure of our domestic intelligence architecture, which I think is inevitably going to feature very heavily – the government at the federal level but also at the state and local levels.

And I think the nature in particular of our American federalist system means that some involvement of local law enforcement in domestic national security related intelligence work is inevitable, and it's going to take quite a bit of time to figure out exactly what that system – exactly what that architecture – exactly what that relationship between the federal government and state and local governments are going to look like.

And that's because, unlike some democracies like Israel that have national police forces, or Britain and Germany that have regional police forces but with a fairly high degree of uniformity in the way that they're structured among just a few dozen agencies, here in the United States we have historically a very localized, decentralized, heterogeneous policing system. We believe in localized law enforcement, localized policing, but depending on how you count, there are about 17,000 individual law enforcement agencies here in the United States.

And so there – since 9/11, there have been a number of models created for trying to link them together as well as to link them to the federal government, and we've already heard from Faiza some of these and we'll hear some more of them. These include joint terrorism task forces to help coordinate local investigators with the FBI, fusion centers within each state to try to consolidate and analyze information and help share it,

information and data sharing initiatives between and among jurisdictions, training programs from the federal government on down to the state and local government.

But because of the great diversity in our law enforcement system, the way this is going to play out in practice, even if we have these fairly generic building block programs, the way they're going to look in individual jurisdictions is going to be very, very different, and that's because law enforcement and the shape of it differs so much from jurisdiction to jurisdiction.

So, you know, I – what happens – the way law enforcement intelligence looks in New York City, which has an intelligence capability that rivals that of many powerful states and also has a very sort of target rich environment, large ethnic communities, et cetera, is going to look very different than the roughly 800 police jurisdictions in the United States that have one uniformed officer.

In addition to just mentioning this kind of diversity the way I think we're going to have a very uneven and textured sort of intelligence and national security law landscape across the country, I also mentioned this diversity because it makes this a very difficult problem to research, and in that regard I really commend the work of the Brennan Center in some of its recent reports which do a great job of bringing together some important information about what's going on in a variety of different jurisdictions.

It's often easy to find out in some very high profile jurisdictions like New York what intelligence looks like, or you can get information that's at a very, very high level of generality that names the kind of programs that I just talked about. But if you really want to understand how things are going on on the ground, it's very difficult to research, and I think the work that the Brennan Center has done already and the work of today's conference I think will be very, very useful in filling in some of that detail.

My second point is that the future architecture – intelligence architecture here in the United States is going to depend in part on the evolution of the terrorism threat. There is one future terrorism threat scenario that says that the thing we most need to worry about is organizations like al-Qaeda, that even though they're decentralizing and dispersed to some degree, we're talking primarily about foreign terrorist organizations that have some organizational coherence and are largely organized and operated and funded abroad that may be trying to launch attacks into the United States.

That's one possibility. Another possibility is that we're going to see the growth of so-called homegrown terrorism, much more indigenously organized – self organized smaller groups of individuals here in the United

States, or we might see some combination of the two. The reason it matters for thinking about the future of our intelligence architecture and especially the role of state and local institutions is because the federal government and state and local governments each have different comparative advantages.

The federal government has certain comparative advantages including its knowledgebase, technical capabilities, for example, monitoring large masses of communications, a very rich – robust network of relationships abroad with foreign intelligence services, et cetera, and those kinds of comparative advantages, those tools are particularly well suited for dealing with organized transnational terrorist threats.

On the other hand, local law enforcement, when it comes to intelligence has its own set of comparative advantages. These include personnel resources, familiarity with local communities in part because local police, local law enforcement officials tend to be deeply embedded in communities and stay there for a long period of time, and therefore they build networks of relationships. Those types of relationships may be especially important for dealing with some types – not all types, but some types of the more home grown terrorism threats.

While I think both type of threats in combination pose a future challenge, the balance of those threats, what the future terrorism threat looks like five years, ten years, fifteen years down the line is important to understanding what our organizational architecture and what the relationship between local law enforcement and the federal government should look like. My third point has to do with how much state and local policy variation and discretion we ought to see in an area like national security and counter intelligence – I'm sorry, counter terrorism intelligence.

You know, those of us who study law – study constitutional law, I often think about issues of federalism and there are some well known advantages and virtues of our decentralized federal system. These include the idea that state and local governance can provide some advantages. They can provide a check on the consolidation of power at the federal government level. They can provide for greater accountability because of the close proximity between government officials and the governed.

It can result in some experimentation, innovation, and learning as different communities, different states are able to adjust their policy according to local context and therefore perhaps generate knowledge – generate ideas that may be transferable to other jurisdictions. So sometimes perhaps diversity among jurisdictions is good. This is not a set of virtues that we normally associate, I think, with national security, intelligence, and counter terrorism because we're so used to thinking about national

security and counter terrorism – national security in particular as, well, national.

We don't think about it as a state and local function, so we're not used to thinking about these types of possible virtues of our federalist system, and so the questions that I'm interested in studying and also hearing more about today are things like if these virtues of federalism are applicable here in the realm of intelligence. How so and how do we structure the relationship between the federal government and state and local government in order to promote them rather than inhibit or squelch them?

Are there opportunities, for example, for states and localities to experiment and innovate in this area, and then for other jurisdictions to learn from that experience? I think this may be especially important given the diversity of context in which intelligence takes place at a local level and also because the same agencies at the local level that may be performing intelligence functions, let's say law enforcement, also have other very important jobs to do including crime prevention, basic law and order, other community services that they provide.

And so one of the things we need to think about, how do we get better, is allowing local law enforcement to continue to perform those traditional functions well while perhaps also assuming a national security or counter terrorism intelligence function. And then the fourth point I would just end with has to do with the question of oversight.

And I think, you know, when most people hear the word oversight, they think about it in terms of preventing abuse and protecting rights, and I think that's one important element of oversight in the intelligence and counter terrorism context, but oversight is also critical to policy effectiveness, including national security effectiveness. Oversight is important to efficiency, to using resources well and ensuring that policies are not misguided and perhaps causing more problems than they're solving.

So one question that I have is, if roles for national security and counter terrorism intelligence are devolving down to lower levels, the state and local level, how does oversight also devolve down to those levels? How do we want to structure oversight of those functions at a state and local level? And let me begin by saying, you know, we've been working on intelligence oversight at the federal level for decades.

For decades – and I think we still don't have it right. It's really hard in part because it requires a certain amount of expertise, in part because we're talking about oversight of activities that are, by nature, secret and therefore difficult to expose to public scrutiny. There are a couple of

models though that I just want to throw out to think about if indeed intelligence operations activities are going to be pushed down to the local level, where should the main locus of oversight be? Should oversight for those activities also be pushed down to the local level, or do we want the federal government, for example, exerting a lot of oversight of intelligence activities going on at the state and local level? I think there are a number of different ways to structure this, and those are, again, some of the questions that I'd ask and I think are important for us to discuss today. Thank you.

Faiza Patel:

Thank you, Matt. I've been told to make two announcements before we proceed. The first is to introduce myself. I think I know most people in the room, but I'm Faiza Patel. I along with Liza am the Co-Director of the Liberty and National Security Program at the Brennan Center. The second thing I've been told is that you are tweeting, please use hash tag BCJustice.

So, for the tweeters among you, there we go. Okay, so thank you Matt for giving us this sort of bird's eye view of the issues that we confront when we talk about this topic. Our next speaker, Sheriff Leroy Baca is known to many of you due to last week's hearing at the House Homeland Security Committee.

At that hearing, Sheriff Baca testified about his department's positive experience in building relationships with the very large American Muslim community that's in his jurisdiction. I wanted to add that this is not a new position for the sheriff. He has testified over the last several years about his efforts to build community relations before the Congress. Sheriff Baca is the elected chief law enforcement officer of Los Angeles County. He commands the largest Sheriff Department in the United States with a budget of \$2.5 billion and more than 18,000 people working from him.

In addition to providing protection for the large number of people within his jurisdiction, Sheriff Baca is a national leader on community policing issues. He has pioneered the concept of public trust policing and works with a number of different advisory groups, including a clergy council, which has more than 300 leaders representing every faith community. I'd like to turn the mic over to you, Sheriff, to give us your thoughts.

Leroy Baca:

Okay, well thank you very much. It's a real pleasure for me to be here at the Brennan Center and thank you Faiza for your leadership and this panel as well for dealing with a topic that I think is worthy of a lot of discussion. My points are relative to the intelligence matters that this nation is involved in and my local department is involved in and how I see this subject matter.

It's distinct from the public trust policing's model that I was talking about last week, and all things that I testified in front of Congress, but I also need to bring that back in sometime because the truth of it all is that we can't accomplish the goals of safety for all unless we fully understand the relationship with the community that we're serving and the diverse communities there in Los Angeles. Los Angeles is unique—before I get into this—is that we are the epicenter of diversity because of our vast Asian population.

We kind of surpass this great city in terms of diversity. We hate to see – think of anything more diverse than New York, but the two epicenters of diversity in America are New York and Los Angeles, and we have great respect and admiration for the law enforcement systems of both sides of the nation. Having said that, let me focus on the subject that you've asked me to talk about. We obviously, in Los Angeles, collect data.

We are involved with the FBI and the joint terrorism task forces, and the LAPD, and the Sheriff's Department have deputy sheriffs who are federalized. They work in the federal system. They're managed by the federal authorities, and they're there. But at the next level, we deal with a joint regional intelligence center that [former Los Angeles Police] Chief Bratton and I put up, and it's basically dealing with the non-secret, non-classified open source forms of information.

Largely all the criminal activity that is going on in Los Angeles County is shared across policing jurisdictions, and our theory is that the more we share our traditional non-terrorist related criminal activity in a platform sharing fashion, then the idea that terrorism is a crime is going to continually permeate our investigative culture. And so we're criminal based intelligence gathering as opposed to any other aspect of the definition of intelligence.

So we collect only to criminal related activities of individuals, organizations, and groups. The LA County Intelligence System, the joint regional intelligence center that we operate has guidelines that strictly prohibit the collection of data regarding political, religious, or social views, associations or activities except as it relates to criminal activity. Now we – the Sheriff's Department and the regional intelligence center that we operate relies on federal intelligence collection standards.

In other words, the 28CFR part 23 federal law for direction on collection, analysis, storage, and dissemination, retention of intelligence products is what we follow. Regarding Matthew's excellent point on oversight, the Sheriff's Department on its own volition has its intelligence system examined by the Institute for Intergovernmental Research, more commonly known as IIR. IIR is the federal contract training group for this

federal law 28CFR part 23. There were no compliance issues identified by this group when it came to our joint regional intelligence center.

We have our own guidelines reviewed by this organization, as I said. Now in the context of the confidential materials and how they're maintained, it is in a secure environment free of intrusion. It obviously has to be kept in a manner where, you know, it just doesn't get all blown out in all public matters. The Sheriff's Department, however, is still committed to its transparency and how it does its job and that's why I'm explaining to you right now how we're doing it.

Every effort is made to ensure that collection, analysis, storage, and dissemination of information meets legal requirements and community approval as well. And the sources of our collection that are our focus is the criminal activities of gangs, organized crime, outlawed motorcycle gangs, narcotics groups, and terrorist groups. The information that we collect is shared with federal investigators in either or task forces – mentioned that joint terrorism task force the FBI runs, the joint regional intelligence center that locals run.

We participate in a local fusion center modality. Chief Bratton and I were the architects of this local fusion center. We are connecting the all crimes strategy within it as I mentioned, and our goal is moving in a Southern California modality up to Las Vegas, and we are morphing into plans to connect the system laterally to Nevada and Arizona. Now there are challenges to this, and I just want to stay within my timeframe.

Faiza Patel: Yeah.

Leroy Baca: So...

Faiza Patel: Just a couple more minutes.

Leroy Baca: I think that the challenges that we're dealing with, crime related purposes in terms of what we're doing, and so therefore we want to make sure there's no conflict with our federal agencies. The reporting protocols are there.

We realize that the issue of terrorism that the FBI's lead investigative agency. We've had very few instances where communities have felt the impact of intelligence gathering. Since each LASD [Los Angeles Sheriff's Department] case has the criminal nexus to it and therefore if you stay within the guidelines, you're not shotgunning societies or groups of people as a general strategy.

The civil liberties aspect of this is that we have a statutory mandate to locate and arrest and incarcerate criminal offenders. That's our focus but it's all probable cause based. There has to be evidence. There has to be a degree of substance there that allows us to do that, and the First Amendment issues are examined only when it's possible that there's an infringement on the rights of others and violation of law.

What's interesting is that we in law enforcement have to recognize who we are, and that because we collect information on a criminal nexus that it should be for that purpose and only that purpose, and so all the elements of our core values are predicated on the Constitution, the Bill of Rights, civil rights, and human rights, and the culture in the Sheriff's Department is one that honors those.

Our core values are very definitive to the things that you heard earlier by Mr. Brennan, by Congressman Thompson, and certainly by – I'm sure the panelists that are going to be further explaining their points of view. It's constitutionally driven. It also is human rights driven. Thank you.

Faiza Patel:

Thank you, Sheriff Baca. So, moving on, we're going to have Mike German speak to us. Mike works at the ACLU where he has been a leader on ACLU's efforts on national security issues. He's particularly a specialist on domestic surveillance, privacy, and intelligence and law enforcement.

I know that Mike was a key voice for civil society and the development of the information security environment standards, which governed the collection of information under the Suspicious Activity Reporting system. That's a mouthful, right? But basically this is the information sharing environment which indicates how you standardize information that is gathered by state and local law enforcement, and so it's very important that the input going into the system goes in the right way, and Mike was very involved in that process.

Before joining the ACLU, Mike served for 16 years as a Special Agent with the FBI where he specialized in domestic terrorism and covert operations, so he brings a very unique blend of expertise to our panel, and I'd like to have him speak.

Mike German:

Thank you very much, Faiza, and thanks to the Brennan Center for holding this very timely and important event. And I'd like to personally thank Sheriff Baca for his comments at the King Hearings because it really brought it a sense of rationality and reason and facts into what was otherwise an ugly brawl.

You know, it's interesting. I mean one thing to keep in mind is that none of this is really new. Law enforcement has been involved at the state and local level and intelligence gathering as long as there has been law enforcement. And, you know, I think it's important to look back at the history of where abuse has occurred in order to see what were the sort of underlying problems that allowed that abuse to happen.

And, you know, if we look back to the period, you know, in the 1950s, '60s, '70s, and '80s where you had law enforcement agencies that were, you know, running red squads or subversive squads or otherwise engaging in a lot of political surveillance and monitoring different politicians as they progressed through different public office, what you find was there was a number of different problems. I mean one was the vagueness of the terms.

You know, even the term intelligence is not really very well defined. I understand the intelligence community doesn't have a definition for it, so, you know, it's unclear what it is we're talking about, and because of the vagueness of the terms, you know, terms like national security or public safety, what that means. The new one that's come up with regard to fusion centers is that they're not just counter terrorism and anti crime but also looking to protect against all hazards.

So that's an extremely broad mandate and, you know, what we've seen in the past is that law enforcement officers see them not just tied to criminal justice mission but defenders of the status quo and they, you know, are then hostile to things like protests or dissent or any challenge to the social order which drives a lot of the racial profiling and other improper police activities. So it was very important in the 1970s and '80s when reform began to put in – and Sheriff Baca's already mentioned 28CFR part 23 which I'm sure you all know like the back of your hand.

But in the law enforcement community that actually is known like the back of your hand, and Faiza mentioned that our interactions with the Information Sharing Environment's Suspicious Activity Reporting program, and I'll say that our allies in that effort in many cases were state and local law enforcement agencies who recognized how important that standard was and were afraid that, if the ISE adopted a lower standard, it would harm their own efforts within their communities.

So, you know, I think what Matt talks about as far as the federalism system and whether that is effective, I think that is a strong part of why, you know, as communities we often have far more confidence in our local law enforcement than we do in federal law enforcement or broader – the federal intelligence community that's often acting in secret and what they're doing is hard to know, and therefore raises much more suspicion.

So what we've seen is – post 9/11 that there has been a return to this – you know, what the Church Committee called war psychology, that national security mission overrides other considerations like civil liberties or other legal constraints, and that didn't come out of – you know, it wasn't sort of, like, born out of an egg.

You know, there was already mechanisms, intelligence lead policing with sort of a slowly developing concept that was challenging the community policing paradigm and other paradigms that law enforcement had, and you also had this joint terrorism task force, but there was also an interest by law enforcement to sort of get away from the constraints that the federal programs allowed.

And that's what sort of spurred the development of fusion centers – intelligence fusion centers that were based locally, sometimes at the state level, sometimes at regional levels with really very little clarity on which, you know, it mixed state, local, and often federal law enforcement agencies and it became very unclear who was actually in charge, what rules apply, and what constraints were there, which lead to a lot of problems initially.

And then the extension to Suspicious Activity Reporting, which in its original iteration suggested that it wasn't just crime that the police should be looking for but other suspicious activities, other illicit intentions, whatever that meant. Again, very poorly defined and sort of empowered police agencies to go out and start collecting information about people in the community that isn't tethered to actual suspicion of criminal misconduct, and that again led to abuse.

And this is all sort of lying on a very fractured framework, and that framework is the lack of training that is given to state and local law enforcement officers on what is intelligence collection, what are the national security threats, you know, in addition to the Brennan Center's report *Rethinking Radicalization*, which again was sort of being pushed out as this concept of a funnel where, you know, the small number of terrorists come from a discernable pool of believers and therefore law enforcement should target the believers in the hope of finding the few terrorists rather than being tethered to actual criminal investigations and finding people who are actually involved in wrongdoing rather than who have potentially dangerous thoughts.

As well, the Political Research Associates has recently put out a report, *Manufacturing the Muslim Menace*, which documents a lot of anti-Muslim law enforcement training that is going under the guise of counter terrorism training. And so when you have that foundation on which you're putting

the Suspicious Activity Reporting program, the likelihood that people will be targeted because of their religious beliefs rather than because of any suspicion of wrongdoing increases dramatically.

Unfortunately we've seen evidence of this abuse. This isn't just hypothetical. On our website at www.ACLU.org/spyfiles, we have information about – that we've collected that documents improper police spying or obstruction of First Amendment activities in 33 states in the District of Columbia. You know, so this is a widespread problem. It's not just the federal government. It's not just the FBI.

It's the Department of Defense, Department of Homeland Security, but also state and local law enforcement is often involved in this type of activity, and we see three types of abuse. One is improper targeting and collection, and this is a longstanding law enforcement problem with racial profiling, but also with targeting protesters and others engaged in the political process. And now with this new program of Suspicious Activity Reporting, we're seeing abuse of that particularly around photography where people who are merely taking photographs of iconic sites are being stopped.

Often their cameras are being confiscated, their photographs deleted, many times being arrested simply for taking photographs. And of course all of us take photographs on a regular basis. We usually carry a camera in our phone now. So, you know, it's not photography itself that is suspicious but whatever other biases that the police officer brings to the situation that is likely driving a lot of this improper activity.

The second problem is the improper analysis of information, and we've seen this in intelligence reports that have leaked from the fusion centers, and, you know, we – they are as ridiculous as a north central Texas fusion center report that hypothesized a conspiracy between Muslim civil rights groups, lobbying organizations, anti-war organizations, the US Department of Treasury, and hip-hop bands to spread tolerance in the country that would allow Sharia law to take over to, you know, a much longer document from the Virginia fusion center that detailed some 50 terrorist groups that were operating within Virginia and identified the diversity at military bases and historically black colleges as nodes of radicalization.

And again – another Missouri fusion center report on right wing extremism reported that followers of Ron Paul are potential militia members. You know, again, targeting political activity rather than misconduct, and again, these reports go out to law enforcement agencies, so when you're talking about that one or two man department and they get this report that says universities or nodes of radicalization, what are they

to do but to go out and start monitoring universities or these political groups that are identified as potential threats?

And the third problem is the improper use or dissemination of information. A Massachusetts auditor recently completed an audit of the Massachusetts criminal intelligence justice system, which has a user name and password type of protection. And what they found was that police, being good investigators, were able to identify some terminals where they could access it bypassing that user name and password protection, and they used a novel approach. They just picked local celebrities like Tom Brady and Matthew – Matt Damon.

Sorry about that, Matt, and found out that they had been searched thousands of times, and of course that's bad for Tom Brady and Matt Damon, but what that audit doesn't show is how many neighbors of these police officers were searched. How many, you know, new boyfriends of the ex spouse were searched, how many people who the police didn't have a real reason for investigating them but wouldn't pop up in an audit because they're not celebrities.

And then we also – with the improper dissemination, recent case in Pennsylvania where they – the state department of homeland security official hired a private company to spy on local protestors and that private company and the state homeland security director appeared to be in league with local industries like natural gas drilling and getting information about political protests against the natural gas drillers to those companies as opposed to actually protecting the public safety.

It appeared they were actually protecting the economic liability of an industry, which, again, is not a law enforcement purpose. So those are the problems we're seeing, and I think oversight is the key way to protect against this, but because this activity is happening in secret, and because of the fracture, or because federalism separates these things when all the entities are working together, who actually can provide that oversight becomes a big question.

And that's really been the hardest part of you have a local officer working on the basis of a regional fusion center report and information provided by the FBI and some harm comes, who's responsible for that? It becomes very difficult questions and there simply aren't the government structures necessary to control that type of activity.

Faiza Patel:

Thank you, Mike. So our next speaker is – works on some of these types of government structures, so it'll be really interesting to hear from Kara Dansky. Kara is the head of Impact Assessment at the Office of Civil Rights and Civil Liberties at the Department of Homeland Security.

She serves a critical function in DHS because CRCL, which is what this office is normally referred to as, provides advice to [Department of Homeland Security] Secretary Napolitano and to other senior officials in DHS as well as to the many state and local partners that DHS works with on the civil rights implications of national security policies. CRCL is also a conduit for individual complaints and has extensive community outreach responsibilities.

Before joining DHS, Kara was a leading voice on criminal law and criminal justice policy issues. She was the Executive Director of the Stanford Criminal Justice Center, and also taught at the law school over there. So, Kara?

Kara Dansky:

Thanks, Faiza. I wanted to say I'm very grateful to the Brennan Center for hosting this event and in particular to Faiza for moderating this panel. I was a bit of a late addition to the panel, so I'm grateful that the Brennan Center was able to accommodate my being here. So I'm just going to say a few brief things about the Department's role and also about CRCL's role, and then I'll get into a little bit more of the specifics about how DHS and in particular CRCL is involved in working with state and local law enforcement in the ways that we're discussing today.

So just a few words about the Department. DHS has a responsibility which is consistent with the vision of Congress and the direction of the President to contribute to a robust information sharing environment. Consequently, DHS has focused on getting resources and information out of Washington and into the hands of state and local law enforcement to help combat threats in their communities.

So that's sort of a sense of the overall DHS vision for what we're doing. Within DHS, as Faiza said, I work at the Office for Civil Rights and Civil Liberties, which he also said is commonly referred to as CRCL, and CRCL is responsible for helping shape policy and practices that respect Civil Rights and Civil Liberties by evaluating and advising on a wide range of technical, legal, and policy issues across DHS programs and activities.

What I specifically do at CRCL is conduct civil rights and civil liberty's impact assessments, which my office sometimes does at the direction of Congress, sometimes at the request of the Secretary, and sometimes at the discretion of my boss, Margo Schlanger, who's the Officer for Civil Rights and Civil Liberties.

We also, as Faiza said, investigate and resolve complaints filed by the public regarding DHS policies and actions, provide leadership for DHS's

equal employment opportunity programs, and engage with the public to ensure that ethnic and religious communities both understand DHS policies and procedures and are empowered to express concerns and seek information from DHS officials.

So that's a little bit about what we do generally, but I really want to talk about some of the specifics of how we're involved in this effort. So one of our major responsibilities is intelligence product oversight. So in doing that, we oversee the intelligence products for dissemination to state, local, and tribal law enforcement while enabling these products to be released in a timely fashion.

So in particular this means we review products and intelligence reports to ensure they don't describe incidents of actual or perceived racial or ethnic profiling, violations of constitutional rights, or other civil rights and civil liberties issues. For example, we work to ensure that the intelligence products the department disseminates from the Office of Intelligence and Analysis don't attribute the bad actions of an individual to a group they belong to or, likewise, attribute the actions of a group to a particular individual associated with that group but who was not a participant in the actions.

CRCL staff also provide training to intelligence analysts before they're deployed to fusion centers and to all new analysts who take basic intelligence and threat analysis course that CRCL offers, and we believe that these are – greatly improved awareness of civil rights and civil liberties issues in DHS, intelligence, product development, and dissemination.

So I also want to say something about the nationwide SAR initiative that Mike talked about. DHS works very closely with the program manager for the information sharing environment and with DOJ on what is called the nationwide Suspicious Activity Reporting initiative, or NSI. The NSI is a partnership among local state, tribal, and federal agencies for the purpose of sharing terrorism related SARS across the information sharing environment.

The NSI is a tool for local law enforcement to connect the dots, to combat crime and terrorism by establishing a national capacity for gathering, documenting, processing, analyzing, and sharing suspicious activity reports in a manner that rigorously protects the privacy and civil liberties of Americans. DHS has worked extensively with its interagency partners to develop a system for this nationwide initiative, including a functional standard for NSI reporting that has received approval from civil rights and civil liberties advocates and organizations.

In addition, what is called Functional Standard 1.5, which governs what information can be shared as part of the nationwide Suspicious Activity Reporting initiative, states that only information that is reasonably indicative of terrorism related crime can be part of the NSI shared space. In addition, we train front line personnel on behaviors and actions associated with terrorism related crime. We also implement an extensive review and vending process for all NSI SARS.

Specifically which means that SARS must be reasonably indicative of terrorism related crime before they are made available to other law enforcement entities. We also insure privacy, civil rights, and civil liberties policies are in place, which means establishing a clear and specific auditing and redress process. DHS also recognizes that information sharing cannot be confined to only government sharing but requires public involvement.

To that end, DHS has licensed a very simple campaign that was first initiated here in the city. If You See Something, Say Something campaign which Congressman Thompson mentioned earlier, which is designed to raise public awareness of potential behavioral indicators of terrorism and crime.

If You See Something, Say Something emphasizes the importance of reporting suspicious activity to proper law enforcement authorities. And the If You See Something, Say Something campaign is not unlike longstanding neighborhood watch programs that have been across the nation and have for a very long time.

It alerts the public to the usefulness of observing and reporting potential criminal activity in their own neighborhoods. The campaign takes a behavioral focused approach to identifying suspicious activity. Factors such as race, ethnicity, national origin, and religious affiliation should not be considered to create suspicion, unless those attributes are used as part of a specific suspect description.

Likewise, the public should not be reporting on potential unlawful actions rather – sorry. The public should be reporting on potential unlawful actions rather than beliefs thoughts, idea, expressions, associations or speech unrelated to terrorism or other criminal activity, and the Department is very involved in articulating these standards to the public.

Over the past year, DHS has expanded the If You See Something, Say Something campaign across the United States through partnerships with Wal-Mart, Mall of America, the American Hotel and Lodging Association, Amtrak, the Washington Metropolitan Area Transit Authority, the General Aviation Industry, the NFL, the NBA, the NCAA

and state and local fusion centers. So I want to address specifically the fusion centers themselves and specifically the training that CRCL offers to fusion center analysts and staff.

So as we all know, fusion centers are operated by state, local, and tribal entities. And because they're locally run and operated, there's no nationwide standard organizational model. Virtually all have missions that extend beyond anti-terrorism and characterize their scope of activities as all crimes. A majority of the staff are drawn from local law enforcement. Many centers also have fire service personnel, emergency managers, public health officials, private sector liaisons, and other civil personnel, and some have expanded their mission to all crimes and all hazards.

As Faiza said, there are 72 centers that are recognized by state governors in each state as primary points of contact, including 20 urban area security initiative locations in major urban areas such as Los Angeles. It's a requirement of receiving DHS funding that all fusion centers have in place by the end of this month a privacy policy that is no less protective than the information sharing environment guidelines.

Through a push of the DHS privacy office, 69 of the fusion centers – 69 of operational fusion centers currently have such a policy in place, and we expect all operational fusion centers to have privacy policies in place by the end of this month. Now CRCL is acutely concerned with potential civil rights and civil liberties problems in the collection of intelligence by state and local law enforcement.

To that end, as I have mentioned, CRCL conducts training throughout the country to many fusion centers. Our CRCL training is provided to all DHS officer or intelligence analysts before they deploy to fusion centers. Since 2009, CRCL staff has provided intensive training to nearly 850 staff from 26 fusion centers in 17 states, and we've also trained the privacy civil liberties officers who are in place at 66 fusion centers to deliver their own privacy civil rights and civil liberties training to local fusion center staff.

We provide technical assistance, including a joint website with DOJ to support these efforts as they provide their own training programs. Our goal is to train all privacy civil rights, civil liberties officers to provide their own continuous training on civil rights, civil liberties, and privacy issues to local fusion center staff. We have found that some issues arise in first amendment protected activities.

Generally our training covers how to handle reports of these protected activities such as protests, exercise of religious freedom, freedom of

association, the capture and retention of video feeds that have identified persons on tape, and the use of materially inaccurate or misleading information. Our training encourages that fusion centers have in place sufficient redress mechanisms and discourages the targeting of communities based on the use of overly broad demographic information and the collection of information on individuals that perpetuates any racial or ethnic stereotypes.

We recommend implementing privacy, civil rights, and civil liberties policies on which fusion center staff are thoroughly trained, and discuss the usefulness of community engagement to provide a level of government transparency. We also offer training on 28CFR part 23 which Mike mentioned, and guidance on multi jurisdictional criminal intelligence systems. I think I'll just stop there and we can have questions later.

Faiza Patel: Okay. Thank you so much to all of the panelists. So I'd like to encourage people in the audience to come forward with questions please, and if not, I have a long list of my own. Please.

Bill Tafoya: My name is Bill Tafoya. I'm a professor at the University of New Haven in Connecticut. Mr. German, in your praise intelligence lead policing, and so I'd like to ask Sheriff Baca to comment about the appropriateness of that relatively new program in law enforcement and what you think about that, Sheriff Baca.

Leroy Baca: Well thank you very much. I, for one, believe that we in law enforcement love acronyms of all kinds and we're always trying to come up with a new paradigm. Community based policing I think is all encompassing. Intelligence led policing as a phraseology has been debated by the major city chiefs members, the national sheriffs members. We still don't know entirely what it means in its scope, and because of its ambiguity it does raise some issues with a number of observers of what are you talking about.

So, with that, you know, my department doesn't emphasize that phraseology. We talk about public trust policing. If you're going to go to a new paradigm, it's public trust that is most engaging for all forms of criminal investigations, not just a counter terrorism strategy phraseology. And so because we're so driven by our standards that have been well defined in law as to what probable cause is and what can you do if you're going to assume a crime is committing, you've got to advise people their constitutional rights.

The minute you believe they've committed a crime, police are in the role of advising people of their rights because the ensuing arrest is about to come. And so the nature of our standards are tighter in many respects than

phraseology implies. So we don't – I don't want the public at least – I don't think any police agency or sheriff's department wants the public to think that intelligence led policing is somehow a widening of the law that the American jurisprudence requires us to follow.

Faiza Patel: Thank you. Linda?

Linda Sarsour: My name is Linda Sarsour. I'm from the National Network for Arab-American Communities, and I was actually going to bring this up earlier with John Brennan and Michael brought it up, the report from the PRA. *Manufacturing Muslim Menace* basically documents anti-Islam and anti-Muslim bias incorporated in training for law enforcement. Most recently here in New York actually on Tuesday at 2:00 we're having a press conference to call out NYPD for using their – a film *The Third Jihad*, which is an appalling and offensive video to be showing to new cadets.

So I want to just know what your thoughts about the use of independent contractors and the kind of oversight and the incorporation of community to be a part of the training of how to interact with the Muslim American community and what your thoughts about these trainings and kind of this documentation of a very extensive ADP report documentation of these similar types of materials that are being used in law enforcement training.

Kara Dansky: That was to me? I think that perhaps –

Linda Sarsour: I wanted – that was for – for me personally, I would like the Sheriff to...

Faiza Patel: So why don't we start with you, and then if the other panelists have comments as well we'll open it up.

Leroy Baca: Well, I can't comment on what you just said relative to the specificity of what the New York Police Department intends to do. I haven't reviewed it. I don't know what it means, other than I just heard what you said. But in our training of our people who work in our joint regional intelligence center, and we have terrorism liaison officers to the other 44 police departments in the County Los Angeles, and so we do an awful lot of training.

Our idea of talking about public trust is the theme of what we do. Now obviously there's a variety of materials that even the violent Jihadists are very proud of, that they push out, and whether this one is one of those or this is another one, I don't know.

I have to read it and look at it and evaluate it. And we're happy to do that, but I believe that part of our trading involves bringing in representatives from strong Muslim American well known organizations such as the

Muslim Public Affairs Council, and we had Salam Al-Marayati, Edina Lekovic putting forth their message in representative of the broad diversity of Islam. You know, there isn't just one form of Muslim culture and one form of Muslim language. I mean this is a very diverse society.

I think there's over 50 nations in the world that are considered large Muslim countries. So they were able to ask questions of people about the faith and about various elements of threats to the faith and take tough questions, and I think the dialog is the better form of training as a general professional. That's all I'm saying. You need to bring the people who are the subject matter of the faith and let them tell you what their interpretations are of what's going on around the world.

Faiza Patel: Thank you, Sheriff. Does anyone else on the panel want to comment on that? Mike? Kara? No, go ahead.

Kara Dansky: Well I was just going to say that CRCL is involved in working within the department to create a curriculum that is designed specifically to train front line law enforcement personnel in working with communities. It's a very community oriented approach and it's specifically designed to ensure that frontline law enforcement understand that they should be on the lookout for behaviors rather than engaging in activity that could be characterized as profiling anyone on the basis of race and ethnicity, so we're working on that.

Faiza Patel: Can I ask a question? I just want to interject one. You know, we make this distinction between behaviors and race and ethnicity, and I just wonder whether there is really such a clear cut line that we can draw because if you look – I'm just going to take an example. If you look at a Muslim man who – grows a beard, right? Is that a behavior or is that ethnicity? Which part are you focusing on? And the reason I use that example is because that's sort of one of the signs of radicalization identified in the NYPD's report about the path to terrorism.

But it's just a question that I raise for us to think about that I wonder whether there is such a strong and clear dividing line between those two concepts as we talk about them, but I'll turn the mic over to Mike if he has anything else to say, or...

Mike German: Well I think that is the problem is that you've identified behaviors that are so innocuous and ubiquitous that it opens the door to any particular officer or any particular agency of targeting people. You know, if the people who grow beards that you're targeting are only Muslim, is it really the beard or is it the practice of the religion that is what's being targeted?

And, you know, particularly in pro – I mean the Suspicious Activity Reporting programs it's things like photography but also note taking, which I noticed a few people doing, and, you know, of course might have to make a few reports. Where, you know, it's not really the note taking that's suspicious but some bias the police officer already has to contrive the reporting, and we've seen abuse of it.

I mean the Tennessee fusion center recently had a public website that had the suspicious activity reports that were put in the system, and it included the ACLU writing a letter to local schools around Christmastime cautioning them to observe, you know, a number of religions and not just one, and that went in as a terrorism related suspicious activity report. So, again, you know, it's the same sort of thing where, you know, it's challenges to the social order that are being viewed as security threats rather than political concerns.

Faiza Patel: Okay, so we have about ten minutes left, and I have three questions, so I think that's probably just about right. Please, go ahead and introduce yourself.

Candace McCoy: Hi. I'm Candace McCoy I'm a professor at CUNY's John Jay College and Graduate Center. My question probably – well it's sparked by Sheriff Baca's comments, but probably the whole panel may be interested. There are those of us of a certain age who remember the silver platter doctrine.

You know, at one time this was a big deal, now it seems like the silver platter doctrine writ large – really large, is allowing – well, ignoring the silver platter doctrine is allowing information of – at a very low level of criminal related matters, not necessarily the first amendment questions that of course are extremely important that are being discussed here.

But I mean just the everyday law enforcement gathering of information and databases at the local level that, through fusion centers, can be turned over to federalization and use. For instance, Sheriff Baca mentions when a fusion center gets the information, it is all criminal based and it is all probable cause based. I'm unsure if maybe we have a very broad – broad understanding of probable cause there.

I've been to the NYPD's real time crime center. I know that they use expunged cases, sealed cases, juvenile records, traffic records, and that they take it down to the block level in the NYPD intelligence – well, just information gathering whether it's intelligence or not. These things get merged. All the databases get merged in a very powerful law enforcement mechanism which affects everybody, not just First Amendment issues. So I'm wondering, what are the protections when this sort of material gets federalized?

Leroy Baca: That's a very interesting question. I think that first of all these are records that are historically public other than the expunged records that you identified. The fact that the all crimes approach appears to be a federalization reality, at truth it is a local reality shared, but it's a public right for people to know, including the police. We just are responsible by law to keep all these records.

In fact, I am the record keeper of all the crimes in Los Angeles County as the elected sheriff, and it's tied into a statewide system and tied back into the FBI's files as well, especially for the Part One offenses. So the revelation of past history is critical to future problems in the crime-fighting world. You can pretty well assess in research that has been done in a variety of educational institutions that the most likely predictor of solving a crime is police files.

That's the number one solvability factor because people commit various crimes including low level crimes. And if it weren't for the low level crimes, Timothy McVeigh would have never been caught. You know, he was caught by speeding down the highway from one of the worst terrorist attacks that has ever occurred in the United States, and that's one of the earlier points in my testimony was if you don't have these records, we forget.

And we realize that 77 of the last 10 years of terrorist attacks have been not Muslim related. Forty-one have been, but of the last 10, Muslim Americans came forward and informed on seven of those last 10. So it's all relative to perspective, but we protect the records. We don't just throw them out on a street for everyone to see them.

Faiza Patel: Do the panelists have other comments or – okay?

Kara Dansky: I think we have to distinguish between Suspicious Activity Reporting generally and the nationwide Suspicious Activity Reporting initiative, which is a joint effort of DHS, the program manager for the information sharing environment, and DOJ. And if we're talking specifically about the nationwide SAR initiative, then in order for information to be part of that initiative, it has to be reasonably indicative of terrorism related crime.

So there's a standard that's in place if we're speaking specifically about this nationwide SAR initiative, which is different from Suspicious Activity Reporting generally. If you're referring to people just reporting things to law enforcement, which doesn't necessarily have to comply with that standard, right?

Candace McCoy: I'm interested actually in all kinds of, as I say, the low level things. The sheriff's appropriate remark that these are the things that you can put together to stop terrorism from a federal level is incontrovertible, but to get there you end up having an incredible intelligence gathering low level stop and frisk information on everybody goes into this stuff.

And my concern is that all that information not end up abused as Mike German mentioned. You know, it'll be used to get the new boyfriend of the ex police officer, right? You know, it's very bothersome and it's especially scary when you think that it could become federalized through the fusion centers rather than the SARS, I think, in ways that we can't imagine.

Faiza Patel: Thank you. So I think the last question goes to Liza Goitein.

Liza Goitein: Hi. Sheriff Baca, I'm sorry, I'm going to pick on you also. I know you're very popular today. I wanted to ask you about domain mapping, and in particular, I know after 9/11 the FBI was engaging – or has been engaging in a program of domain mapping.

It's something that's described in the guidelines that govern the FBI investigations, domestic investigations as authorization for the FBI field offices to, quote, identify locations of concentrated ethnic communities and in field offices domain and the locations of ethnic oriented businesses. And the idea behind this undertaking, according to Director Mueller, is to, quote, understand every inch of the given community, its geography, its populations, its economy, and its vulnerabilities, which phrasing that way sounds innocuous but the result is to essentially map ethnic enclaves within a community.

And my understanding is that the LAPD intended to undertake a similar project and that ultimately it had to be scrapped because the community was very unhappy about it and felt that it really was ethnic or religious profiling. And to me that example really illustrates some of the tensions between some of these intelligence gathering modalities and community relations and the impact on the communities, and I was wondering if you could tell us anything about the LAPD mapping initiative and your thoughts about it.

Leroy Baca: Well, yes. First of all, the mapping concept came largely from our partners in England to the LAPD, not the Sheriff's Department, and recognizing the point you just made, the LAPD withdrew that concept because it's too innocuous in terms of what it means, and the Sheriff's Department never has done mapping in regard to religious groups of people because it doesn't have an appropriate specificity to it.

It's kind of like saying here's where they live, so to speak. Now we don't have ghettos in the United States, that I'm aware of, of Muslim Americans. They're rather integrated into the rest of society, in my opinion, and hold high positions of all professional and work related careers. So I think it was a leap that was a little too premature locally. I can't account for the federal guidelines, to the FBI strategies and so forth, but to me, we build relationships.

You know, I have a Muslim American Affairs Unit that's made up of Arabic speaking Muslim deputy sheriffs. We're into the people business. One of the difficulties with using too much technology and too much sophistication is you become overly dependent on it, whereas people know more about what's going on, and if they're trusting relationships with law enforcement then they will share their own fears before we detect them. It's really an interesting thing. Muslims don't want their homes blown up.

They don't want their mosque blown up. Shocking as it might sound, they want to be peacefully capable of the American Dream. When I formed this Muslim American Homeland Security Congress, all the leaders of the Muslim society in Los Angeles County formed it. I just helped them, you know, get a 501C3 and talked about the principles and the values and so forth. These are people who are willing to help. You know, this isn't a matter of is there some doubt, but the question – it's very hard to find extremists because secrecy is the key element of extremism.

If you were to start an extremist program you're not going to walk on Fifth and Broadway and say here we are. It has elements that are very hard to detect even by the Muslim Americans. But we do monitor a lot of things, as you know, and yet the key is relationship building. The key is to do what the Department of Homeland Security is doing. I might say that the Department of Homeland Security has been very supportive of the community outreach program that the LA County Sheriff's Department in particular has been singled out as a model for the rest of the country.

But I also want to emphasize the Muslim American Homeland Security Congress, which is a non-profit educational group to help families who need help occasionally because they – we've already sensed when a child has started to behave a little differently in a Muslim family, what do you do? Well, you should report it, but then the reporting should be – not to put the kid in jail but to find out what his problem is sociologically speaking, and then address the problem and restore the integrity of the family, and we've done that with this Muslim Public Affairs Unit.

Faiza Patel:

Thank you. I'm sorry to cut you off, but I know that the Sheriff has to leave promptly at 1:00, so maybe you can address your question right after.

Unidentified Male: Are you cutting me off?

Faiza Patel: I'm apologizing for cutting you off, but I'd like all of you to thank – join me in thanking our speakers. It's been a really great discussion.