

2003 BENCH BAR JUDICIAL CONFERENCE

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"NATIONAL SECURITY AND CIVIL LIBERTIES"

Tuesday, November 11, 2003

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United States District Judge
Eastern District of Pennsylvania

Panelists: JUDGE MICHAEL CHERTOFF
United States Circuit Judge
Court of Appeals for the Third
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1 CHIEF JUDGE SCIRICA: Good morning, everyone.

2 Good morning on this bright and sunny day.

3 We have a fascinating presentation this morning,
4 and I'm going to introduce the moderator of the panel, Judge
5 Michael Baylson, Judge in the Eastern District of
6 Pennsylvania. As you all know, Mike was a former United
7 States Attorney for the Eastern District of Pennsylvania,
8 and he has assembled a star studded panel. Michael.

9 JUDGE BAYLSON: Thank you. Thanks, Chief Judge
10 Scirica, and welcome everybody.

11 Today's panel is about the response by our
12 Government to the events of September 11th, a topic which
13 has prompted vigorous controversy and debate among many
14 different people in our country.

15 9-11 ushered in a new epic in our history. When
16 blame was placed on a foreign terrorist organization that
17 very few Americans had ever heard of, we all wondered what
18 was going to be our response, and what were we going to do
19 to prevent this from happening again.

20 Whatever we had learned from the Unabomber or from
21 Oklahoma City or from the bomb exploding in the basement of
22 the World Trade Center was hardly enough preparation for
23 what we feel must be done to counter the events of September
24 11th. And some say it was inevitable that these events

1 finally took place in such a major way on our own soil.

2 As lawyers and judges, we anticipate that many of
3 the answers to the controversy and the issues that have
4 followed September 11th will take place as a result of the
5 process of judicial review. Those of us who are judges
6 naturally look to the Supreme Court and yesterday we all
7 felt a sigh of hope or relief or whatever the right
8 adjective will be, no one will know until the decision comes
9 out, but when the Supreme Court granted certiorari in the
10 so-called Guantanamo Bay cases, there will be at least some
11 guidance on the issue of jurisdiction. And our speakers
12 today may have more to speak about that.

13 The distinguished biographies of all of our panel
14 members are set forth in your program, and I'm not going to
15 repeat them. Suffice it to say that our first four speakers
16 have had very high positions within the Department of
17 Justice. Two of them served as Deputy Attorney Generals,
18 and the other two served as Assistant Attorney Generals very
19 recently in the Bush administration and were on the front
20 line of the war against terror and the response to September
21 11th. Our fifth speaker, David Rudovsky, is well known to
22 Philadelphians as an outstanding civil libertarian, a
23 distinguished member of the faculty at the Penn Law School,
24 and someone who has been vigorous in defense and advocacy of

1 civil rights for many, many years.

2 I just want to add that Ron Noble, who is known to
3 many of us as a former Assistant U.S. Attorney and then
4 Under Secretary of Treasury for Enforcement and is now
5 Secretary General of Interpol, had graciously agreed to be
6 on the panel, but events took over his schedule in the last
7 week or so, and he was forced to cancel, and we regret that
8 he is not here.

9 Just let me say a word about the format of our
10 program. Professor Heymann will be the keynote speaker and
11 will go first. He will give us an analysis as he sees the
12 issues. Some of it you will find in his outstanding new
13 book called "Terrorism, Freedom and Security", if you want
14 to read further on his very, very well-founded expertise in
15 this area.

16 Secondly, Viet Dinh will then follow Professor
17 Heymann. Viet is well known as the author of The Patriot
18 Act and will describe that and some of the responses to 9-11
19 that he was personally involved with at the Department of
20 Justice.

21 Jamie Gorelick is also known to many of you, and
22 in addition to having served as Deputy Attorney General, she
23 is currently a member of the 9-11 Commission and will speak
24 to us on her view of the threat of terrorism and the

1 activities of that commission.

2 At that point we will have some questions, either
3 among the panelists or from the audience. I'm happy to
4 receive written questions if you want to bring them up, or
5 people can just go to the microphones and speak up loud and
6 clear and we'll answer the questions.

7 We'll then take a short break. When we resume,
8 Judge Chertoff will speak on the topic of judicial review
9 and what he views as the proper role of courts, and then
10 David Rudovsky will give his views.

11 At that point, all the members of the panel are
12 going to have a short reply period, then we'll have
13 additional questions from the audience.

14 So thank you very much for being here today, and
15 now I'd like to introduce Professor Heymann.

16 PROFESSOR HEYMANN: Thank you, Judge Baylson.
17 Ladies and gentlemen -- by the way, it's spelled as if it's
18 Heymann but the name is Hyman (phonetic).

19 What I'm really interested in is sort of the scope
20 of review, the way decisions are made, and whether we have
21 to go with what I think of as an on/off switch as to war, or
22 whether there's something of a rheostat where you can have
23 something, where you can in many ways make much more subtle
24 judgments about what should be done and not done.

1 My major subject is civil liberties, human rights,
2 sovereignty of other nations on the one hand and the needs
3 of national security on the other.

4 All right. Let me start with the list of majors
5 that are contentious, and not easily, most of them not
6 easily resolved: increasing electronic surveillance and
7 other secret forms of fact gathering; attendance of agents
8 at mosques without any reason to believe that anything is
9 going on at the mosque that bears on terrorism but just
10 patrolling; nationality profiling with or without
11 distinctions between visiting aliens and resident aliens;
12 and total information systems. All of these are big
13 questions. Total information systems is where the government
14 tries to pull together information from Visa card records,
15 banking records, libraries, a whole set of places, to see if
16 the pattern suggests that certain individuals may be
17 involved in terrorism.

18 All of those actions bear on detention without
19 judicial review for both citizens and non-citizens. Coercive
20 interrogation of both citizens and non-citizens. For
21 non-citizens, targeted killings and military tribunals.

22 Now that's a rather imposing list. I don't expect
23 you now to have it in your mind. It's just that there are
24 very, very serious tradeoffs to be made. That's the point I

1 want to make. These are very hard issues.

2 There's room for dispute about almost all of them,
3 and as to the necessity for them, the usefulness of them in
4 terms of national security, the danger they pose now and the
5 danger they will pose if they remain presidential powers for
6 the decades that terrorism will be with us.

7 The problems are hard both in terms of what should
8 be authorized. Should targeted killing, otherwise known as
9 assassination, be authorized? Should it apply to American
10 citizens or only to foreigners, if authorized? But these
11 are decisions that you might well think would be made by
12 the American people speaking through its Congress and
13 enforced by judges in some way ascertaining that the
14 necessary facts for drastic measures were indeed satisfied
15 before the drastic measures were taken. That seems to me to
16 be the American democratic tradition.

17 The only reasons you wouldn't want to have those
18 great tradeoffs, those things that affect our safety, our
19 relations with other nations in the world, and our feeling
20 about ourselves as American citizens made by democratic
21 processes would be two. First, if you thought that civil
22 liberties shouldn't change in any way despite September
23 11th, you would think well, the issues have been resolved
24 and they will now be determined by courts applying precedent

1 as it was before September 11th. And you wouldn't think
2 there was need for legislation and public debate. Second,
3 if you thought that by the President throwing a switch which
4 says this is war, the President gets all the powers and has
5 no reason to think about whether he should exercise any of
6 the powers that the President had in World War II when
7 instead of facing 500 members of Al-Qaeda, we faced perhaps
8 150 million well-armed Germans, Italians and Japanese and
9 their allies, or in the Civil War when the nation's very
10 existence was in doubt.

11 If you believe that the decision that this is war,
12 made by the President, with Congress saying that he has the
13 powers to do what's necessary to deal with Al-Qaeda, but
14 without reference to any of the eight matters that I just
15 mentioned, except for a statute that says no American will
16 be detained. If you believe that he has those powers, then
17 you don't think you have to balance. He should do what he
18 wants to do or what he thinks is necessary.

19 Okay. Now what would it look like if we thought
20 about terrorism and we said it's too serious for things to
21 stay as they were on September 11th, but that it will be
22 with us for 30 or 40 years and indeed it won't be just Al-
23 Qaeda. There will be Timothy McVeigh's in the world, who
24 will be carrying around or threatening to carry around

1 suitcase atomic bombs. If you think that's it going to be
2 with us for 30 or 40 years, and if you think that we ought
3 to try to handle it in a democratic way, not just by
4 throwing an on and off switch and saying it's up to the
5 President, what would that look like? That's why I gave you
6 these little charts.

7 Take a look at Figure 3, the last figure here. By
8 the way, the Attorney General has said over and over again
9 that he believes his instructions to be and his policies are
10 to be, to do everything that is lawful that will increase
11 our security against terrorism. But believe me, it is very
12 difficult to identify anything that any of our speakers
13 today will say is unlawful, given the administration's
14 assumption that we are at a war like the second World War or
15 the Civil War or the first World War. Everything is lawful,
16 including perhaps assassination of Americans at home. And
17 the argument of the Attorney General is that his job is very
18 simple and mechanical, to do everything that's lawful to
19 protect our security. It seems to me an untenable position.

20 What that position amounts to is saying that
21 everything that falls in the overlap area between circle
22 one, steps useful to reduce the chance and harms of
23 terrorism, and circle two, steps dangerous to democratic
24 liberties and unity, automatically gets resolved in favor of

1 "do it." Not just that the President has the power to do it
2 because it's war, but do it because that's the order he's
3 given the Attorney General. That's what the Justice
4 Department says over and over again. If it's lawful, and
5 I'm assuming that everything here is lawful, do it.

6 If you were to want to reach that type, much more
7 democratic approach to the next 40 years of our nation's
8 history, there would be decisions to be made in the B and
9 the E area. And courts would have a role in applying those
10 decisions, and they would also have a role in deciding
11 what's permissible in the B and the E area.

12 What would be decided differently, it's not so
13 hard to imagine. The detention of American citizens by the
14 military when arrested within the United States, not on
15 battlefield conditions, Padilla not Hamdi, and held without
16 lawyers, and without access to courts, would simply fall in
17 the B category but, maybe it's in the C category, something
18 that makes people feel better -- maybe it's in the E
19 category, something that also makes people feel better, but
20 it would look like a power of trivial importance compared to
21 its dangers to democracy. We do after all have a habeas
22 corpus clause in the Constitution, and we're not faced with
23 an insurrection, nor an invasion.

24 What I'm trying to do is describe situations where

1 there is minor national security gain and great threat to
2 democratic liberties over the next 40 years.

3 I know Viet Dinh will laugh a little bit about the
4 library provisions. I don't think they're the worst thing in
5 the world, but secret access to library records, some did
6 panic. People who like to read books and go to a library
7 rather than buy them in a book store, it hasn't been used
8 once. Now, I don't think a judge can say well, this is a
9 power that hasn't been used, therefore you don't have it.
10 But I think the legislature, the Congress, could very well
11 consider whether that was necessary if it hadn't been used
12 once in the first two years, and if the power to detain
13 Americans such as Padilla, who were arrested in the United
14 States, has been used once in two years.

15 And attendance at mosques randomly by FBI agents?
16 Nobody knows how much it's being used. All of these powers,
17 if they are simply activated and approved of as soon as the
18 President says "war", have been exercised with immense
19 secrecy. We don't know what's being done in our names.

20 But I do know that a provision that said you could
21 only attend a mosque if you either have reason to suspect a
22 crime or reason to suspect hate speech, or reason to suspect
23 urging violence, would get everything that the Government
24 needs and wouldn't have everybody who's attending a mosque

1 for a religious ceremony wondering who was the FBI agent in
2 the room; it's not necessary. But you get what I'm urging.
3 What I'm urging is that there are balances, and Congress has
4 to get into it. The courts have to lean a little bit into
5 it, but the Congress is going to have to lead.

6 How can you tell, if you're in Congress, if it
7 will help in terms of national security? Turn a little bit
8 to Figure 1. There are a number of things that across the
9 top, A, B, C, D, all the way up to I, are things that
10 terrorists need. If you're in Congress, you have to ask
11 yourself, does this step really prevent the terrorists from
12 getting one of these things they need? There's a J and a K,
13 fine. Add J and K to it. Along the rows, 1, 2, 3, 4, 5 are
14 things we can do, various steps we can do.

15 But again, it's not impossible to press a little
16 bit and cross-examine on whether a step is likely to be
17 useful. And that would remind you that every step that's
18 useful is likely to not only reduce terrorism in some ways,
19 but increase terrorism in other ways. Israel is learning
20 that. Targeted assassination is creating -- and this is what
21 Secretary of Defense Rumsfeld mused, wondered about in his
22 recent famous memo. Are we making more terrorists than we're
23 killing? You'd have to ask that question.

24 And you'd have to remember that whatever we do may

1 be used in a jujitsu type form against us, and you have to
2 worry about that a little bit too. A couple of MIT students
3 wrote an article that is famous and has circulated, it's
4 called the "Something Carnival", showing that no matter what
5 we do to screen at airports, if you had a group of four or
6 five terrorists, you could simply send them one at a time on
7 airplanes to different cities without bombs, just traveling,
8 and the one that wasn't double-checked would be the one you
9 would then want to use for the terrorist attack. You have to
10 remember that there are ways to strategically use our own
11 devices against us. That person who didn't trigger it on
12 his trip to Detroit would be searched less than other people
13 and would therefore be a good terrorist.

14 I wouldn't punish somebody who has shown the
15 failures of our system, the failures of our airline security
16 system. I don't think it's up to a judge to decide this.
17 But the idea that someone who's shown that our system is not
18 working will be punished and sent away to jail seems to me
19 to be sheer folly as a matter of policy.

20 Last point. How can you tell if it hurts human
21 rights? The administration acknowledges that it can't
22 violate the law, but it says we're at war, and human rights
23 diminish to the vanishing point in war. What if anything is
24 outside the power of the President in times of war? It's

1 hard to imagine. It's hard to think of them. On the other
2 hand, it seems a little bit unnecessary to give the
3 President all the powers of an endangered nation in dealing
4 with a group that may be 500, that will be succeeded by
5 other groups from the Muslim world, and other groups from
6 the United States, and everywhere else over the next 30 or
7 40 years.

8 To worry about human rights you have to worry
9 without regard to whether this is war or not war, whether
10 it's traditional or not traditional, about privacy such as
11 the total information awareness and its effect on democracy,
12 about freedom of speech, about freedom of religion, what
13 will the effect be of FBI agents randomly attending mosques,
14 about freedom of movement, what will it mean if Americans
15 can be detained because the Secretary of Defense says he
16 believes they were involved with terrorism, with the right
17 to lawyer, to rights against discrimination.

18 Civil liberties exist beyond the law, they exist
19 separately from the law. They exist as freedoms that we urge
20 on other countries and that make us feel secure as
21 Americans. And those are the things that have to be
22 balanced, not surrendered in the name of war.

23 And finally, and with this I close, the Justice
24 Department has had a tradition for many years, certainly

1 going back through the civil rights period, of being the
2 voice of civil liberties, civil rights, non-discrimination,
3 decency in Government councils. The Government's always
4 needed that. It's always needed that leaning in that
5 direction. For a very long time, Jamie Gorelick, and I as
6 the Deputy, and others from the Justice Department, have sat
7 on the group that has to approve any covert action by the
8 CIA; and then in the later stages when it's finally
9 approved, the Attorney General sits there. Why does the
10 Attorney General sit there? Not to make sure the laws of
11 war, that nothing has been done that is not permissible in
12 war time. The Attorney General sits there to make sure that
13 we remain true to traditions of American democracy, and to
14 urge that. The Justice Department has to go back to that
15 role. Thank you.

16 (Applause)

17 JUDGE BAYLSON: Professor Dinh.

18 PROFESSOR DINH: Thank you very much, Professor
19 Heymann, thank you very much, Judge Baylson, Judge Scirica
20 for this invitation to a conference that I've always envied
21 because Judge Chertoff keeps talking about what a wonderful
22 group this circuit is, and what a wonderful conversation
23 this conference has always been. I must say that I have
24 added pleasure of attending this particular conference

1 because we do not have to deal with the boring sunshine of
2 the U.S. Virgin Islands, but rather we can be here in
3 beautiful Philadelphia, and it is beautiful with wonderful
4 views of Camden across the river. And I thank you very much
5 for this special invitation to this place.

6 I will start off by noting that this is the
7 absolutely opportune time to have this critical
8 conversation. I have likened this period, the two-year
9 period after the September 11th, as somewhat of a transition
10 phase whereby the Department of Justice and others involved
11 in the campaign against terror is ending our sprint stage of
12 the race towards safety and entering the marathon phase of
13 that race. That is why key leaders like Larry Thompson,
14 Judge Chertoff, Ralph Boyd, and to a lesser extent myself
15 feel comfortable in handing off the baton to the long range
16 runners whereas we were the initial responders to this
17 crisis. And you noticed, I included the name of Ralph Boyd
18 in that group in order to round out the gang of four. And
19 that inclusion is not an incidental one, but it is a
20 critical one, and it goes to emphasize Professor Heymann's
21 point as to the role of the Department of Justice as the
22 defender of civil rights and civil liberties of law-abiding
23 Americans.

24 I remember immediately after 9-11, I think it was

1 September 12th, the Attorney General was considering his
2 first speech to the nation, his first press conference, one
3 of many. We were over in the FBI Center, in the Command
4 Center, because the conferences were being done out of
5 there, and Ralph Boyd ran out the hall after me and handed
6 me a piece of paper. He says whatever you do, make sure the
7 Attorney General says this in his opening statement or in
8 answer to a question. I looked at it, it was one paragraph
9 iteration of how important it is for the entire country to
10 keep its head and not, and not engage in stupid, unwarranted
11 crimes of retaliation, misplaced retaliation. And I
12 remember a somewhat heated conversation between myself and
13 Ralph. I said you know, we're going out there in order to
14 reassure the public, do you think this is really necessary.
15 He insisted it was, and even edited his one paragraph, and
16 those of you who know Ralph Boyd, know how hard it is for
17 him to make things shorter, his one paragraph into one
18 sentence, which the Attorney General stated in that first
19 speech and indeed reiterated every single time he appeared
20 in any press conference.

21 And the campaign, in order to investigate and
22 prosecute such crimes as, hate crimes of retaliation, was an
23 integral part of the campaign against terror because we know
24 that we seek to protect the American people in general, but

1 those people who are most helpful to us in that effort are
2 the communities which are most affected by terrorism, and
3 that's the source of the information that we would get.

4 And so even as Judge Chertoff was engaged in an
5 aggressive campaign against the terrorists, Ralph Boyd is
6 there engaged in a very aggressive campaign, equally
7 aggressive campaign, in order to investigate hate crimes,
8 resulting in approximately 112 to 120, depending on how you
9 count, prosecution assistance at the state and local level,
10 and a couple of federal prosecutions of retaliatory hate
11 crimes.

12 But to the topic at hand, which is the primary
13 response to the campaign against liberty by the terrorists
14 waged on September 11th, and I believe they continue to wage
15 it until this day.

16 There is a lot of confusion. There is a lot of
17 misinformation, and at times there is a lot of obfuscation
18 and disinformation in this current dialogue. I hope that as
19 we, intelligent commentators and decision makers, progress
20 in this conversation to discuss and discover and implement
21 the rules of the road for the continuing path toward safety
22 for the marathon phase, I think that it is appropriate for
23 us to reconsider those rules of the road. I think it is
24 incumbent upon us to separate the wheat from the chaff, and

1 make sure that our conversation proceeds not on what is
2 politically sexy, but rather what is jurisprudentially,
3 legally and historically relevant to our conversation.

4 So my comments will be in that vein, to try to
5 distinguish between constitutional rights and civil
6 liberties in general, to distinguish between the practices
7 and policies of the Department of Justice, and the practices
8 and policies of the Department of Defense, although the two
9 are obviously intertwined, but in order for us to make heads
10 or tails we have to distinguish between chief war power and
11 chief law enforcement authority of the President of the
12 United States, and also to distinguish between actual
13 activities of the United States Government versus potential
14 activities or imagined fear out there in the electorate.
15 That way we can dispel the fears while at the same time
16 reaffirm the public as to the steps that have been taken in
17 order to protect the security of America and the safety of
18 her people.

19 In this regard, I want to refer to the three
20 primary prongs, the three, I would consider them all equal
21 but the three primary prongs of the campaign or the strategy
22 against terror. First, information; second, detention; and
23 third, immigration. Of these three, it is obvious that they
24 are not of equal weight.

1 Unless we are to ignore the terrible mistakes of
2 history such as the German and Japanese internment and other
3 regrettable mistakes of history, detention cannot be a
4 primary, even a significant part of any campaign to prevent
5 terror.

6 Likewise, immigration. Unless we are going to
7 offend the liberality of tradition and the generosity of
8 spirit that have brought us all, my family included, to
9 America and the fruit of opportunity to the peoples of the
10 world, we cannot, we cannot rely on the cessation of
11 immigration or significant restrictions on the right to
12 travel across and into our borders as a primary or even
13 important component of our campaign against terror.
14 However, both of these are necessary components; not
15 significant, not important, not primary, but necessary
16 components.

17 The primary component is information. Developing
18 actual intelligence so that prosecutors can disrupt and
19 prevent terrorism crimes from being perpetrated here in the
20 American Homeland. And we had no illusions when we sat down
21 and crafted the strategy in order to develop more actual
22 intelligence for law enforcement officials to use to disrupt
23 and prevent terrorism.

24 I remember a meeting, I think it was the Thursday

1 after September 11th, where Judge Chertoff, myself, Larry
2 Thompson, the Attorney General and all of our staffs were
3 gathered in a conference room to discuss administrative and
4 legislative proposals that would be necessary for us to
5 create the seamless web of information gathering in order to
6 prevent terrorism. And one of us remarked that it is an
7 irony, indeed it is a significant pitfall of our strategy.
8 That is, the more successful we are in implementing the
9 strategy of preventing another catastrophic attack on the
10 American homeland, the more space we create for those who
11 would detract from our policy to criticize it either as
12 ineffective, unnecessary or worse, counterproductive. We
13 fully recognized that, but obviously we took an oath to
14 defend the Constitution of the United States against
15 threats, and we've fulfilled that oath. Now we've seen 25
16 months of relative peace, where not another American life
17 has been lost to terrorism on the American soil, we see the
18 same political dynamic coming to effect.

19 What this little story reminds me is that each and
20 every single one of the considerations that Professor
21 Heymann had so articulately highlighted for us here, we had
22 internally considered, as we progressed to craft that
23 strategy, because we fully knew not only that it is our
24 constitutional duty to weigh these various considerations,

1 these momentous concerns, but also that if we didn't do it,
2 there would be political hell to pay.

3 And so even though, and I acknowledge this very
4 explicitly, even though the public relations campaign, the
5 messaging, did not reflect this type of consideration,
6 because those decisions were made above our pay grade and
7 outside of our earshot and outside the cannon of our
8 expertise, the careful substantive work that went into
9 crafting the policy and the strategy did reflect the careful
10 consideration of the concerns that Professor Heymann has
11 articulated. Of course, we're not infallible and we may well
12 be proven wrong. I am very glad that the Supreme Court has
13 now decided to enter the conversation. It is a rather
14 surprising case to be entering into, to be perfectly honest.
15 Of the six judges in the DC Circuit, not one dissented from
16 the decision, so it is rather surprising, but I am heartened
17 by the fact that the justices now will engage in judicial
18 determination of these matters, and hopefully that will, and
19 it is ultimately the hope that they will refrain from making
20 extra judicial statements about these weighty concerns.

21 Information. Professor Heymann said that I would be
22 laughing about Section 215. It is no laughing matter,
23 although I do think that the hullabaloo over Section 215
24 (which is the business records provision of the USA Patriot

1 Act) has been greatly overblown. Those of you who are
2 prosecutors and defense attorneys, know that a normal grand
3 jury subpoena can get you business records of all types in
4 ordinary criminal investigations.

5 Judge Baylson mentioned the case of the Unabomber.
6 In that case, it is widely reported that federal
7 investigators served criminal grand jury subpoenas on the
8 libraries of at least the University of California at
9 Berkeley, and also the University of Michigan, in order to
10 see who checked out three particular books, rather esoteric
11 books that were cited in the manifesto that he had sent to
12 various news organizations. A rational, reasonable
13 investigative step, going to look at the library records to
14 see who checked out these three books. It didn't pan out to
15 be anything because he covered his tracks a lot better, but
16 you can see if the same person checked out all three books,
17 it would be a pretty good investigative step. In order to
18 get that, you have to do nothing but sign the subpoena and
19 go to the clerk of the court in order to get a stamp.

20 Section 215 gives that same authority to national
21 security investigators in the Foreign Intelligence
22 Surveillance Act context. It does so with a very significant
23 and potentially intrusive civil liberty provision: that is
24 the provision for confidentiality. It is an automatic gag

1 order. You can get the same thing in criminal context by
2 going to a judge and requesting the confidentiality order.
3 Section 215 is automatic. The persons receiving the order
4 cannot disclose to a third party except to execute that
5 order, consult counsel or other staff in order to comply
6 with the order. That is a potentially significant intrusion
7 upon the civil liberties of the third party, that is the
8 person whose records are being sought by the investigators.

9 Because of that potential, Congress saw fit to put
10 specific restrictions and safeguards. One, you actually
11 have to go to a judge, a Foreign Intelligence Surveillance
12 Act judge, and he has to -- he can only grant that order
13 only after finding that it's relevant to a national security
14 or terrorism investigation.

15 Second, every six months, the United States
16 Department of Justice has to report both to the Intelligence
17 Committee and the Judiciary Committee of the number of
18 times, the manner and the purpose and fully inform those
19 committees of the use of Section 215. Those reports have
20 been made consistently since October 26th of 2001 when the
21 Act was passed.

22 Finally, although the business records provision
23 does not specifically single out a First Amendment activity
24 such as bookstores and libraries, it does include the

1 standard protection for such activities, in that it says
2 that the provision cannot be used to target First Amendment
3 activities. I do think that the fears surrounding the
4 provision has been of great benefit to the debate, but is of
5 a different kind of benefit. It is not that provision itself
6 that should be the focus of our attention, but rather to the
7 extent that the debate centers on First Amendment
8 activities, the next question should be asked: should it be
9 so easy for criminal investigators, without any approval of
10 a court and order, to get records of First Amendment
11 protected activities like records of bookstores or
12 libraries? That's a debate separate from and apart from the
13 Section 215 debate.

14 Professor Heymann brought up a very good point,
15 what good is this power if it has not been used. If it has
16 not been used, then maybe it should be removed from the law.
17 If it is truly necessary, then why don't you use it. I think
18 that is a very important question, but one thing that needs
19 to be put into debate is the prosecutorial choice. There is
20 a choice for an investigator. You can go to a grand jury
21 proceeding, a relatively easy way in order to get the
22 records, or you can go the Foreign Intelligence route,
23 Section 215. It depends on how much you value the
24 confidentiality of your investigation, and what steps you

1 are willing to take. This investigative choice exists for
2 the investigators. Just because the investigators have made
3 the choice not to employ Section 215 in the last two years,
4 but found grand jury subpoenas adequate, does not mean that
5 there would not be a case or an instance in the future that
6 arises where they would not make a choice differently. And I
7 think the existence of that choice is a very important arrow
8 in the quiver of the investigator seeking to protect against
9 national security threats.

10 Other areas of the law have been very significantly
11 commented upon. I must say I frankly do not, do not credit
12 very much the criticism. Because the criticism, while
13 politically sexy, does not weigh very significantly in the
14 jurisprudence of the legal tradition of our history. The
15 entirety of Title 2 of the USA Patriot Act, the so-called
16 surveillance provisions, were only incremental changes that
17 removed the loopholes that prevented law enforcement from
18 having the seamless web and allowed terrorists and other
19 criminals to exploit those loopholes, in order to
20 communicate their criminal or terrorist plans.

21 Each and every single time that Congress extended,
22 made those incremental extensions, it also extended the
23 authority of the judiciary, using the same level of
24 predication, be it probable cause, relevance or whatever,

1 that existed in previous law to the incremental extensions.
2 These are incremental changes that have resulted in an
3 exponential gain in the defensive preventive capacity of law
4 enforcement. It is not the existence of the net that matters
5 but rather the existence of the breaks in the net that allow
6 the fish to get through. By closing those loopholes in this
7 net, creating that seamless web, you have exponential gains
8 because you catch all the information that you are
9 authorized to catch, while at the same time having an
10 incremental effect on the civil liberties of law abiding
11 citizens.

12 The focus on the politically sexy provisions, be it
13 library records, sneak and peek, or I guess the Department
14 of Justice would call it the terrorist tipoff provision, or
15 more neutrally the delay notice provision, all of these are
16 politically sexy areas, although not very juris prudentially
17 worthwhile. All the attention that is lavished on these
18 provisions I think comes at a cost, a cost in the public
19 debate by not focusing our minds on the truly important
20 provisions, the ones that are truly worthy of attention and
21 may potentially impose significant costs on our civil
22 liberties if not infringe upon our constitutional rights.
23 These are the questions that we weighed very, very carefully
24 during the passage of the USA Patriot Act; among them, the

1 revision to the Foreign Intelligence Surveillance Act to
2 permit coordination between intelligence and criminal
3 investigators. This has been facilely described as an end
4 run around the Fourth Amendment. That is obviously too
5 facile, because none of us can do an end run against the
6 Fourth Amendment and everybody is subject to the same
7 restrictions.

8 However, to the extent that criminal investigators
9 can use, freely use, the heightened surveillance authorities
10 of the Foreign Intelligence Surveillance Act authorizations,
11 that would become a significant threat. That Act exploits
12 the emergencies or exigency of circumstances that affect the
13 national security exception to the Fourth Amendment
14 therefore does not as the Court in the In Re: Sealed case
15 has articulated. It's not subject to the warrant requirement
16 but is only subject to the reasonableness requirement. To
17 the extent that criminal investigators can freely exploit
18 the Foreign Intelligence Surveillance Act provisions in
19 order to investigate ordinary crimes, then that would raise
20 I think a significant constitutional issue. That is why the
21 Attorney General's guidelines implementing this provision
22 very carefully articulated limits on such coordinations so
23 as to prevent and avoid the difficult constitutional
24 questions. But again, we are not infallible. I think the

1 public debate should be focused on what is going on down in
2 Florida and the first case being brought using derived FISA
3 evidence. This raises questions such as whether or not
4 FISA is the appropriate authority or whether the Classified
5 Information Protection Act is the appropriate level. To
6 what extent does constitutional exclusion apply to such
7 evidence and the like. All of this is going under the radar
8 in Florida. I think it's maybe good for the decision-making
9 process, but these are the questions that I think should be
10 a significant if not dominant part of the public debate.

11 Second I want to comment a little bit on the
12 detention policies of the United States. And here I want to
13 introduce again the distinction between the Department of
14 Justice and the Department of Defense.

15 Each and every single arrest and detention by the
16 Department of Justice after September 11th has been made
17 based on an individualized predicate: either a charge of
18 immigration law violation, a violation of criminal laws, or
19 a judicial issue material witness warrant. Each and every
20 single one. That's obvious because we have the Fourth
21 Amendment, and all prosecutors are subject to those
22 restrictions. You have to have an individualized predicate
23 in order to make a law enforcement arrest and detention.

24 That does not of course include the Department of

1 Defense. And the case of Hamdi and Padilla are very
2 prominent examples. Indeed, in the case of Jose Padilla, he
3 was initially arrested by the FBI and held by the Department
4 of Justice based upon probable cause of a crime against the
5 people of the United States, that is, to use a weapon of
6 mass destruction. The President personally, subsequently
7 designated him as an unlawful enemy combatant and
8 transferred his detention to the military detention context,
9 and thereby invoked his, some would say unilateral,
10 executive authority in times of war, in order to detain this
11 person for the pendency of that war.

12 I think that it is beyond question that the
13 President, during the time of war, has such authority to
14 detain enemy combatants on the battlefield to prevent him or
15 her from doing further harm to our troops and defeat our
16 military objective. I think it is a more difficult question,
17 but again, there should be little question, that that
18 authority extends to the non-traditional battlefield in the
19 war against terrorism because the battlefield of the
20 terrorist's choosing includes the everyday streets of our
21 society and not just some battlefield in Europe or in
22 Afghanistan or in Iraq. It takes just one more step of
23 inferential logic in order to extend that authority to a
24 non-traditional battlefield. Just as Chicago O'Hare can be

1 seen as that battlefield, if Jose Padilla seeks to make that
2 his battlefield, correspondingly the President's authority
3 to make a military detention extends to that unconventional
4 battlefield.

5 I think it is the most difficult question and one
6 that the President will ultimately -- and here I am again
7 making a prediction that I should not make but one that I
8 feel confident in based on my review of the law -- the
9 President will lose in the courts, if not in the Supreme
10 Court, on his assertion of the extreme position that the
11 Executive authority not only gives him the power to detain,
12 but the absolute power, with some limited articulation, to
13 decide what process if any is due to these detainees. This
14 is a question that is critical in both the Hamdi case and in
15 the Padilla case. Based on my review of the cases, I find
16 little support in the precedents for the courts to defer to
17 the processes of the executive or military when there has
18 been nothing to defer to. Both the *Ex Parte Quirin* case and
19 also I think more relevantly the Dames & Moore v. Regan case
20 which dealt with the U.S. Iranian Claims Tribunal, the court
21 made much of the fact that there are alternative procedures,
22 either prospectively in the Danks and Morby Regan case, or
23 retrospectively ex parte in Quirin, which the court can
24 judge to be adequate or not. They do not require to be

1 judicial, they do not have to be immediate, they can be
2 delayed and executive in nature as in both of those cases.
3 But I think there has to be some processes for the court to
4 defer to if one seeks deference from the court.

5 In this instance, by the way, I do not mean to
6 fault the administration for asserting a strong position.
7 We've seen areas in the past where the Executive would seek
8 to assert a strong position. I think most prominently is the
9 executive privilege case of United States vs. Nixon where
10 the Executive not only asserted the existence of executive
11 privilege, but argued that it extended to exclude the
12 jurisdiction of federal courts to decide the contours of
13 that executive privilege. Of course, the Supreme Court there
14 for the first time acknowledged the existence of Executive
15 privilege but also retained authority to judge for itself
16 where the balance of that Executive privilege exists in the
17 criminal context and did not give ultimate deference to the
18 executive to determine the contours of that privilege. I
19 think the same historical process, litigation process will
20 happen in this case based upon my reading of the cases.

21 Finally, as the resident refugee, I think it
22 incumbent upon me to make a comment regarding the
23 immigration policies of the campaign against terror. And
24 here the immigration policies are not limited to the

1 campaign against terror because when the administration came
2 into office, it was readily apparent that we had a
3 dysfunctional immigration system. With every single scare of
4 the past, and David Cole, my colleague, in his recent book
5 makes a very good historical case of this phenomenon where
6 there is a scare in the past, Congress and Washington saw
7 fit to restrict immigration. You can recall the Red scares,
8 the Palmer raids of the 1950's, Cold War and even in 1996
9 when the terroristic attack was not foreign based, you have
10 significant restrictions on the immigration but without
11 adequate resources, and, I would say, the expectation that
12 the INS would not be able to fully enforce those
13 restrictions.

14 And so you have the response to the public outcry
15 for more restrictions while not paying the full cost of
16 those policy changes by knowing that this system would be
17 under-enforced or in many cases unenforced. I think that
18 that is an inherently unstable policy-making process. That's
19 why the Attorney General and the President embarked, well
20 before September 11th, on a comprehensive solution to the
21 immigration policy issue, including dialogue with Mexico and
22 other countries in order to solve the influx while at the
23 same time seeking to return the rule of law to immigration
24 law so that an entire area of law does not go under-enforced

1 or unenforced.

2 What was good policy prior to 9-11 became a matter
3 of national security after 9-11 in order for us to make sure
4 that the immigration laws are adequately enforced.

5 There were difficult choices to be made. Congress
6 had mandated since 1996 for the INS to have a comprehensive
7 entry/exit registration system. So we, like the countries of
8 Europe, would know who comes in and who goes out, and
9 therefore have a good inventory of the people who are
10 currently visiting in the United States. That is immensely
11 difficult when you have 2,000 miles of very porous land
12 border, both the southern and northern border. That's why
13 the INS had missed that deadline in 1998 and issued it again
14 in 2001. Congress and the USA Patriot Act rearticulated that
15 deadline and extended it to 2005. The INS had to start from
16 somewhere, and it decided to start with the countries and
17 persons who are the most significant security risk to the
18 United States after 9-11. First, the visitors from countries
19 of state sponsors of terrorism, and then other countries in
20 which there was a threat. I do not think that this could be
21 characterized as an effort of racial profiling or ethnic
22 profiling or even necessarily nationality profiling except
23 for those state sponsors of terrorism.

24 Now, the Department of Homeland Security has

1 announced that it has come up with the comprehensive
2 entry/exit registration system. I think that alleviates any
3 charge of selective prosecution or enforcement. It stands
4 for us to evaluate whether or not such a comprehensive
5 system gives us additional security, more than the targeted
6 national security registration system and whether or not
7 that comprehensive system imposes additional costs on
8 unsuspecting and unsuspected visitors to the United States.

9 Again, here, I must admit that mistakes have been
10 made. The Inspector General of the United States Department
11 of Justice on June 1 of this year released a report severely
12 criticizing the "hold until released" policy that was
13 articulated somewhere within the Department of Justice as a
14 violation of administrative procedures and statutory
15 provisions limiting the authority of INS to hold a person
16 pending deportation for a period of days, I think it was 90
17 days. And in some cases, that period was extended while the
18 FBI sought to clear the names of these individuals as
19 individuals of interest.

20 The mark of a good organization, the mark of good
21 governance, is not that mistakes will be made. They will be
22 made when you're running a department of 189,000 employees,
23 but how one responds to those mistakes. And I think here the
24 Department of Justice deserves credit for instituting

1 procedures acknowledging their mistakes in order to prevent
2 future mistakes. We are not perfect. None of us are, and
3 neither should the Department of Justice be expected to be.

4 I close by quoting Carl Llewellyn, the great
5 professor of contract law, when he said that ideals without
6 technique are a mess, but technique without ideals is a
7 menace.

8 I hope that this conference and other conference
9 conversations around the country will not only reaffirm our
10 ideals but also give us the techniques to secure those
11 ideals against the threat of terrorism. Thank you very much.

12 (Applause)

13 JUDGE BAYLSON: Thank you. Jamie Gorelick will
14 speak next.

15 MS. GORELICK: We are well on our way to looking
16 at the issues of terrorism from the point of view of the
17 checks and balances that we are accustomed to having in our
18 country, and how the events of 9-11 have changed that.

19 I was asked by Judge Baylson to give us some
20 context, talk about the nature of the threat and how we're
21 doing against that threat. But in light of these two sets of
22 remarks that we just had, I think I would start with a
23 little bit of commentary, because I think it illustrates
24 some of the problems that the 9-11 Commission will be

1 dealing with.

2 Viet Dinh talks about incremental changes that we
3 have made in our system of laws since 9-11, and one of the
4 changes is the change in FISA, Foreign Intelligence
5 Surveillance Act. It allows a prosecutor, say Judge
6 Chertoff, in his former position, to utilize a FISA warrant
7 instead of a grand jury subpoena or a Title III warrant in
8 situations where a case or an investigation could go either
9 way, in a much more substantial way than I could when I was
10 at the Justice Department.

11 The only check really on the FISA power, because
12 the FISA court at this point really has, with all due
13 respect, very little to do, is in the case that Viet Dinh
14 mentioned, where there is a criminal indictment. Because at
15 that point the court says well, is it appropriate to use
16 FISA in a case that the prosecutor knew or should have known
17 was going to be a criminal case, where the tool should have
18 been a Title III wiretap?

19 The problem of course is that a miniscule number of
20 these FISA's are going to result in criminal indictments.
21 And so what is the check on the use of the FISA power?

22 Now I pose this question to you not as a rhetorical
23 question, because I sought, when I was Deputy Attorney
24 General, this very authority. The Clinton administration

1 itself sought this authority when we were trying to ratchet
2 up the war on terrorism.

3 When we did that, we were told that you've gone too
4 far. That proposal from the Justice Department came off the
5 table at the behest, at the insistence, of conservative
6 Republican Senators. After Oklahoma City, the Justice
7 Department asked for many new powers to fight terrorism. In
8 that instance however the threat was thought to be domestic.
9 And in that instance, the left and the right combined to put
10 a check on what the Government was doing, or wanted to be
11 doing.

12 And I would just say to you that the political
13 dynamic has hugely changed, hugely changed, so that not only
14 do you not have the same kind of check on legislative
15 proposals, but in my own observation I don't think you have
16 the kind of oversight that these dramatic new powers would
17 suggest you might.

18 And Viet Dinh is right to point out that the Civil
19 Rights Division has been vigilant in creating a counterpoint
20 within the Justice Department with regard to hate crimes.
21 But, in my experience in any event, the Civil Rights
22 Division is not the voice of civil liberties against the
23 prosecutors and those who are involved in national security.
24 That has to come, shall we say, above his pay grade.

1 So, where does that leave you? Well, one of the
2 proposals that has been put on the table, for how we as a
3 government should structure ourselves, is very interesting.
4 It would take domestic security out of the FBI, out of the
5 Justice Department where it now sits, and move it. There are
6 several proposals as to where to move it, and we can talk
7 about that. Have the Justice Department serve as the
8 protector of civil liberties and the voice of civil rights,
9 by setting policies, by doing oversight, and "de-conflict"
10 if you will the Attorney General's role.

11 Now, why have I chosen to alter my remarks to start
12 off this way? Because both Professor Heymann and Professor
13 Dinh have made the point that we are in a dramatically new
14 place as a country. And I will tell you that I think some
15 very radical thinking is necessary to determine how to deal
16 with this. We are going to have to determine, to use
17 Professor Heymann's graphs, how we as a country organize
18 ourselves to get the information that will help us protect
19 our citizens from harm, and at the same time ensure that we
20 have proper checks and balances.

21 Our Government should be commended for the many
22 things that it has done to make us feel safer. And I'll talk
23 a little bit as well about the ways in which we are safer
24 and the ways in which maybe we are not. But the structures

1 of government in my personal view have not come along for
2 the ride, and we do not have the balances and checks that we
3 once had and that we will need to return to in some way.

4 So now let me turn to where we are in the war on
5 terrorism. Devising a scorecard for how we're doing is very
6 difficult. And even within the administration you have very
7 different views. The Attorney General has said we're winning
8 the war on terrorism. The Secretary of Defense says we lack
9 the metrics to know if we are winning or losing the war on
10 terrorism. I think Secretary Rumsfeld is right in that,
11 traditional measures of body counts don't work when you're
12 not fighting a standing army and when, if you're measuring
13 how many people you're taking out, and not measuring how
14 many people are coming in and are in the pipeline, you have
15 no idea if you're winning or losing.

16 It is clear that Al-Qaeda has suffered some
17 significant damage since September 11th. It has lost the use
18 of a major base of operations and its ability to train and
19 get assets is definitely undermined. Its financial
20 operations have been disrupted although it's again very
21 difficult for us to know to what extent. The United States
22 and its allies are clearly rolling up cells, capturing and
23 indicting terrorists and their associates across the globe.
24 And I think most fruitfully, the interrogations of those who

1 have been captured are yielding information not only about
2 what happened surrounding the run up to September 11th, but
3 where we are facing challenges going forward.

4 A noted terrorism expert has said, however, that
5 for a terrorist, not losing is winning. That is, making the
6 effort and staying in the game is a measure of winning for a
7 terrorist. Of course we know Bin Ladin is still at large,
8 his deputy Zawahiri remains at large. The threat of
9 sympathizers is as potent as it has ever been, the 2002
10 attacks in Bali by Jemaah Islamiah and the recent attacks
11 last May in Morocco are just examples of this sort of hydra-
12 headed monster that we are facing.

13 So we are living. If my job is in part to give you
14 a sense of our vulnerability, I think we are to be
15 congratulated for having the degree of safety we've had over
16 the last two years in the United States as Viet points out.
17 But we are living in an increasingly radicalized Islamic
18 world.

19 Less than ten percent of the Islamic world approves
20 of our current role in the world, and that's down from 46
21 percent pre 9-11.

22 Our State Department warned us before September
23 11th, warned us American citizens, not to go to 12 countries
24 in the world. When I last checked, it was warning us not to

1 go to 56 countries in the world. It's a pretty dramatic
2 number.

3 So, where are we in terms of the threat we are
4 facing? Afghanistan is safer, is a safer place for us, but
5 we basically have civilized control only in Kabul. The
6 surrounding countryside is not in any way where it needs to
7 be in terms of denying that place as a haven. We have not
8 finished the job there.

9 In Iraq, we see daily the threats that we face
10 there, and that is a new theater for us. And in the United
11 States, and perhaps Judge Chertoff will talk about this, we
12 still face threats internally. That is, we as a government
13 believe that there remain supporters of Al-Qaeda and of
14 terrorism generally who we have not identified.

15 The good news, I think, is that our citizens are
16 much more alert. We are not going to have a cleaning lady
17 for a motel accepting laundry out the door for four straight
18 days without her saying to her manager shouldn't we ask
19 somebody about who's in there and what they might be doing.
20 I personally think that's good news. Other people might not.
21 But, I think that's good news. We have a much more alert
22 local law enforcement. And improving, although there's lots
23 of room for further improvement, relationship between
24 federal and local law enforcement.

1 But I think we have been very slow as a nation to
2 do the things that we need to do. I mean, even the creation
3 of the 9-11 Commission. It was 18 months before we had the
4 political will to say we're going to take a hard look at
5 what we did wrong. And that's contrary to every impulse
6 we've ever had in this country. We've always looked at our
7 mistakes, in a dispassionate and clear-eyed way to see what
8 we did wrong and what we could do better. And so now we're
9 up against a difficult deadline and a lot of the trail is
10 cold, but we are doing what we need to do. It took almost
11 two years to create a Department of Homeland Security, and
12 merging all of those assets is a huge undertaking.

13 I don't think we've got the intelligence function
14 right. We have a Counter-Terrorism Center at the CIA which
15 says that it has intelligence and law enforcement people
16 working together. We have a similar center at the FBI which
17 has people from the intelligence community there. We have
18 created a third entity called the Terrorist Threat
19 Integration Center, the TTIC, which brings FBI and CIA
20 together in one place, yet a third place. We have a
21 Terrorist Screening Center at the FBI. We have yet another
22 unit at the DOD, and we have Congress saying that the
23 Department of Homeland Security should have yet another
24 integration center. I don't think we've got this right.

1 Last week at the Commission we had a group of
2 people who were senior officials over a period of 20 years,
3 from the FBI, the CIA, the DOD, come in and give us the
4 product of their thinking, on an ad hoc basis, just as if
5 they decided to get together themselves to think about what
6 we should be doing as a country. And they believe we do not
7 have an effective domestic security function.

8 I think this is going to be the hardest question
9 that the 9-11 Commission deals with. Because their
10 assessment, and I think it is the assessment of many, many
11 people who are dispassionate observers here, is that we do
12 not have the ability to assess the threat here in the United
13 States and go after the places where that information might
14 be. We are better than we were, but we are not where we need
15 to be, and the question is whether the current FBI can do
16 that job. And that is going to be a very significant issue
17 that you all ought to keep on your screens. There's been
18 some talk of creating a U.S. version of the British MI5.
19 There are various proposals floating out there, but this is
20 a very significant issue. The words "domestic security" are
21 not ones that are comfortable for us. But it is a function
22 we need to do. And if we're not going to do it in the way it
23 needs to be done, we ought to own up to that fact and not
24 say we're doing it and not do it inappropriately.

1 And if we do do that, we are going to need to
2 return to the beginning of my remarks, to develop a set of
3 checks and balances that work.

4 Our law enforcement agencies, the national security
5 apparatus of our law enforcement agencies, knows how to do
6 domestic security. They were very good at infiltrating the
7 Communist party, very good. And then, they took certain
8 next steps that were the logical extensions of that which
9 ultimately ended up in the wiretapping of Martin Luther
10 King, and many of the events in the FBI's history that made
11 the American people most uncomfortable. We have to come to
12 grips with those issues, because if you are going to be
13 looking in mosques, if you are going to be looking where the
14 threat might possibly emanate, if you're going to be
15 protecting the scenes which terrorists have exploited in our
16 extremely open society, you're going to have to deal with
17 the notion of domestic security and what we want that to be
18 and how we protect ourselves in that circumstance.

19 Briefly about the 9-11 Commission. We are ten
20 commissioners; five democrats, five republicans. We have a
21 staff of 65 fabulously qualified people who've operated in
22 the worlds of intelligence, law enforcement and/or military
23 for decades. And our job is to look at every element of our
24 government and determine what it did to protect us against

1 JUDGE BAYLSON: Our next speaker will be Judge
2 Michael Chertoff.

3 JUDGE CHERTOFF: Thank you, Judge Baylson. This is
4 a very tough act to follow. This is a terrific panel.

5 When I came out of the Department of Justice, I had
6 occasion in the course of preparing a couple of lectures, to
7 actually go back and look at the history of judicial review
8 as it relates to presidential decision-making in times of
9 what I call armed conflict, which includes war, but is not
10 limited to a formal declaration of war. And I thought that
11 may be kind of a useful point of departure, given the topic
12 that Judge Baylson asked me to talk about here.

13 But I begin by saying let's talk a little bit about
14 what war is. We use the word war a lot as a metaphor.
15 There's a war on drugs, a war on poverty. And we the find
16 ourselves actually in what you could describe as a war, and
17 we feel almost as if we've simply heard this word over-used
18 too much before.

19 I think legally "war" actually is not a useful
20 term, and I prefer the term "armed conflict" because it is
21 broader than that. If you look at the Constitution itself,
22 there are various provisions which describe the
23 extraordinary powers of Congress, for example, in the face
24 of "insurrection" or "rebellion" or "invasion." And it uses

1 all these words grouped together. There are various
2 provisions that talk not just about war but other kinds of
3 circumstances where the threat to civil authority is so
4 great that conventional law enforcement does not seem to
5 apply.

6 And so I do think that constitutionally we have
7 something of a historical basis for recognizing that not all
8 wars look alike. They're not all like the wars, for example,
9 that I used to see in movies when I was a kid and used to
10 see movies about World War II. And they're not like
11 Vietnam. And in fact, if you look at the paradigmatic wars
12 from a legal standpoint, I would say the Civil War and the
13 Second World War, they're both quite different. The Civil
14 War was not recognized as a war by Lincoln. And in fact, one
15 of the issues he had to contend with was how could he use
16 the extraordinary powers he wanted to use in a circumstance
17 where he didn't want to recognize the rebels as being a
18 legitimately constituted state.

19 World War II is very much as we think of a
20 conventional traditional war. And now we have an armed
21 struggle which is I think unlike either the Civil War or the
22 Second World War, and yet about which we could say that the
23 potential for damage and loss of life in the continental
24 United States is greater than in any prior war we've ever

1 fought; which is to say, I think you could make a very good
2 case that standing as we are today, the chance of an enemy,
3 in this case a terrorist enemy, wreaking havoc and killing
4 Americans inside the continental United States is greater
5 than we faced in the Second World War, and greater than we
6 faced in the Civil War. And that's simply because the
7 leverage that enemies have now to impose destruction and
8 terror is so much greater due to the invention of weapons of
9 mass destruction.

10 So, it raises the question whether it is terribly
11 useful to think about precedents as being helpful as we
12 determine how do we proceed in the face of the current
13 threat.

14 But I do want to talk a little bit about the
15 precedents because I think they're actually quite
16 instructive and a little bit surprising. For example, here's
17 a question for you. Who are two justices who in two separate
18 Supreme Court decisions writing for the Court, took the
19 position that in a time of armed struggle or insurrection or
20 even domestic disturbance, the President had essentially
21 unreviewable power to make the determination that it was
22 necessary to use military force, and that the President had
23 virtually unreviewable power to have people killed or have
24 them detained without a trial? And who is the justice who

1 took the contrary position, who said that no, even in times
2 of war, the President has to be subordinated to the judicial
3 branch and to judicial review, and who went so far as to
4 order a President to follow a court order which the
5 President subsequently defied?

6 Well, the first two justices are Justice Story and
7 Justice Holmes. Justice Story writing in a case which is
8 called Mott in the early part of the 19th Century was faced
9 with an issue where the President had mobilized troops,
10 militia troops in anticipation of a potential British
11 invasion during the War of 1812. And one of the individuals
12 mobilized chose not to show up for duty and was later fined
13 by the appropriate military authorities and then went to
14 Court to contest the fine. And it made its way up to the
15 Supreme Court. And Justice Story made I think what's
16 probably the most vigorous exposition of presidential power
17 in time of war that you can read in any case. His position
18 is basically when we have a military situation, it is the
19 President who is the sole and final judge of whether it's
20 necessary to use the exigency of military force, it is not
21 reviewable by a Court, the President can rely on things that
22 would not be admissible in a courtroom or we can never have
23 a jury secondguess it, and we can never after the fact
24 decide that the President was wrong in doing it. And that's

1 Justice Story who I think is widely viewed as one of the
2 leading expositors of the Constitution.

3 A hundred years later almost, in a case called
4 Moyer vs. Peabody, Justice Holmes wrote an opinion for the
5 Supreme Court in a case in which the governor of Colorado
6 had had a labor leader arrested because of his view of
7 incipient labor unrest. And the labor leader was simply
8 detained for a period of several months until the threat
9 was, at least in the eyes of the governor, averted. And
10 Holmes sustained that detention which was not pursuant to a
11 criminal statute or an ordinary judicial procedure, and he
12 did so by saying that in terms of insurrection or rebellion,
13 the executive authority, in this case the governor, has the
14 ability to decide that civil law enforcement authorities are
15 not enough, and that he has to call out the troops. And
16 since the troops have the ability even to kill people,
17 that's the way Justice Holmes reasoned, it has to follow as
18 a matter of logic that they have the right to detain people
19 without a trial.

20 So those are two I think generally well regarded
21 justices who took positions that would be viewed as
22 extremely deferential to the President. And who's the
23 justice who really stood up to a President? Well, that's
24 Chief Justice Taney, the author of Dred Scott, who in a

1 decision in the Mexican American War was very emphatic about
2 the fact that notwithstanding that we were at war, the
3 President's or the executive branch's determination about
4 whether certain military action had to be taken was
5 ultimately subordinate to the requirement of judicial
6 review. And shortly after the Civil War began, when Lincoln
7 in complete disregard of the habeas corpus clause, rounded
8 up many, many people who were viewed as Southern
9 sympathizers, one of them, John Merriman, went to court in
10 Baltimore and had someone appear before Chief Justice Taney
11 who was sitting as a circuit justice. And Taney ordered the
12 military to release Merriman on grounds of habeas corpus,
13 and Lincoln himself didn't go to court but he sent a
14 subordinate officer to basically tell Chief Justice Taney
15 that he wasn't going to obey the order. Subsequently,
16 Justice Jackson writing about this event in one of his
17 books, described it as perhaps the most pathetic instance of
18 judicial action in the nation's history.

19 So, how do we reconcile these things, because we
20 also have to say that if Chief Justice Taney who was an
21 ardent Southern sympathizer, had in fact been able to impose
22 judicial supervision over the way Lincoln conducted the
23 Civil War, it might very well be that there would be two
24 countries now in what we have as the United States of

1 America.

2 I laid this out historically because it turns out
3 that we have for a couple of hundred years, from time to
4 time, had to struggle with the question of judicial review
5 and presidential power. And it's a fascinating topic which I
6 will certainly not resolve today -- maybe the Supreme Court
7 will resolve when they decide the Guantanamo case they took
8 yesterday -- because it really puts two powerful ideas at
9 loggerheads.

10 One is the concept that the President ultimately has
11 the fundamental responsibility of the defense of the United
12 States against destruction or deadly attack. And that's part
13 of his oath, to defend against all enemies, foreign and
14 domestic. And history shows, whether it be Lincoln or
15 Franklin Delano Roosevelt, that in those circumstances where
16 a President honestly believes there is a deadly national
17 security threat, the President is quite likely to do
18 whatever he thinks is necessary to defend the country,
19 notwithstanding what the courts say. Certainly Lincoln did
20 that in the Civil War. And there's at least a recent account
21 of the trial of the Nazi saboteurs under Franklin Delano
22 Roosevelt in which Roosevelt is purported to have told his
23 Attorney General that if the court were to require the
24 saboteurs to be released, he simply wouldn't release them.

1 On the other hand, we all, certainly everybody in
2 this room, take as an article of faith that at the end of
3 the day when we are dealing with issues of the Constitution,
4 it is the courts and it is the judicial branch that has the
5 ultimate right of review. Even if it turns out that the
6 courts defer to the executive branch, it is the courts in
7 the first instance that make the determination whether to
8 defer or not. Courts always have jurisdiction to decide
9 their jurisdiction.

10 And I think historically, although we've come close
11 to seeing these two ideals, which may be the irresistible
12 force and the immovable object, clash, the ultimate clash
13 has always been averted. One argument is that what has
14 happened is that at times of maximum peril, when the
15 temptation for the President to exert his power without
16 regard to the courts is at its height, the courts have
17 simply backed off. And with the exception of Merriman you
18 could certainly look at the Civil War history and the
19 history of the cases in World War II, including the infamous
20 cases of Hirabayashi and Korematsu, and draw the conclusion
21 that at the height of the emergency, courts were not quite
22 ready to secondguess the President, but that after the
23 emergency was over, the courts came back and reasserted the
24 right of habeas corpus or the rights to review what the

1 executive branch had done.

2 Of course, that's not a very helpful example in the
3 current situation because we don't know when the war is
4 going to be over. We don't know when the struggle is going
5 to be ended.

6 I do want to suggest though that there are some
7 characteristics of executive branch behavior that maximize
8 and some that minimize the likelihood that courts, if we
9 look at the historical record, will take action to block the
10 executive.

11 First of all, I do think that timing is a very,
12 very important issue. I think in the wake of an emergent
13 situation or in anticipation of an emergent situation,
14 courts have given, have given the maximum deference to the
15 executive branch.

16 Another factor has been duration. Where a measure
17 is taken by the executive branch that is questionable but it
18 is of finite duration, I think that the courts have been
19 much more relaxed in their review of that type of decision
20 making. And Moore vs. Peabody is actually a great example
21 of that, because although Holmes give a very full blown
22 defense of the right of the executive to detain someone in
23 the course of combating an insurrection, he acknowledges
24 that the detention only has gone on for a certain period of

1 time, and that seems to be a factor that gives him some
2 comfort in deferring to the executive.

3 I think another factor frankly is who the decision
4 maker is. Where the President himself has personally made a
5 decision, I think the courts are understandably reluctant to
6 secondguess; where those decisions are made by inferior
7 officers, I think the courts are much more willing to be
8 aggressive. And of course, we're all familiar with Justice
9 Jackson's often quoted statement in the Youngstown Sheet and
10 Tube case, that where Congress and the President act
11 together, the President's power is at its apex because he
12 has both his own power and all that Congress is capable of
13 delegating to him.

14 I think a third thing that is important and will
15 increasingly be important as we move into a phase of post 9-
16 11, that is probably less emergent than the sprint that Viet
17 described, is the existence of some kind of a process for
18 the courts to look to. And I do think in this respect it's
19 useful to separate two separate issues. One is the issue of
20 the role of the courts, the institution as one of the
21 branches of government, and the need for the courts to
22 assert that role and to make sure that the primacy of the
23 law continues. And the second related but distinct concept
24 of the need to have an orderly process for deciding issues

1 as they relate to individuals. Whether that process be
2 located in the executive branch or the judicial branch.

3 I think it's likely again, as duration progresses,
4 as time of emergency passes, and as one encounters decisions
5 that are not being made by the President personally, the
6 likelihood of the Supreme Court or other courts being more
7 vigorous in reviewing and raising questions about actions
8 that affect individuals will increase. I think to the
9 extent that the executive branch is capable of demonstrating
10 the existence of a process, that may not be a typically
11 criminal trial under Article III, but some kind of a process
12 that appears to be reasonably objective and reasonably fair
13 and reasonably regular, I think that process may be one that
14 the courts are prepared to defer to. I think it's going to
15 be much harder frankly if the executive comes in and simply
16 says we're not going to tell you that we have a process, we
17 have made the decision, you have to accept the decision.

18 We are I think now as Viet points out, at a
19 transitional phase. In a kind of example of the common law
20 method, we are now seeing a case by case development of the
21 contemporary law of judicial review as it relates to things
22 like detention of enemy combatants.

23 But I guess I want to suggest that perhaps the time
24 has come to take a more comprehensive and universal approach

1 to the issue as opposed to the ad hoc approach we've taken
2 up to now. We have our study commission, the 9-11
3 Commission, which I think is a terrific idea because it
4 gives us an opportunity to step back and look at a whole lot
5 of institutional issues that relate to our national
6 security. I wonder whether Congress or some other body ought
7 to sit down in a nonpartisan way and look at all the various
8 issues that are presented in terms of enemy combatants and
9 similar types of questions, some of the legal challenges
10 that are now faced in trials of terrorists that are
11 currently underway, and see if one can fashion a
12 comprehensive approach to how to deal with these issues. One
13 that would have the benefit of Justice Jackson's observation
14 that when Congress and the President act together, there's
15 the acme of power. One that would have the ability to learn
16 from what we've experienced in the last two years as well as
17 what we've experienced in the last 200 years, and one that I
18 think might fashion an enduring process to go forward in,
19 for what I envision will be a long term problem that will
20 not have a ready solution.

21 The final observation I guess I would make is this.
22 It's very important, I think it's important for courts, it's
23 important for anybody else that is looking historically at
24 events that are the process of decisions that are made under

1 time of great stress, to be mindful of the difference
2 between hindsight and foresight. And I know it's an oft
3 remarked difference but I think it bears, it helps us to
4 bear it in mind when we make very important decisions.

5 Inevitably, decisions in war are made with
6 imperfect information. The risks are very great, because if
7 you make a mistake, there can be a horrendous loss of life.
8 On the other hand, if you are waiting for proof beyond a
9 reasonable doubt you will never make a decision, and that is
10 making a decision by default.

11 So I think we have to be careful when we apply
12 hindsight to decisions that were made before. People were
13 critical, for example, or have been critical of Lincoln and
14 Roosevelt for things that they did during the wars that they
15 were in. But certainly speaking of Lincoln, although we now
16 know the outcome of the Civil War, I don't know that anyone
17 could have predicted in 1861 that it was clear that the
18 Union was going to win that war. And had Lincoln been
19 hesitant to exert the full measure of his power, it's not
20 clear to me there would be a Lincoln Memorial on the Mall in
21 Washington. So I think that's an important factor.

22 As it relates to our own time, I would leave you
23 with this thought. I think Phil Heymann gave you a very
24 persuasive presentation about the importance of not

1 overreacting to what happened in 9-11. But I remember
2 shortly after 9-11 there were stories that appeared in the
3 paper that were very critical of unnamed individuals in the
4 FBI because they did not authorize a search of a computer of
5 Zacarias Moussaoui who is currently on trial in the Eastern
6 District of Virginia. And there was an enormous hue and cry
7 about how feckless and irresponsible those unnamed agents
8 were because they didn't connect the dots up, they didn't
9 let the computer be searched. I don't want to take a
10 position on the merits of whether they were right or wrong.
11 I want to observe though that at the time they made the
12 decision, I'm fairly confident they must have believed they
13 were upholding the rule of law and civil liberties. And they
14 must have thought they would have been applauded for what
15 they did. And had it not been Zacarias Moussaoui but Joe
16 Blow whose computer they didn't allow to be searched,
17 perhaps they would be acclaimed.

18 So when one is making decisions about whether to
19 authorize searches or wiretaps or things of that sort, and
20 when one doesn't know the ultimate outcome, it really is
21 anybody's guess as to whether at the end of the day the
22 decision will be applauded or will be condemned.

23 We have to send a message now to everybody who is
24 in the Government who has to make those decisions this week,

1 here on how far the Government should go, how we should
2 balance the need to fight the war on terrorism against the
3 dangers to civil liberties. I want to talk a little bit on
4 that level. But I really want to spend most of my time
5 examining some of the steps we've taken because now, with
6 two years of information, and sometimes non-information, I
7 think we could make some judgments that we couldn't make two
8 weeks, two months, or even six months after 9-11. The
9 Government took a lot of actions immediately in the name of
10 national security, and it was very hard to tell at that
11 point whether in fact those actions were justified.
12 Fortunately or unfortunately, we now have a lot more data, a
13 lot more information, a lot more perspective to make some
14 judgments I think even two years out as to the legitimacy of
15 some of those actions. And looking forward, we ought to
16 learn from what I think are some of the serious mistakes
17 that we've already made.

18 But let me put it in a broader context. Judge
19 Chertoff talked about history and the importance of history.
20 And those who ignore it, as you know what George Santayana
21 said, are condemned to repeat the mistakes of history.

22 Just look at the 20th Century in the United States
23 and how we've done in times of war, in terms of balancing
24 our need for self preservation and protection of civil

1 liberties. It's not a glorious record. No country does well
2 in times of war. No country at any place in the world does
3 well in times of war in terms of protecting civil liberties.
4 We probably do better than most. But we know from World War
5 I, World War II, the Cold War, even metaphorical wars, as in
6 the war on drugs, the dangers that are inherent when we give
7 unlimited and unchecked power to the executive.

8 Think back just a little bit, World War I. At that
9 time with the Alien and Sedition Acts, we imprisoned people
10 during World War I for simply criticizing the war and
11 criticizing the draft. Eugene Debbs was sent to prison for
12 ten years in a case that was upheld by the U.S. Supreme
13 Court, simply for criticizing the draft. The notion at the
14 time was that it undermined morale, it endangered national
15 security, it was too dangerous to countenance at a time of
16 war. Years later we all say that was a mistake. And yet the
17 Supreme Court at the time sustained his imprisonment and the
18 imprisonment of hundreds of others under that theory.

19 Following World War I, we have the infamous Palmer
20 Raids with which I think we can draw a distinct parallel to
21 some of the arrests after 9-11. A series of terrorist
22 attacks on government officials, a bomb outside of the home
23 of Attorney General Palmer, followed by a roundup of some
24 2500 immigrants, treated in a miserable fashion, beaten, no

1 trials, deported, and at the time all the actions sustained.
2 We said it was a rule of law, they were immigrants, they had
3 no rights, courts refused to intervene. Years later again,
4 we say it was probably a serious mistake.

5 World War II brought us the Japanese internment,
6 probably the deepest stain on our constitutional fabric in
7 the 20th Century. Again, think back to the time. And it's
8 true, there's pressure, there's war, there are people who
9 might, as the Government suggests, be here to undermine our
10 war effort. We interned 120,000 people simply on the basis
11 of their alienage; they were Japanese Americans. A hundred
12 thousand of them being American citizens. What did the
13 Government say? What did the Executive say? The Courts
14 have no role in reviewing those detentions, this is an
15 Executive decision made in time of war, the war power gives
16 us that authority, and we have information. We have
17 information that a good number of these people may be
18 threats to American national security. It turns out they
19 didn't have that information. They represented that to the
20 Supreme Court, and not surprisingly, in the time of war,
21 during a war, the Supreme Court upheld the government's
22 power. Thirty years later Congress issued reparations to
23 many who had served in those internment camps, recognizing
24 the serious mistake that we had made.

1 During the Cold War, what kind of actions did we
2 take? It was a period marked by guilt by association. People
3 who simply belonged, who were members of the Communist party
4 were prosecuted without any burden on the Government to show
5 that they in fact intended to further any criminal ends of
6 the Communist party. It was simply guilt by association.
7 During the terror of the Cold War, the Supreme Court again,
8 somewhat predictably, during the time period, upheld the
9 Smith Act prosecutions in the early 1950's. And it wasn't
10 until the Cold War had passed in large part, the late 1950's
11 and 1960's, that the Supreme Court said well, maybe we got
12 it wrong. Maybe you really can't send someone to prison for
13 five years simply because they belong to a political
14 association without showing and proving that that person
15 intended in some way to further the illegitimate or criminal
16 acts of that organization.

17 We've seen, as I said before, what even
18 metaphorical wars can do. The war on drugs, I'm not going to
19 spend a lot of time on that. But I think we can all
20 recognize the undermining of certain privacy protections and
21 Fourth Amendment protections that come along when we say
22 we're at war.

23 There's this initial reaction. We have to give
24 deference, there shouldn't be much judicial review, things

1 are too important to think about individual civil liberties.

2 When you think about the characteristics of all
3 those events, there are several that run through them. One,
4 there's a reflection of expanded, in some case, unchecked
5 executive power.

6 Two, there's limited or no judicial review with
7 respect to what the Government has done.

8 Three, there's use of administrative measures to
9 achieve preventive detention or other serious restrictions
10 on liberty without the normal protections of the criminal
11 justice system.

12 Four, there is an overuse of secrecy on the part of
13 the Government.

14 Five, there's a targeting in many of these cases of
15 racial minorities or ethnic minorities.

16 And six, as I said before, there's a notion of
17 guilt by association.

18 Now let me be clear. Simply because we've made some
19 mistakes in the past does not necessarily mean that anything
20 we've done post 9-11 is similarly infected by those
21 mistakes. It may be we've done everything right, that we've
22 learned from our mistakes and that everything we've done
23 since 9-11 has been correct, or most of what we've done
24 since 9-11 has been correct.

1 Nor do I mean to suggest that some of the things
2 even in my view are not steps that were well taken, designed
3 to protect ourselves and also to enhance protection of civil
4 liberties in the United States.

5 But we ought to learn that there are serious
6 dangers whenever you have that confluence of those
7 characteristics: executive power; no judicial review;
8 secrecy; and targeting of ethnic and racial minorities;
9 which have been the characteristics of the way we've
10 responded to threats both real in war and perceived threats,
11 as in the Cold War. We have to be careful about the risks
12 that actually emanate from that kind of decision making.

13 Attorney General Biddle during the Second World War
14 famously said "the Constitution has not greatly bothered any
15 acting President in time of war". I take that to heart.

16 I also am guided by the comments of another former
17 Attorney General, Attorney General John Mitchell, who said
18 when being criticized about certain actions the Nixon
19 Administration had been taking in terms of national security
20 said, "Watch what we do, not what we say."

21 What I'd like to do now is not so much focus on
22 what the Government has said in the past few years, couple
23 of years, but in what they've actually done. And I want to
24 talk about some of the measures they've taken, and I want to

1 examine them in terms of the balance between protecting us
2 from terrorism and also protecting civil liberties.

3 My overall thesis, as you will see as I develop it,
4 is that the Government in word and in deed, is intent on
5 creating a broad terrorism exception to the Constitution.
6 That the invocation of the term "terrorism", which has its
7 strong implications and often shuts down discussion, the
8 Government in this area, when we look at a number of
9 discrete areas, is carving out a position that where the
10 Government has a high interest in preventing terrorism, that
11 should be an exception, and sometimes a very broad exception
12 to basic civil liberties and the Bill of Rights.

13 Let me suggest how that's been done. And let me
14 suggest again why I say let's watch what they've done, not
15 what they say. The point was made before that the Attorney
16 General Ashcroft from the very beginning has tried to assure
17 us that we shouldn't have misplaced retaliation, that we can
18 protect civil liberties and also protect ourselves in this
19 time of danger.

20 Let me just read to you what else he said in
21 December of 2001. And I believe it was his first appearance
22 before Congress for a hearing on determining what the
23 Department of Justice was doing, what their reaction was to
24 9-11. The Attorney General in considered remarks, these were

1 not off-the-cuff remarks, these were prepared remarks, said
2 the following:

3 “To those who pit Americans against immigrants, and
4 citizens against non-citizens, to those who scare peace-
5 loving people with phantoms of lost liberty, my message is
6 this. Your tactics only aid terrorists, for they erode our
7 national unanimity and diminish our resolve. They give
8 ammunition to America’s enemies and pause to America’s
9 friends. They give aid and comfort to the enemy,” a
10 definition of traitorism on the Constitution.

11 That was the message that the Attorney General gave
12 just three months after 9-11.

13 I want to look at what we’ve done in the context of
14 those words.

15 First, and I’m going to talk about some discrete
16 areas. We’ve had some commentary and discussion of the
17 detentions that occurred after 9-11. You’re all aware that
18 within two, three, four months of 9-11, the Government
19 arrested, detained some 1200, 1500, 2,000, 2500, we don’t
20 know the numbers because the Government until today has not
21 told us the number of people who were detained on
22 immigration charges during that period of time. We were told
23 at the time that they were picked up and were being charged
24 in lawful immigration proceedings, because there were visa

1 violations or there were other immigration violations which
2 subjected them to deportation.

3 I have no doubt that in the great majority of the
4 cases that was true.

5 Then the Government took the extraordinary step of
6 saying that despite the fact that in these cases where we
7 normally pick up people on immigration charges, we can hold
8 them only to ensure their deportation. We know historically
9 most of those people have been released before their
10 hearings or pending their hearings. What the Attorney
11 General said was that if we think that any of those people
12 we picked up have connections to terrorism, then the
13 executive has the power to hold those people until such time
14 as their innocence is proven; reversing completely the
15 presumption of innocence. Now the Government says we think
16 you are a terrorist, you have to in effect prove that you're
17 not or the FBI has to clear you before you get your hearing,
18 before we do deportation, before we release you.

19 Now, as I said, we don't know the numbers. The
20 Government stopped giving us the numbers in November of 2001
21 when we had reached about 1200 and so we simply don't know
22 how many people were kept two months, three months, four
23 months, six months, eight months, in custody.

24 We do know, however, and this is why I say we have

1 much more information now than we did within the months
2 after 9-11, thanks to the internal report of the Justice
3 Department and other reports, that the Government batted
4 just about zero on their prediction of relationship between
5 these individuals and terrorism.

6 Now I don't expect the Government to bat 500, I
7 don't expect the Government to bat 300 sometimes. I expect
8 something above zero.

9 Remember what the Government said. With respect to
10 each of these people, we have information that connects them
11 to terrorism. Well, the internal report that the Department
12 of Justice just completed last spring in which they looked
13 at 762 cases, out of that total number of cases, there
14 wasn't a single case, not a single case of those 762, in
15 which the Government was able to show any connection to
16 terrorism, much less to 9-11. The report also indicated,
17 not surprisingly, that those inmates, whose detentions were
18 held in brutal conditions, some were beaten, and they were
19 denied counsel in many cases. The Government avoided
20 contacts with their families. In effect, they were kept
21 incommunicado for visa violations. There was no showing at
22 all two years later that that group, individually or as a
23 group, posed any threat to American security. And yet we had
24 been told early on that the reason we're doing it, and I

1 believe the Courts stayed their hands in looking at those
2 cases because of the assertion of executive power, they are
3 connected with terrorism, the Courts really have no role in
4 second guessing the Government's determination that they
5 were.

6 And indeed we know from litigation, and certainly
7 with the Courts, that not only weren't we told who these
8 people were, what the number were, but the Government closed
9 all hearings in all those cases. Every one of those hearings
10 was closed to the public, on the notion again that somehow
11 national security would be affected, and that judges have no
12 role even in a case by case basis in evaluating whether
13 certain evidence in a particular hearing might jeopardize
14 national security.

15 So when you look at that, and here the jury is in,
16 this isn't a matter of speculation as to what the balance
17 was between governmental security and individual rights,
18 when you look at that category of cases, and again we don't
19 know whether it's 1500 or 2500, whatever that number is,
20 nobody was associated with 9-11 in that group. There were a
21 couple of prosecutions that came out of it. Most were
22 detained, held as I say in inhumane conditions, and then
23 some deported and some released. I think a cautionary tale
24 for sure in terms of what we were doing.

1 And it's not just critics of the Government on the
2 civil liberties side who had trouble with what the
3 Government was doing at that time. Special Agent Colleen
4 Rowley, who you recall was the agent who was very critical
5 of the FBI for not doing the search of the computer in the
6 Moussaoui case, had this to say about what the FBI and the
7 Government was doing during that period. She remarked that
8 the vast majority of the 1,000 plus persons did not turn out
9 to be terrorists, they were mostly illegal aliens. And she
10 said we had every right to deport them of course. But after
11 9-11 she says, Headquarters encouraged more and more
12 detentions for what seemed to be essentially PR purposes.
13 Field officers were required to report daily the number of
14 detentions in order to supply grist for statements on our
15 progress in fighting terrorism.

16 So ultimately I think the Government's claim of
17 threats to national security, the claim that these have to
18 be secret hearings, were really claims to protect the
19 Government against criticism much more than they were to
20 protect us against acts of terrorism.

21 There are a number of other very discrete but
22 related measures that the Government has taken, all of which
23 I'd classify as a means of preventive detention and kind of
24 an end run around the criminal justice system. Let me talk

1 about them collectively.

2 First we have, even where criminal charges have
3 been filed, as in the Moussaoui case, we have a very
4 troubling issue in that case concerning what I think we all
5 accept is a basic doctrine in the American criminal justice
6 system, that a defendant in a criminal case has a right to
7 access to exculpatory evidence. That's been the law for
8 many, many years. It's a pillar really of our criminal
9 justice system.

10 Here's a case where the Government is actually
11 prosecuting somebody in an Article III Court under criminal
12 laws. Mr. Moussaoui has made a non-frivolous claim that he
13 needs access to certain information, persons and documents
14 to demonstrate that he is innocent of some of the charges
15 lodged against him with respect to his connection to 9-11.

16 The Government has taken the extraordinary position
17 I think, the extraordinary position, that because this is a
18 case of terrorism, and because access to those documents or
19 persons might undermine our worldwide fight against
20 terrorism, he, as opposed to every other defendant in the
21 system, is not entitled to access to that exculpatory
22 information. And indeed, we can put him to death, we can
23 impose capital punishment against Mr. Moussaoui after a
24 trial in which he has not had access to potentially

1 exculpatory information.

2 There are arguments obviously on both sides. The
3 Government claims that we can't let him have access, even to
4 his lawyers, because of the danger to national security. I
5 recognize some of those dangers. The trial judge there I
6 think has crafted a way of protecting both sides.

7 But when you step back, look at the radical
8 position that the Government has taken. We can execute
9 somebody in this country after a trial in which that person
10 has not had access to exculpatory information, kind of an
11 end run around the Fifth Amendment.

12 The question of enemy combatants. For the first
13 time in our history, the Government has made the claim that
14 if the President unilaterally designates someone as an enemy
15 combatant, we, the Government, can hold that person
16 incommunicado indefinitely, indefinitely, for the rest of
17 their lives potentially, and that's what the position is
18 right now, without any judicial review of that person's
19 status, without any judicial review of the Government's
20 reasons for determining that that person is an enemy
21 combatant, and most remarkably, without any access to
22 counsel. That a person in that situation has no right to
23 access to counsel, to family, to even challenge, to even
24 bring a challenge habeas corpus or otherwise, to challenge

1 the nature of his detention.

2 You know, the book, "The Trial", by Franz Kafka is
3 a great metaphor about a justice system which follows all
4 the rules and still does a lot of injustice.

5 Even Joseph K., the poor man immersed in the
6 bureaucracy in "The Trial" was considered a threat to
7 national security, but even Joseph K., was given a lawyer.

8 It is inconceivable to me, a year after the fact, a
9 year and a half after the fact that Mr. Padilla and Mr.
10 Hamdi had been arrested and detained, that the Government
11 still takes the position that we can hold them for five
12 years, ten years, 20 years, perhaps 40 years, offering them
13 no hearing in court, and no counsel to represent them in
14 court. All American citizens.

15 At Guantanamo Bay we're holding 650 alleged illegal
16 combatants from Afghanistan War. This raises all kinds of
17 questions, obviously, and the Supreme Court will decide the
18 question of jurisdiction. But what seems to me, what's most
19 troubling to me is, regardless of how far a Court should go
20 into inquiring as to the status of those people, that the
21 Government's position is in effect no Court, no Federal
22 Court, has the power to examine those cases, to even
23 entertain what review they might make of the status of those
24 people, those 660 people, simply because Guantanamo prison

1 camp is not a permanent part of the United States. That is,
2 if those people were brought here and held in a prison camp
3 in the United States, then habeas corpus would lie. Now as
4 a matter of real property law, right, it's real property law
5 now governing habeas corpus, because we have people on
6 Guantanamo which is a long term lease from the island of
7 Cuba, somehow the Federal Courts don't have that power. It's
8 kind of the exception to habeas corpus which is like the
9 offshore banking exception for investigations of misdeeds.

10 We shouldn't stand for it there and we shouldn't
11 stand for it when we've obviously made the choice. And the
12 irony of holding those prisoners on the island of Cuba,
13 right, on the island of Cuba where we had been so critical,
14 deservably so in some cases, of the repression or the
15 unfairness, whatever you want to call it, of the Cuban
16 Government. We're now taking the position we can hold 660
17 people there, we'll create a prison camp there, not in
18 Virginia, to avoid any habeas corpus review. And there's no
19 question that's why they're there. Good lawyers determined
20 we have a good argument that no Federal Court can get
21 involved because it's outside of the United States
22 jurisdiction.

23 Okay. On the Sixth Amendment point as well, where
24 we talk about no right to counsel. A little noticed

1 provision, and hopefully it's not been used very much, is
2 the Attorney General's asserted authority by regulation, now
3 that he has the power in cases in which defendants are
4 charged with terrorist offenses, to monitor and overhear all
5 conversations when that person is in custody, between that
6 defendant and his or her lawyer. And the Attorney General
7 can do that without getting any Court supervision, warrant
8 or otherwise, as to whether there's grounds to do that.

9 Now we know historically that sometimes lawyers
10 abuse their trust, lawyers act with criminal defendants in
11 illegal ways. When the Government has information that they
12 do that, they can get a warrant, both to surveil the
13 lawyer's office, to surveil the conversations, it's under
14 the jurisdiction of a federal judge in that situation to
15 determine whether there's probable cause to determine
16 whether the lawyer is acting illegally.

17 Now again, in an act that's consistent with what
18 the Department of Justice is doing, which is to avoid any
19 judicial review, in all of these areas, the Department now
20 says we, the Government, the Executive, have the power and
21 the right to make that decision without any judicial review.
22 We'll determine whether or not we think the lawyer and the
23 defendant are involved in some kind of criminal activity.
24 We'll give them notice that we're monitoring their

1 conversations. That notice plus that Chinese wall between
2 those who hear it and the prosecutors will ensure complete
3 safety and won't denigrate the right to counsel.

4 Well, I don't know how many of you do criminal
5 defense work. It's hard enough to get a relationship with a
6 client, particularly in a terrorist case. But when you tell
7 your client, look, what's going on here now is that
8 everything you say is being overheard by the very people who
9 are prosecuting you, but you still have to be candid with me
10 because they won't use against you what you say, I doubt
11 you're going to get very much information on what they've
12 done, who the witnesses may be who aren't going to be
13 protected by this arrangement, and regardless of how far you
14 want to go, in limiting the confidentiality of
15 attorney/client conversations, which is really again at the
16 core of our criminal justice system. It is quite a radical
17 move I suggest to say that we're taking that decision out of
18 the hands of judges and putting it into the hands of the
19 very people who are prosecuting those cases.

20 Government surveillance. There's been some
21 commentary and some discussion so far about the changes that
22 were made in the Patriot Act to FISA, the Foreign
23 Intelligence Security Act of 1976. These are rather dramatic
24 changes, I think more than has been suggested so far by the

1 panelists.

2 We know that FISA was a compromise. In FISA what
3 happened is that Congress approved a plan under which the
4 Government, on less than traditional probable cause, could
5 get warrants for the most intrusive kinds of surveillance,
6 phone surveillance initially and then bugs in people's home,
7 probably video surveillance, the most intrusive kind of
8 surveillance that can go on not only in the privacy of one's
9 home but can go on for weeks and months at a time. We said
10 the Government could do that on less than probable cause
11 where they could show to a special court that the primary
12 purpose of that surveillance was either to get foreign
13 intelligence information or to protect against foreign
14 terrorist activity. That was the balance that was drawn.

15 The notion was that since the primary purpose of
16 what the Government was doing was simply in the foreign
17 intelligence field, we didn't need full probable cause. This
18 was not information that would normally be used to prosecute
19 a particular defendant.

20 Now the rules are changed dramatically, much more
21 dramatically than has been suggested. Under the Patriot Act,
22 the Government can get that same kind of warrant on
23 virtually no showing of the normal criminal probable cause
24 that you need for a warrant, even though, the Government's

1 primary purpose in obtaining that warrant is to effectuate
2 or get information in support of a criminal indictment.

3 And so again, for the first time in our history, we
4 have now authorized, at least at this point and the secret
5 FISA Court has upheld it so far, we've now authorized the
6 Government when its main purpose is to prosecute a
7 particular person or organization, to secure a warrant for
8 the most invasive kinds of invasions of privacy on less than
9 the traditional probable cause that we need under the Fourth
10 Amendment. Again, what's the argument? The argument is
11 it's terrorism, therefore, we need an exception to the
12 normal rules under the Fourth Amendment.

13 Interrogation practices. We don't know a lot about
14 what kind of practices we're using, either here or overseas
15 in terms of trying to get information from persons who are
16 captured on the battlefield or other members of Al-Qaeda.
17 And obviously it's a very valuable tool. I have no doubt
18 that those are legitimate tools to be used. The question is
19 how far are we going to allow ourselves to go in getting
20 information. And the question is how close do we get to the
21 line of torture versus non-torture in interrogations.

22 Here too, I would suggest that we want to be
23 careful. There was a case decided by the Supreme Court last
24 term, Chavez vs. Martinez which dealt with the interesting

1 issue of whether questioning of somebody without Miranda
2 Warnings, in a coercive atmosphere, was unconstitutional if
3 the Government didn't intend to use, or didn't try to use
4 that information in court. Ultimately the Supreme Court
5 split a number of different ways on that issue.

6 But interestingly to me, the Government took the
7 position that there was virtually no constitutional
8 protection against governmental methods of interrogation
9 that might even reach the very coercive, or perhaps what
10 some people would consider torture, if the Government
11 decided we're not going to use that information in court,
12 we're just going to use it for intelligence purposes. I
13 think we want to be very concerned about what the Government
14 is doing in our name in terms of using very coercive, and
15 for many centuries were outlawed, practices in terms of
16 interrogation.

17 Let me conclude by saying this. The operating
18 principle I think which unites and ties together a lot of
19 the measures that the Government has been taking, is that it
20 is better in the long run to prevent acts or terrorism than
21 to seek to punish those who commit them. And of course
22 everything being equal, we'd all agree with that. It would
23 be much better to prevent if we can, isolate those acts,
24 prevent those acts, rather than simply punish after the

1 with David Rudovsky, and I come from a long line of Reagan
2 conservatives, on the mantra of trust but verify. And I
3 truly believe it and I wanted to highlight the last comment
4 that David talked about, and give some illumination on the
5 verification with respect to the numbers of detainees that
6 he commented upon.

7 Absolutely right. Prevention is a shift in focus.
8 The operative question is how one goes about doing
9 prevention. And here, contact with Europe, Article 5 of the
10 European Convention of Human Rights, consistent with the
11 civil law systems of the member countries, allows for
12 preventive detentions in order to prevent the commission of
13 crimes. This is what the Italian authorities use in Mafia
14 prosecutions; the French authorities use also in terrorism
15 prosecutions.

16 We obviously have a completely different regime and
17 that is the Fourth Amendment. You can't arrest unless
18 there's probable cause of a crime committed.

19 The question then, how do you go about effectuating
20 a prevention focus while being fully consistent with our
21 constitutional structure? The answer is predication. It may
22 well be that there is a shift in focus that changes for
23 prosecutors, as Judge Chertoff was, and as other prosecutors
24 in the room, that is to build a net around in order to snare

1 the big fish. Don't do that. Build a net in order to get all
2 the little guys, get as much information as possible, and
3 when you have enough information of a violation of law, take
4 down the small fry because the risk is too great that if the
5 whole conspiracy builds, that there would be an untoward
6 threat to the American populous.

7 That basic view rests on the notion that there is
8 no legal, moral or constitutional right to violate the laws
9 of the United States of America. Even if the United States
10 Department of Justice does not charge you with the big fish
11 charge, that is terrorism, weapons of mass destruction or
12 something like that, but can simply charge you with credit
13 card fraud, well, they have to prove credit card fraud.
14 There is no shifting of the presumption. There is no
15 preventive detention. What it is I think can be more
16 accurately portrayed is preventive prosecution. One that
17 effectuates the prevention focus while remaining fully
18 consistent with the Fourth Amendment tradition of our
19 Constitution.

20 The same insight highlights the comments that David
21 made regarding the numbers. There were varying estimates
22 that were given after 9-11. I simply do not know what the
23 exact -- the estimates were given at different times. The
24 estimates were for persons of interest to the investigation

1 who were detained either in immigration or criminal charges
2 or in a small number of cases, material witness warrants.

3 Let's put this in context. Approximately 500
4 persons, the Department of Justice actually has released
5 those numbers and it's on its website, 515 individuals as of
6 today, have been deported who were of interest to the 9-11
7 investigation. Were they deported for terrorism-related
8 offenses? No. And David is right that none of them have
9 been charged with or deported for terrorism-related
10 immigration violations. That doesn't mean that the
11 Government is batting zero on its terrorism suspicions, but
12 rather it says hey, instead of proving a terrorism
13 connection we can get you out of the country for overstaying
14 your visa or other independent violations of the immigration
15 law, we'll do that without sacrificing the security of our
16 intelligence information. Unless you argue that there is a
17 constitutional or legal right to overstay one's visa or
18 otherwise violate the laws of this country, I think that the
19 burden should not be on the Government to actually charge
20 people with terrorism crimes in order to designate or commit
21 the person as of interest.

22 The numbers are illustrative, and Colleen Rowley's
23 comment is taken in very good stride. That is because the
24 public demands the numbers.

1 And what always interests me is that each year,
2 certainly the last year, the numbers are looked at, the
3 Immigration and Naturalization Service arrests and deports
4 approximately one million people within the United States.
5 And of those, 535 for the last two years, of the last two
6 million people, are of interest to the investigation. Why
7 does that differ from the 1500, 1200 or whatever the number
8 at various times? Because people of interest, the list of
9 people who are of interest of a particular investigation
10 changes. If my name is on the phone list of Mohammed Atta, I
11 would hope I would be considered of interest to the
12 investigation relating to Mohammed Atta. If the
13 investigation later turns out that I was on there because I
14 was his tutor for law and economics purposes, then I would
15 hope that my name is removed from the list persons of
16 interest.

17 If I am of interest and I have committed some
18 independent crime, I surely hope that the Government is
19 doing everything in their power to remove me from the
20 streets, and the people against whom I would do harm.

21 I would hope also that when my name is removed from
22 the "of interest" list, that the normal rules for
23 prosecutorial discretion apply. That is they apply whether
24 or not they want to take down an absent-minded law professor

1 and incarcerate him as opposed to a terrorist sympathizer.
2 It may well be that the prosecutor says yes, I do want to
3 take down an absent-minded law professor. It's certainly in
4 his prosecutorial discretion to do so, just as it is for him
5 to use the full force of the law in order to prosecute
6 against me as a suspected terrorist.

7 There is one comment here that I want to make that
8 relates back, finally, to Professor Heymann's diagram. The
9 limits of prosecutorial discretion is defined by law. There
10 has to be obviously some discretion but the outer limits are
11 defined by law. That is the democratic process speaking as
12 to how that limit should be defined.

13 If we as a democratic society think that those
14 limits are too broad, I think we should restrict the limits
15 of that prosecutorial discretion. That is, amend the laws,
16 limit the number of the crimes and the like. But as long as
17 there is that discretion in the law, that there are
18 chargeable offenses, I surely hope that those who are making
19 the decision to charge, would look at the entire range of
20 possibilities that Congress and our polity have given them
21 in order to protect us against catastrophic threats like
22 terrorism. Rather than exercising their own internal checks,
23 we would charge them on this crime but not on the other
24 crime. I will wait in order for him to commit a terrorism

1 crime rather than this crime because I want to advance my
2 career more, rather than simply charging a person for
3 immigration fraud or for visa fraud, because the threat
4 really truly in my mind is too great for us to be using a
5 normal balancing analysis.

6 JUDGE BAYLSON: Thank you. Jamie?

7 MS. GORELICK: Pass.

8 JUDGE BAYLSON: Okay. And Judge Chertoff.

9 JUDGE CHERTOFF: Just very briefly on one issue.

10 When you come to this issue of prevention as
11 opposed to prosecution, I mean we, and David says you know,
12 we have a tried and true method for adjudicating guilt. And
13 of course it's true in our society that we have made a
14 constitutional judgment and rightly so, that it's better not
15 to punish somebody than to punish them using a shortcut as
16 to establishing the facts beyond a reasonable doubt.

17 But prevention of harm to innocent individuals is
18 something of a different circumstance. Now we have in the
19 law a number of circumstances where we do prevent people
20 from doing things on less than proof beyond a reasonable
21 doubt; for example, under United States v. Salerno we have
22 pretrial detention. And the facts on which someone is
23 detained don't necessarily emerge entirely in the nature of
24 the charge.

1 I think the problem we face going forward is this,
2 and I think it is a matter that perhaps it's time we address
3 not ad hoc through cases but in a more systematic way.

4 What do you do when you have perfect intelligence
5 or near perfect intelligence information that X or a number
6 of X's in this country have been trained by enemy
7 terrorists, have been tasked to find radioactive material
8 and to construct dirty bombs and set them off in cities all
9 over the United States? And that information comes from
10 electronic intercepts from a foreign power that will never
11 disclose or never allow to be disclosed that it is
12 cooperating with us? You actually have the intercepts. They
13 are totally unassailable in terms of their accuracy.

14 If you were to charge those people with conspiracy
15 to commit acts of terror, which I think you could under the
16 law, you'd have to prove it in court. The Government that
17 has provided you with the intercepts tells you if you ever
18 disclose in the slightest that we have given you this, we
19 will never help you again, you will never get another iota
20 of intelligence information. Thereby meaning that the next
21 wave that comes in you're not going to know about it.

22 In that circumstance, it seems to me you have three
23 options. You can do nothing, because you don't have proof
24 beyond a reasonable doubt that you can put in court. And

1 then when the bombs go off, we'll have another 9-11
2 Commission to explain why we didn't do what we should have
3 done. Or, you can charge them, you can blow the electronic
4 surveillance. Now it's probably not admissible anyway
5 because the other country is never going to allow witnesses
6 to come forward to authenticate it so you'll either get an
7 acquittal or even if you do get a conviction, you'll wind up
8 having destroyed that as an intelligence source. Or you
9 have to come up with some third way to deal with the issue.

10 And I think it's that third way that is a
11 challenge. The executive branch has taken the position in a
12 couple of cases that the law does allow a third way. Whether
13 the executive branch has managed that third way optimally, I
14 think is an interesting question, and you could argue that,
15 one could create a process in the executive branch that
16 would allay some of the concerns that people raised.

17 But in any case, I think we're at the point where
18 you can't, we can't wish the problem away or pretend it
19 doesn't exist. We have to find a way to address it, and as I
20 say, perhaps systematically rather than ad hoc.

21 JUDGE BAYLSON: All right, thank you. David?

22 MR. RUDOVSKY: Let's open it up.

23 JUDGE BAYLSON: Okay. Okay, I have a couple of
24 written questions. I'd like to start with those, and then

1 we'll invite questions from the floor.

2 The first one is to Professor Heymann.

3 "Since you are so critical of the response to the
4 second World Trade Center bombing, that is the 9-11 bombing,
5 do you regard the response to the first World Trade Center
6 bombing, that is the one that took place in 1993, as on the
7 model of criminal justice, not war, as a better one?"

8 PROFESSOR HEYMANN: Judge, I didn't think you had
9 to read that with so much enthusiasm when it is so critical
10 (laughter).

11 Okay. Actually, the first World Trade Center
12 bombing had a lot that worked very very well within the
13 criminal justice system. We gathered the information within
14 the criminal justice system. We got cooperation from abroad
15 within the criminal justice system. We didn't need military
16 tribunals to try the individuals. Plea bargaining and other
17 devices produced a great deal of information. The
18 Pakistani's allowed us to go in and pick up Ramzi Yousef,
19 the leader, so we weren't alienating countries whose help we
20 wanted.

21 And finally, the FBI had screwed up, as happens, in
22 the previous investigation, and this was immediately
23 apparent and there were immediate steps taken to deal with
24 it. The FBI actually had information that the World Trade

1 Center was going to be blown up the first time, but hadn't
2 translated it so it never became usable. And afterwards, we
3 went back and looked and it was usable.

4 So I think that is a pretty good model of how to
5 handle an event. If there's a criticism, it would probably
6 be that afterwards there was an inadequate attention to the
7 fact that the first World Trade Center bombing was likely to
8 be the beginning of a chain of attacks by the same people.
9 And of course, that became a more valid criticism after the
10 bombings of the embassies in Kenya and Tanzania and then the
11 attack on the Cole, all of which preceded World Trade Center
12 two.

13 MS. GORELICK: Could I --

14 JUDGE BAYLSON: Yes, Mr. Gorelick, please.

15 MS. GORELICK: I would add to that that the FBI
16 with assistance from the CIA and other elements of the
17 national security community, did get a lot of information
18 which led to the successful prosecution in the first World
19 Trade Center cases. And then it, in my personal view, failed
20 to exploit that information.

21 There was a ton of information that was developed
22 that was not shared with the other agencies, and one would
23 have thought that the Bureau after that event would have
24 looked at the treasure trove of information that it got at

1 enormous expense and effort and decided to alter its mission
2 and the way it did its business.

3 And one of the things that has emerged from the
4 joint inquiry of Congress and that is emerging from the 9-11
5 Commission review is that the Bureau was too wed to its law
6 enforcement function and not sufficiently attentive to the
7 work of its national security division. And it was too wed
8 to a law enforcement model, and not sufficiently embracing
9 of its national security model.

10 Bob Muller is trying to change that, and when I
11 averted earlier to the question of whether we are going to
12 be able to leave that mission at the Bureau, that is a
13 question before us. The question is can an organization
14 which has had historically a post hoc role, change its
15 mission to act more like an intelligence agency in the
16 domestic United States, as fraught with difficulty as that
17 may be.

18 So I would say to the questioner, the Government
19 for decades did not do what it needed to do to have those in
20 charge of our domestic security trained and incentivized to
21 do what they needed to do.

22 JUDGE BAYLSON: All right, thank you. I have
23 another question in writing that I'm going to ask Judge
24 Chertoff to comment on first, and then open it up.

1 "Where in the balance so to speak do we place the
2 threat, not just to individual liberty, but the threat posed
3 by terrorists to our very democratic institutions, where the
4 threat gains force as we become more autocratic in our
5 response? Do we not need to be vigilant in this regard?"

6 JUDGE CHERTOFF: Well, I think we always need to be
7 vigilant in this regard, and I think that we did learn after
8 9-11, a lot of lessons of history. I mean, the fact of the
9 matter is no one even remotely suggested the kind of action
10 that in any way, shape or form approached the kind of
11 terrible thing that was done during World War II with
12 respect to Korematsu. So we have learned a lot of lessons,
13 as we will continue to learn lessons from the last couple of
14 years.

15 I do think it's important though to have a
16 recognition of the nature of the terrorist threat. And by no
17 stretch of the imagination am I a scholar of foreign affairs
18 of that part of the world. But it strikes me that unlike a
19 lot of the wars that we've seen historically, if you look at
20 the war in Algeria against the French, there was an outcome
21 there in which the French could end the war by leaving
22 Algeria. If you look at Vietnam, the Vietnamese people who
23 were struggling against the Americans, once the Americans
24 left, the war was over. They weren't coming to the United

1 States to try to destroy the United States.

2 As I understand the way Bin Ladin and Al-Qaeda
3 operate, they really want to destroy the United States.
4 There is no appeasement. There is no ground in which you can
5 say okay, we'll get out of here and leave us alone. They're
6 going to leave us along when we're dead.

7 So with that in mind as a goal, I don't know that I
8 would describe their objective as destroying our civil
9 liberties. I think I would describe their objective as
10 destroying our society.

11 What we owe to ourselves however is to maintain a
12 balance, and a balance that will be maintainable or
13 sustainable over the long term as opposed to during the
14 sprint phase. And that's what I think all these discussions
15 are about. They're an effort to try to reconcile what we
16 need to do to combat terrorism with our fundamental values
17 that we have no intention of sacrificing.

18 JUDGE BAYLSON: Thank you. Anyone else like to
19 comment on that?

20 PROFESSOR DINH: I completely agree and the only
21 other thing I would add is by quoting Edmund Burke when he
22 said that the only liberty I need is the liberty associated
23 with order, that not only can we coexist with order and
24 virtue but we cannot exist at all without them. Because

1 without that system of order what we have is license. And
2 without liberty what we have is autocracy and neither is
3 stable or legitimate enough for a constitutional government
4 nor should be under our system.

5 MR. RUDOVSKY: I just want to make one comment.
6 Obviously there are different opinions here.

7 What strikes me here when we think about what we've
8 done and what we know is how we've done almost in the
9 reverse order. The Commission doesn't get started for 18
10 months. After Pearl Harbor, we had a commission, a national
11 commission which looked into what happened at Pearl Harbor
12 within three weeks, that was operating immediately after
13 that event.

14 Here, we rushed in a number of measures, perhaps we
15 had to, 9-11 was a very serious event, a catastrophic event,
16 without even knowing what had gone wrong before. We didn't
17 have the intelligence. I mean, Professor Dinh says we need
18 intelligence. And yet the Government for many months fought
19 the very notion that either Congress or an independent
20 commission should actually find out what happened before.
21 And at least we're finding out now it wasn't lack of
22 intelligence before 9-11, it was the inability to determine
23 what that intelligence means, the connecting the dots.

24 And so we've taken a lot of steps, again maybe

1 history will say they were necessary and they were
2 justified, but it seems to me we did some of them in the
3 reverse order. Without knowing what the problem was, we
4 took the normal law enforcement steps.

5 PROFESSOR HEYMANN: I just wanted to make a
6 distinction, remind you of a distinction between the effect
7 of our counter-terrorism steps on our own democratic
8 liberties which is what the question went to, and the effect
9 and the number of places on counter-terrorism itself.

10 The fact of the matter is that we are losing at an
11 extraordinarily fast rate the belief of our closest allies,
12 that we are a reliable leader in the fight against
13 terrorism. The Muslim world of between a billion and a
14 quarter and a billion and a half according to the Pew
15 Institute which has for the last four or five years been
16 polling abroad that are absolutely staggeringly hostile. In
17 a large number of countries, people vote that they think,
18 when asked who can they rely on to do the right thing, in a
19 large number of Muslim countries, people vote Bin Ladin
20 ahead of George W. Bush. We even have trouble at home in
21 terms of the support and the enthusiasm among our
22 population, Muslim population particularly, feeling abused.

23 So, that part of the story in which our actions
24 bear very importantly upon, is just as important as what it

1 does to us at home.

2 JUDGE BAYLSON: Okay, thank you. I'd like to call
3 for questions from the floor.

4 UNIDENTIFIED SPEAKER: Hi. I have a question for
5 Judge Chertoff. I had watched you on C-Span for a while
6 because I'm a news junkie so you're sort of a TV star to me,
7 and it's nice to meet you --

8 JUDGE CHERTOFF: You're an insomniac to because --

9 UNIDENTIFIED SPEAKER: Yes, I am --

10 JUDGE BAYLSON: More importantly, he is a
11 newspaper reporter.

12 UNIDENTIFIED SPEAKER: Right, so watch what you
13 say,

14 I wanted to ask you about if you have revised the
15 way you speak publicly since you became a judge, because I'm
16 wondering as you sit on the Third Circuit, as things come
17 down the pike in the next decade that may present factual or
18 as applied challenges to some of these laws that we're
19 talking about today, do you have concerns that your public
20 remarks outside your opinions could ever be used to ask you
21 to disqualify yourself from hearing a case?

22 JUDGE CHERTOFF: You know, I try to -- I mean, I am
23 mindful of that. I try to be guided. There's canons of
24 ethics and I've gotten advice from people and I try to be

1 guided generally by what I've observed other judges do. I
2 don't speak about pending cases obviously. Now obviously
3 cases I was involved in in the Government presents a whole
4 different issue.

5 On the other hand, I think the canons permit and
6 encourage judges to speak about general matters of law. I
7 know the justices do from time to time. And I think there's
8 value in doing that. But I do try to be mindful of staying
9 out of things that will come back to haunt me.

10 UNIDENTIFIED SPEAKER: And just one more question
11 for anyone on the panel, and especially Judge Chertoff since
12 you were right there as we were getting the initial
13 intelligence on 9-11.

14 Are we making a big mistake in this country, not
15 having more people studying the languages that the
16 terrorists speak? And perhaps it's a cross disciplinary
17 question and this is a question better put to educators, but
18 you as lawyers and judges -- should we be doing more on that
19 front so that we can actually communicate with the parts of
20 the world that it seems hate us?

21 MS. GORELICK: We are, both in general and in
22 specific, remarkably insular as a country. It has been clear
23 to the intelligence community and to law enforcement for a
24 very long time that we didn't have the language capabilities

1 that we needed. And if I were to tell you the mineable
2 information that we did not mine and still don't because of
3 a lack of language capabilities, you would be horrified.

4 The larger point is that we are remarkably insular
5 as a country. Anybody who travels abroad gets a very
6 different view of what we are doing in the war on terrorism,
7 how people think of us, whether we are winning, whether we
8 are losing, how our messages are received. And I think that
9 that's an enormous challenge for us.

10 I personally do not feel that we can win this war
11 on terrorism unless we understand much more than we
12 understand both at an expert's level and at a citizen's
13 level as to how we are viewed, and how what we say is heard
14 in the countries that are feeding this terrorist pipeline.

15 JUDGE BAYLSON: Judge McKee?

16 JUDGE McKEE: Yes, I have to be careful because the
17 first (laughter) is egging me on.

18 But my question, Judge Chertoff, you in response to
19 the earlier question, you made a distinction which I'm very
20 uneasy with between civil liberties and society. And you
21 said that the aim of Bin Ladin was not the destruction of
22 our society but the destruction of our civil liberties.

23 I don't see a distinction there. And I think maybe
24 that's part of the problem. Maybe you could amplify that.

1 JUDGE CHERTOFF: Yes, I actually said the reverse.
2 What I mean to say is I don't think he cares about our civil
3 liberties. I think he views our civil liberties as a bad
4 thing, and a piece of our society. I think that our civil
5 liberties are an indispensable ingredient of our society.

6 My point was that I don't -- years ago, like 20,
7 30, 40 years ago, there was a theory among left wing
8 revolutionaries that by committing acts of terrorism you
9 would trigger a backlash that would result in a suppression
10 of civil liberties and that would in turn cause people to
11 rise up and overthrow the existing force and usher in a left
12 wing paradise. That obviously turned out not to be the case.

13 My point was that I don't think Bin Ladin operates
14 on as sophisticated a program. I think it's simply killing
15 Americans, bottom line, and I don't think there's a subtle
16 distinction in his mind between civil liberties and the
17 society. And I don't think we can have a society without
18 civil liberties.

19 JUDGE BAYLSON: All right, Judge Shapiro -- oh,
20 wait, Professor Dinh wants to comment. Yes?

21 PROFESSOR DINH: Actually, a little bit larger
22 than that, and it goes back to the comments in the last
23 question.

24 There has been a lot of talk in this room and I

1 think elsewhere, properly, regarding the root causes of the
2 ills that face us. Why do the people hate us, and what can
3 we do in order to change the hearts and minds and the like
4 that lead to terrorism.

5 I think that it helps our conversation and also our
6 policy to distinguish the root causes of complaints and
7 policy grievances versus the decision to take up arms and
8 violence against innocent civilians, that is terrorism, in
9 order to advance that particular policy change or ideology
10 or to air that grievance.

11 I think that it is obviously very very helpful and
12 necessary for us to think about how our role in the world is
13 perceived, to think about how we can adjust our role as a
14 world leader in order to alleviate the ills of our society
15 and the like to help to develop a new marshal plan if you
16 will in order to improve the world as it is, and
17 incidentally to improve our image around the world. But
18 also to be very, very focused on the fact that hey, the
19 people who take up arms against innocent civilians have
20 abandoned the diplomatic and politic means of expression for
21 their advocacy for the ideology or policy or prescriptions
22 for change, but rather they seek an order to adopt a new way
23 of terror. The analogy to the left wing revolutionaries I
24 think is apt.

1 All of us want a better world where all the
2 children are above average and everybody lives in peace and
3 harmony. There's only a limited number of people who seeks
4 to blow up Brinks armored cars and kill police officers in
5 order to advocate that type of world and to usher in that
6 type of utopia. The difference is critically important, and
7 that's the difference between civilized society and a
8 disorganized anarchic society.

9 PROFESSOR HEYMANN: On Viet's point, I think that
10 first of all the figures on the number of people who approve
11 of suicide bombings in the world are quite staggeringly
12 frightening; very, very high numbers. And if a very large
13 number approve, I agree that only a fraction of those, maybe
14 a small fraction would indeed do it themselves. But a small
15 fraction of a very large number may be ample to be a very
16 big worry for a long time.

17 I think it's a mistake the administration makes to
18 think that they're dealing with a single organization which
19 once destroyed will leave the world at peace.

20 There's a lot of people who want to be suicide
21 bombers.

22 The other thing that I disagree with Viet on a
23 little bit is I think emotional and physical support by
24 people who are not bombers is a crucial ingredient of a

1 successful terrorist campaign. I think it was in Northern
2 Ireland. I think the failure to have that support explains
3 its failure in Germany and other places.

4 And so I think we have to worry about what other
5 people think of us in order to try to deny the support of
6 those who are not willing to take up arms and kill
7 civilians, but who are likely to be quite sympathetic to
8 those who are willing to do that.

9 JUDGE BAYLSON: All right, thank you. Judge
10 Shapiro.

11 JUDGE SHAPIRO: I can't get to a microphone.

12 JUDGE BAYLSON: Well, I'll repeat the question.

13 JUDGE SHAPIRO: I'd like to get back to the
14 difference between what we're saying and what we're doing.
15 For me I'm not suicidal and I don't think I'm unpatriotic,
16 but I don't understand how our Government can indefinitely
17 detain for questioning without charges, without attorneys,
18 without access to their families, and how that differs from
19 what I was always thought were star chambers and the Spanish
20 Inquisition, and indeed it's a big failure that we have all
21 criticized. So I would like to hear some discussion of why
22 these methods are necessary for the fight on terrorism.

23 JUDGE BAYLSON: The question is, why are the
24 (applause) methods being used of detention without counsel

1 and without hearing appropriate given our history, and why
2 are they necessary in the fight against terrorism,
3 paraphrased. Viet, you want to go first?

4 PROFESSOR DINH: Why are you looking at me? What
5 do you mean, we, Kimosabee? (Laughter) It gets really
6 lonely on the extreme right.

7 JUDGE BAYLSON: The seating was not arranged by
8 anybody up here.

9 PROFESSOR DINH: As far as I know, your question
10 relates to two individuals, Hamdi and Padilla. And more
11 generally to the 500 still remaining in GTMO.

12 With respect to the last group, and I think that
13 the Court will have to decide this, I don't know how they're
14 going to decide it, I don't think they're going to overrule
15 Eisenstrager and say that habeas applies everywhere, or they
16 may well take a very narrow position that GTMO is actually
17 for habeas purposes part of the territory of the United
18 States, or they may affirm, all the judges who have
19 considered this and the lower courts have done.

20 But, the choice is, not as Mr. Rudovsky has put it,
21 is it Norfolk or GTMO, but the choice really is, it seems to
22 me, Afghanistan or GTMO. And the danger of having the same
23 prison camp in Afghanistan led us to have a prison camp in
24 the first place, which is the murder of Michael Span and his

1 colleague during the time of their capture because it is an
2 insecure place. And given that choice, I think that the
3 calculus becomes much more sympathetic to the executive
4 decision to have that camp over there.

5 With respect to Hamdi and Padilla -- and if I'm not
6 answering your question, and there are other people that
7 concerns you, please, I would like to know about it. But
8 with respect to Hamdi and Padilla, as I said before and I
9 think Judge Chertoff agreed, I think there has to be some
10 processes, and I think that the Government's position
11 ultimately will be untenable and not sustained by the
12 Supreme Court. I don't blame the Government for taking that
13 position because it believes that there are significant
14 advantages to this third way, as Judge Chertoff puts it. It
15 is not unique to America. Great Britain, for example, has to
16 take exception under Article 12 of the Human Rights
17 Convention, even though it had that provision in Article 5
18 in order to do, to prevent the detention, it had to take
19 exception to the convention in order to hold five or six
20 individuals that it still currently holds exactly because of
21 the need for continued intelligence assets and interrogation
22 of these individuals and not the exposition to a normal
23 judicial process.

24 So the need I think is there, whether or not that

1 need justifies this type of detention, it is for the Court
2 ultimately to decide.

3 JUDGE BAYLSON: All right, thank you. Any other
4 questions? Peter?

5 MR. GOLDBERGER: I'm Peter Goldberger, an attorney
6 from Ardmore in the Philadelphia area.

7 I'm interested in the use of the terminology "war".
8 A couple of the speakers have raised it and I was hoping
9 that some who didn't mention it might address. Our
10 Constitution does use the term "war" in describing certain
11 powers that the Government has.

12 So it seems to me, I wonder if people would agree
13 with me, that it's important that we have a rather strict
14 definition of what constitutes a war for purposes of
15 granting extraordinary governmental powers.

16 And when David used the expression "metaphoric
17 wars", the Cold War, the war on drugs, the war on terrorism,
18 I would suggest a metaphorical war, the war on poverty.
19 What are the powers that we are talking about granting to
20 the President? Is it fair to assume that they are like the
21 powers that the President has when we are engaged in a war
22 of the kind the Constitution calls a war?

23 JUDGE CHERTOFF: I kind of adverted to this
24 earlier.

1 I think the interesting thing that I discovered
2 when I went back and looked at this is that although the
3 Constitution uses the term war in certain respects, it also
4 links it up with other kinds of struggle that are not what
5 we would conventionally call war, and grants comparable
6 powers. For example, Congress's power to suspend habeas
7 corpus, which is not limited to war.

8 Second, at least since the Prize cases were decided
9 by the Supreme Court, it's been clear that when someone else
10 makes war against us, the President, we're in a war
11 situation and the President is capable of using his war
12 powers, notwithstanding the absence of a declaration of war.

13 I also have to observe that I don't think a
14 declaration of war has to have legally any formal magic
15 words. And I think people have argued persuasively that the
16 congressional resolution in the wake of 9-11, allowing the
17 President to use all necessary means to fight against Al-
18 Qaeda, was sufficient to be a declaration of war under the
19 Constitution.

20 The problem is not a definitional problem. I think
21 the problem is how to deal with --

22 MR. GOLDBERGER: I think you misunderstood my
23 question which is not about a declaration, but what is a
24 war? If it is not against a state power, for example.

1 JUDGE CHERTOFF: I think the problem is this.

2 MR. GOLDBERGER: How is it an act of war?

3 JUDGE CHERTOFF: We have a very hard time fitting
4 what we have into the paradigm of war or no war. There is no
5 state power. I mean, when we fought against Afghanistan
6 there was some semblance of a state power.

7 And so one is tempted then to say okay, if we don't
8 have a foreign state or something like an internal rebellion
9 like the Civil War, we should drop back to business as usual
10 under the law enforcement.

11 But here's the problem. In a world in which a small
12 group of people could destroy the city of New York with a
13 nuclear bomb, in what meaningful way would that act be less
14 an act of war than World War II? I dare say there was less
15 chance of the Germans and the Japanese overrunning the
16 continental United States and killing millions of Americans
17 between 1941 and 1945 than there is of terrorists getting
18 hold of devastating weapons of mass destruction and
19 exterminating huge numbers of Americans.

20 In the face of that fact, which is a fact, how do
21 you decide that you're going to treat one as a war and not
22 as a war? It can't simply be the presence or absence of a
23 foreign flag because we have now entered an era of
24 asymmetrical warfare. And I think that is the issue we are

1 struggling over.

2 JUDGE BAYLSON: Thank you. We have time for one
3 more question. Yes, sir?

4 MR. ENGLER: I'm Roy Engler and I practice law in
5 Washington, D.C., and I'm temporarily enjoying the
6 hospitality of the Third Circuit. I also represented Sgt.
7 Ben Chavez in the Supreme Court and continue to represent
8 him on remand in the Ninth Circuit in the case of Chavez v.
9 Martinez which was alluded to.

10 And I wanted to ask Judge Chertoff or Professor
11 Dinh, is it accurate to say that the Government's brief in
12 Chavez said there are no limits on questioning, or did the
13 Government instead say, and did the Supreme Court hold that
14 substantive due process rather than the self-incrimination
15 clause or procedural due process provides a limit on
16 questioning?

17 JUDGE CHERTOFF: If I recall correctly, it was the
18 latter. I don't think that the Government took the position
19 there was no limitation. I think what they said is it's not,
20 there's no independent basis under 1983 to sue for a Miranda
21 violation.

22 JUDGE BAYLSON: That brings us to a close of our
23 allotted time. I think Chief Judge Scirica would like to
24 have some final words.

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(Applause)

CHIEF JUDGE SCIRICA: Thank you, Mike.

I can't think that any lawyer in America would not have wanted to be here this morning. This is really extraordinary. Please give them another round of applause.

(Applause)

CHIEF JUDGE SCIRICA: Our session is now adjourned. Thank you all very much.

(Session adjourned at 12:45 p.m.)

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C E R T I F I C A T I O N

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