

## Life After 9/11: Issues Affecting the Courts and the Nation

*Stephen R. McAllister, Moderator\**

*Viet Dinh\*\**

*Erwin Chemerinsky\*\*\**

*Christopher Stone\*\*\*\**

*Jeffrey Rosen\*\*\*\*\**

DEAN MCALLISTER: It's my pleasure to be here and to moderate this panel, although I don't know if moderation will be necessary. As for our topic, 9/11 is a day that has affected us all in many ways. Personally, many of us lost friends, acquaintances, and so forth. All of us lost something important as Americans, and what we're here to talk about are some of the issues that arise out of that, a lot of issues that I think will be out there for a long time, questions about our civil liberties, as we engage in what sometimes is described as a war on terrorism, questions about immigration policy and practices, who we are as Americans, and security issues that we encounter on a daily basis. My guess is, certainly for anyone who flew here for this conference, you think about security now every time you enter an airport. You get frustrated, you wonder why me; I'm a lawyer; I'm not going to do anything on this plane; why are they searching my bags? But all of those sorts of issues are out there now. Sporting events are different—everything is different now in some sense. And so, the questions that our panelists will address are quite varied, and what I will do is introduce them one by one and let them speak for ten or fifteen minutes, and then leave some time for questions and some comments between the panelists, because I do not think they necessarily all share the same perspective on these issues.

I will start with Viet Dinh to talk about what the federal government has been up to since 9/11. Viet is the Assistant Attorney General for the Office of Legal Policy. And prior to taking that position, he was a professor of law at Georgetown Law School. And he told me today at lunch

---

\* Dean and Professor of Law, University of Kansas Law School.

\*\* Assistant Attorney General for the Office of Legal Policy, United States Department of Justice.

\*\*\* Professor, University of Southern California Law School.

\*\*\*\* Director, Vera Institute of Justice, New York, New York.

\*\*\*\*\* Professor, The George Washington University Law School.

that he's on leave, so that will be where he is likely to return when he's done with his stint at the Justice Department. Viet was very gracious to fill in for us. We did have Larry Thompson, the Deputy AG scheduled. He was not permitted to leave Washington this week for some reason, and Viet responded and came out to talk with us.

Viet has an impressive resume—and I don't want to use up our time introducing people—all four of these people have incredible credentials. Viet is a Harvard Law School graduate; he clerked for Judge Silberman on the D.C. Circuit, and then Justice O'Connor at the Supreme Court. And he's written a lot. And at least in my experience and the people I know who have been around him much, Viet always has interesting things to say. And so with that, I will turn it over to Viet.

MR. DINH: Thank you very much for having me here, and I thank the Deputy Attorney General for making me dispensable. Well, the other alternative is testifying on the Hill. I'd much rather be here. I thank you for that reprieve.

9/11 really was a seismic shock for all Americans, for all around the world, but particularly for all of us in Washington with responsibilities for crafting the response. It was a shock for me personally because I did not know very much about terrorism. I did not know very much about America, to tell you the truth, being a newcomer to this country, and being a recovering academic.

The first question I faced about these atrocities was why? Why is it that these men were willing to give up their own lives in order to take the lives of thousands of innocents? Why is it that we, Americans, engender such jealousy and such zealotry to provoke such inhumane responses? Is it because we, as Americans, are somehow better than the people of the world? I don't think so. Look around this room, look around this land. Americans are the people of the world. We are no better. Give me your poor, your tired, your huddled masses yearning to breathe free. Lady Liberty does not say, "give me your best, your brightest, your highest SATs, your educated lawyers yearning to make more money."

No, she says, "give me your least, your worst. And what will I give in return? I will give you freedom. I will give you opportunity. I will give you liberty under law." That is what differentiates America from the rest of the world. She takes the ordinary people of the world and gives them the freedom, the opportunity, and the liberty under law to do the ordinary things that ordinary people do and thereby realize their God-given potential to achieve extraordinary things as Americans. And yes, those achievements engender some of the jealousy and some of the zeal-

otry that caused some of those people to take some of those drastic actions.

So, as we crafted our response to the horrible terrorist attacks, we were very mindful that under attack were the very foundations that define America—the core institutions and values that make us great as a nation, that protect our freedom, our opportunity, our liberty under law. And so I fundamentally reject any notion that liberty and security are competing goals that must be balanced in this war on terrorism. Rather, we seek to protect liberty by providing security.

Here, I follow the tradition of Edmund Burke, who said, “[t]he only liberty I mean is a liberty connected with order; that not only exists along with order and virtue, but which cannot exist at all without them.”<sup>1</sup> Order and liberty, therefore, are not competing concepts that must be balanced against each other to maintain some sort of democratic equilibrium. Rather, they are complimentary values that contribute symbiotically to the stability and legitimacy of a constitutional democracy. Like love and marriage, like horse and carriage, order and liberty go together. You can’t have one without the other.

In *The Structure of Liberty*,<sup>2</sup> Randy Barnett, a noted libertarian and constitutionalist, distinguishes liberty structured with order from unbridled license by comparing it to a tall building, in his case, the Sears Tower. License permits thousands of people to congregate in the same space, but only with the order imposed by the structure of the building—the hallways, the partitions, the stairwells, the elevators, the signs, and the lights—would those thousands be endowed with liberty, each with the ability to pursue his own end without trampling on the others or being trampled upon. “Like a building, every society has a structure that, by constraining the actions of its members, permits them at the same time to act to accomplish their ends.”<sup>3</sup>

To illustrate the central necessity of that structure, Randy poses this hypothetical: “Imagine being able to push a button and make the structure of the building instantly vanish. Thousands of persons would plunge to their deaths.”<sup>4</sup> Osama bin Laden pushed that button on September 11th, and thousands of people plunged to their deaths. Just as Barnett used the Sears Tower only as a metaphor for the structure of ordered lib-

---

1. Edmund Burke, Speech at His Arrival at Bristol Before the Election in That City (1774), quoted in ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 64 (1996).

2. RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* (1998).

3. *Id.* at 2.

4. *Id.*

erty, Al-Qaida's aim was not simply to destroy the World Trade Center; its target was the very foundation of our ordered liberty. Knowing what we now know about Al-Qaida, it is easy to see that its radical extremist fundamentalist ideology is incompatible with and an offense to ordered liberty. Al-Qaida seeks to subjugate women; we work for their liberation. Al-Qaida seeks to deny choice; we celebrate the marketplace of ideas. Al-Qaida seeks to suppress speech; we welcome open discussion. That's almost too easy of a straw man for me to defeat.

More fundamental, however, is the proposition that Al-Qaida, or any other group or person, simply by adopting the way of terror, attacks the foundation of our ordered liberty. Terrorism, whoever is the perpetrator and whatever its name, poses a fundamental threat to the ordered liberty that is the essence of our constitutional democracy. The terrorist seeks not simply to kill, but to terrorize. His strategy is not merely to increase the count of the dead but to bring fear to those who survive. The terrorist is indiscriminate in his choice of victims and indifferent about the value of his targets. Part of an international conspiracy of evil, he operates across boundaries and recognizes no borders. He uses violence to disrupt order, kills to foment fear, and terrorizes to incapacitate normal human activity—to incapacitate by fear from doing the ordinary things that America promises to her people. Thus, by definition, the methods and objectives of terror attack the very foundation of our ordered liberty.

In this sense, the terrorist is fundamentally different from a criminal normally encountered by our criminal justice system. By attacking the foundation of order, the terrorist seeks to demolish the structure of liberty that governs our lives. By fomenting terror among the masses, the terrorist seeks to incapacitate its citizenry from exercising the liberty to pursue our own individual ends.

This is not simple criminality. This takes war-like attack on our polity. But in waging that war, the terrorist employs means that fundamentally differ from those used by traditional enemies we face on the battlefield, according to the established rules of war among nations. Those rules clearly distinguish uniformed combatants from innocent civilians, a distinction that's not only ignored, but exploited by a terrorist to his advantage. In this war, the international terrorist against whom we fight differs even from the guerillas of southeast Asia or Latin America, because for this terrorist the entire world is his battlefield and his activities are not limited to some far away, remote land.

This is the enemy we face: a criminal whose objective is not crime but fear; a mass murderer who kills only as a means to a greater end; a predator whose victims are all innocent civilians; a warrior who exploits

the rule of war; a war criminal who recognizes no boundaries and who reaches all corners of the world.

To confront this threat, the Department of Justice needed a fundamentally new paradigm, different from the way we approached the traditional task of law enforcement. Unlike traditional soldiers, terrorists waged war dressed not in camouflage, but in the colors of street clothing. Unlike traditional criminals, terrorists are willing to sacrifice their own lives in order to take the lives of innocents.

We simply cannot afford to wait until the terrorists execute their plans. The consequences are too great; the death tolls are too high. That is why, since September 11th, at the direction of the President and under the leadership of the Attorney General, we have undertaken a massive, massive legislative, administrative, and executive reorganization of our legal authorities and the way we do business, with one overriding goal: to prevent another terrorist attack and to disrupt terrorist activities before they can be effectuated into another mass, catastrophic attack.

How do we do this? We do it by delivering freedom from fear, by protecting freedom through law. First, we have sought to create an airtight surveillance net by updating the law to reflect new technology. Law enforcement had long been operating at a technologically competitive disadvantage with the terrorist. We have corrected that. Congress passed the USA PATRIOT Act,<sup>5</sup> which extended greatly the capacity of law enforcement to monitor communications in digital, as well as analog worlds. The Attorney General recently revised the Department's investigative guidelines to enhance the FBI's ability to conduct online searches on the same conditions as the general public. With each of these steps, and for each of these tools, we were careful not to alter the substantive legal predicates that exist to preserve the privacy of law-abiding citizens.

Second, we have enhanced the capacity of law enforcement to gather and analyze intelligence on terrorist activities. The cost of our ignoring this critical intelligence information cannot be borne again by America. The USA PATRIOT Act authorizes the sharing of information from grand jury and criminal wire taps with our intelligence community;<sup>6</sup> it authorized cooperation and coordination of activity between our counter-intelligence investigators and our criminal justice investigators,<sup>7</sup> and,

---

5. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

6. *Id.* § 203, 115 Stat. at 279-81.

7. *See, e.g., id.* § 504, 115 Stat. at 364-65 (authorizing coordination between federal officers) § 701, 115 Stat. at 375 (expanding regional information-sharing systems to facilitate federal, state, and local law-enforcement responses to terrorist attacks).

indeed, it requires the FBI and the CIA to play nice together, to work together in the counterterrorism mission.<sup>8</sup> Don't snicker.

We have also revised the Attorney General's guidelines precisely for this reason. For many years, we had this very strange disconnect in the way we did business at the FBI. Information was gathered and kept at the field. Important decisions about investigations, however, were made at headquarters. So we had information kept and not shared by the various components of the fifty-six field offices, and decisions that are important to these investigations made at headquarters, far away from these investigative agents. What we sought to do with the Attorney General's guidelines is to flip that. We devolve investigative authority to the special agents in charge, to the field agents, so that they can make the critical decisions that are necessary in order to collect information, to gather the pieces of the puzzle. And we authorized the FBI to centralize that information, to gather all these various different pieces of the puzzle on the same table so that the analytical capabilities of the FBI and CIA could be brought to bear to create a fuller picture of the entire mosaic of intelligence information.

Finally—and let me be very clear about this—we have employed the deliberate and clearly specified strategy to remove from our streets those who would seek to do us harm. We utilize our prosecutorial discretion to the fullest extent in order to incapacitate suspected terrorists from fulfilling their plans.

Robert F. Kennedy's Justice Department would, it is said, "arrest a mobster for spitting on the sidewalk." And Elliott Ness brought down Al Capone for tax evasion. We sought to apply this exact same approach to the war on terror. Any infraction, however minor, will be prosecuted against suspected terrorists. However, each and every person detained by the Department of Justice, arising from our investigation into 9/11, has been held with an individualized predicate, a criminal charge, an immigration violation, or a judicially authorized material witness warrant. We do not engage in preventive detention. In this respect, our detention differs significantly from that of other countries, even our European partners. In fact, the European Convention of Human Rights allows states to subject a person to preventive detention, "when it is reasonably considered necessary to prevent his committing an offense."<sup>9</sup> What we do here is perhaps best described as preventative prosecution. If we sus-

---

8. *Id.* § 905, 115 Stat. at 388–89; § 907, 115 Stat. at 390–91; § 908, 115 Stat. at 391.

9. Convention for the Protection of Human Rights and Fundamental Freedoms, Dec. 10, 1948, art. 5(1)(c), Europ. T.S. No. 5.

pect you of terrorism, beware. We will stick on you like white on rice. And if you do anything wrong, we will arrest you and remove you from the streets.

In short, in prosecuting the war on terror, we have taken every step within our discretion, used every tool at our disposal, and employed every authority under the law to prevent terrorism and defend our ordered liberty. We have done so with the constant reminder that it is liberty that we are preserving, and with scrupulous attention to the legal and constitutional safeguards of these liberties.

The Attorney General's charge after 9/11 to all of us in the Department and throughout law enforcement, was very, very simple: "Think outside the box, but never outside the Constitution."

Thank you very much.

[*Applause.*]

DEAN MCALLISTER: Our next speaker, I think is very familiar to this group. I'm going to introduce Professor Erwin Chemerinsky next. Erwin is a professor of public interest law, of legal ethics, and political science at USC Law School. He's a well known and well respected Supreme Court watcher, constitutional law scholar, as well as Court scholar. And because this circuit knows him well, I think I will stop at that for Erwin's introduction and let him speak to you.

PROFESSOR CHEMERINSKY: It is such an honor and pleasure to be with you again. I said before, though I live in Los Angeles, I've become very much to feel a part of the Tenth Circuit.

Throughout American history, whenever the United States has faced a crisis, especially an international crisis, the response has been repression. And in hindsight, we realize we gain very little from the loss of freedom. I could start with the first years of the country, with the story of the Alien and Sedition Act. Let me just begin briefly with the stories that come from the twentieth century.

During World War I, Congress adopted repressive statutes that made it a federal crime to criticize the war or military conscription. In law school, we read the *Schenck*<sup>10</sup> case, where a man was sentenced to ten years in prison for circulating a leaflet that said, "Do not submit to intimidation," and arguing that the military draft violated the Thirteenth

---

10. *Schenck v. United States*, 249 U.S. 47 (1919).

Amendment, as involuntary servitude.<sup>11</sup> There was no showing that those leaflets in the slightest way hindered military conscription or the war. There wasn't an iota of evidence that one person didn't report for induction because of those leaflets. But the Supreme Court, nonetheless, upheld the ten-year prison sentence.<sup>12</sup>

At the same time, the Supreme Court upheld a ten-year prison sentence for Eugene Debs.<sup>13</sup> He gave a speech to his audience where he said: "You are good for more than cannon fodder. There is more I'd like to say, but I can't, for fear I might go to prison."<sup>14</sup> For just that speech, he was sentenced to ten years in prison. He ran for president while in prison. Our Country wasn't made safer because of that repression. We realize it now.

Think of World War II. One hundred and twenty thousand Japanese Americans, aliens and citizens, and 70,000 United States citizens, were uprooted from their life-long homes and placed in what President Franklin Roosevelt called concentration camps. Race alone determined who would be free and who would be put behind barbed wire. Not one Japanese American was ever accused of, indicted of, or convicted of any crime against the country. It was a massive deprivation of liberty. And it didn't make us any safer.

Think of the Cold War. The tremendous repression that occurred then. The lives that were ruined. Think again of a case we all read in law school, *Dennis v. United States*.<sup>15</sup> A group of individuals got together and organized a study group to look at the works of Marx and Lenin and Engels. For just this, they were convicted of the crime of conspiracy to advocate the overthrow of the government. They weren't being tried for overthrowing the government or conspiring to do that, not even tried for advocating the overthrow of the government, but the crime was conspiracy to advocate the overthrow of the government.<sup>16</sup> And they were sentenced to twenty years in prison for that. The Supreme Court upheld their conviction and their sentence.<sup>17</sup> The Supreme Court said that when the harm is great enough to overthrow the government,

---

11. *Id.* at 50-51.

12. *Id.* at 52.

13. *Debs v. United States*, 249 U.S. 211, 216-17 (1919).

14. The opinion quotes Debs as saying, "you need to know that you are fit for something better than slavery and cannon fodder." *Id.* at 214. It describes him further as saying, "he had to be prudent and might not be able to say all the he thought." *Id.* at 213.

15. 341 U.S. 494 (1951).

16. *Id.* at 510-11.

17. *Id.* at 516-17.



there doesn't need to be any showing of increase in likelihood.<sup>18</sup> We now know in hindsight that the tremendous repression from the McCarthy Era didn't make us any safer, but the loss of liberty was enormous.

I begin with this very brief recitation of history because I believe that now history is repeating itself with a vengeance; that a tragic casualty of the events of September 11th is the Bill of Rights and our freedom. I've spoken to this group hopefully enough that you know that I'm not prone to hyperbole. I'm not someone who often yells, "the sky is falling"! But I think that our liberties, and especially, if you happen to be of Arab descent or Muslim, are being compromised.

I listened to Viet Dinh's eloquent words where he said that the administration doesn't want to take away our liberties, just make us safer. And all I can think of is what the generals during the Vietnam War said; they had to bomb the village in order to save it. I believe that the administration is taking away our liberties, but they aren't making us any safer.

Lest you think this is hyperbole, let me give you examples. And I only have time for a few of these. One thing that the administration is claiming is that they have the authority for indefinite detention of United States citizens, with no judicial review in any court. A week ago yesterday, the Solicitor General's Office filed a brief in the *Hamdi* case, saying that if the executive branch labels a person an unlawful combatant, the executive branch gets to hold that person, and no court gets to do any review whatsoever. You might remember, the *Hamdi* case is where a federal district court judge said it was outrageous that the government was taking the position that they didn't have to provide an attorney to somebody who was being held.<sup>19</sup>

This is also the position, of course, that the United States Government is taking in the *Padilla* case, saying if the government labels somebody an unlawful combatant, the government can hold that person as long as the war on terrorism continues—President Bush says it's going to go on way beyond our lifetimes—and no court can review or question that judgment.<sup>20</sup> That means that the executive branch can label you or

---

18. *Id.* at 509.

19. The district court judge's statements are reported in *Hamdi v. Rumsfeld*, 294 F.3d 598, 601–02 (4th Cir. 2002) and *Hamdi v. Rumsfeld*, 296 F.3d 278, 280–81 (4th Cir. 2002), in which the Fourth Circuit reversed and remanded the district court's order.

20. See *Padilla v. Bush*, No. 02 Civ. 4445, 2002 U.S. Dist. LEXIS 23086, at \*10–13 (S.D.N.Y. Dec. 4, 2002) (outlining the government's June 11, 2002 arguments in reply to Padilla's then-pending motion to vacate the material witness statute).

me or anybody else an unlawful combatant, lock us up, and no court, not through a writ of habeas corpus or anything else can review that.

Now, this is an administration that says that it believes in strict construction of the Bill of Rights, following the framers' intent. The framers were deeply distrustful of the executive branch of government. They wanted to make sure that any search, any arrest, any detention was approved by a neutral judge. They wanted to make sure that anybody being held for trial had a grand-jury indictment; that anyone convicted was tried by a jury.

Now the administration is saying they can dispense with all of these rights, just by labeling somebody, a citizen, an unlawful combatant. Now, I think this would be outrageous if it was directed to noncitizens. Anyone in the United States has the protection of the Bill of Rights. But the government is saying it doesn't matter whether it's a citizen or a non-citizen.

I said, of course, that it could be directed at any of you or at me. The reality is it won't be. They are not going to come after federal judges; they are not going to come after prominent lawyers; they probably won't even come after outspoken critics like me. But they will come after individuals who are politically powerless, those who happen to be of the wrong race or those of the wrong religion.

Let me give a second example. The administration is claiming unprecedented authority for indefinite detention under the material witness statute. There is a statute that allows for individuals to be held as material witnesses under limited circumstances; it's 18 United States Code, section 3144.<sup>21</sup> We know that the administration has detained hundreds, maybe even thousands of individuals since September 11th. There is a Freedom of Information Act request pending now to try to find out how many individuals are being held, where they are being held, and for what reasons. We don't know all of the information, but we do know that the administration is saying that they can identify individuals as material witnesses and hold them indefinitely on that basis. Often this is likely to be a pretext for other reasons why the administration wants to hold the person.

Viet Dinh told us that the administration is willing to use this as a pretext if they suppose that somebody is engaged in terrorist activity. That is preventative detention, whether you want to use that label or not. This isn't what the material witness statute was ever meant to be about. A federal district court judge in New York has specifically said that this

---

21. 18 U.S.C. § 3144 (2000).

is an inappropriate use of the material witness statute—that it was never intended to be employed under such circumstances.<sup>22</sup>

Let me give you a third example, and that's the unprecedented use of secret proceedings not observable by the press or the public. On September 21st of last year, Michael Creppy issued a memo saying that immigration proceedings, when a person is suspected of terrorism or assisting terrorism, if the government wants to do so, will be completely closed to the press and the public. Now, there is a specific federal regulation that requires that immigration proceedings be open to the press and the public, except for the most extraordinary, limited circumstances. The Creppy directive flies in the face of that specific federal regulation.

Moreover, there is a long tradition of open and public immigration proceedings. One federal district court judge in Detroit, in *Detroit Free Press v. Ashcroft*,<sup>23</sup> has held that the closed immigration proceedings are illegal, in violation of federal law.<sup>24</sup> The problem with closed proceedings is there can be violations of rights and no one is there to observe it. We equate secret proceedings with Star Chamber proceedings, where the checking value of the press and public are absent.

The legal director of the ACLU, Steve Shapiro, wrote a letter to the Chief Judge in the Southern District of New York asking whether there are secret proceedings that don't appear on the docket, which is a violation of federal law. The judge wrote back, saying "[u]nfortunately, or should I say fortunately, I can't respond to your question, period." At times, secrecy is essential, but blanket secrecy strikes at the very heart of the First Amendment and the Bill of Rights.

A fourth example that I would point to is Attorney General Ashcroft's rescission of the guidelines that limit FBI surveillance of peaceful domestic groups. We know of the FBI abuses from the 1960s and the 1970s. We know how the FBI targeted civil-rights leaders like Dr. Martin Luther King. We know of the abuses of the Counterpro Program. As a result of that, specific guidelines were imposed limiting the abilities of the FBI to spy on, to engage in surveillance of peaceful groups, where there is no reasonable suspicion at all.

Almost exactly a month ago today, Attorney General Ashcroft unilaterally rescinded those regulations. There is now nothing to prevent the kinds of abuses that occurred previously. The only thing the government is saying is trust them, they will only use it against those they suspect of

---

22. *United States v. Awadallah*, 202 F. Supp. 2d 55, 65, 76–80 (S.D.N.Y. 2002).

23. 195 F. Supp. 2d 937 (E.D. Mich. 2002).

24. *Id.* at 947–48.

being terrorists. Again, to me, what the Bill of Rights is all about is a distrust of government and government power.

My final example: some of the provisions of the USA PATRIOT Act. Now, this is a bill that was adopted without a single hearing in any committee of the House or the Senate. Attorney General Ashcroft went to the House of Representatives Judiciary Committee on Monday and made proposals; he went to the Senate Judiciary on Wednesday and made proposals; there were then secret negotiations in the House and the Senate, and then the bill passed without any opportunity for public hearing. I can't think of any other major piece of legislation that passed without the opportunity for public comment and participation.

Many of the provisions of this law are desirable, and I agree with many of the things that Viet Dinh talked about, such as information sharing. But many of the provisions are truly chilling. They put our rights in jeopardy for no gain. One provision of the USA PATRIOT Act says that the government is allowed to detain an individual for seven days on reasonable suspicion that the person is engaged in or supporting terrorist activity.<sup>25</sup> The Fourth Amendment says probable cause. I checked, and there is no Supreme Court case in history that has ever allowed detention on less than probable cause but the PATRIOT Act does that.

The PATRIOT Act also tremendously lessens the check with regard to electronic surveillance. Let me pick one example that is illustrative, because it is one that was most talked about in the media, but the least explained. It's the authority under the USA PATRIOT Act for so-called roving wiretaps.<sup>26</sup> The Attorney General said that this was the centerpiece of what he wanted. The Republicans' response is interesting—the Clinton Administration proposed roving wiretaps as part of the 1996 Antiterrorist Bill, and the Republicans in the House and the Senate rejected it as an unjustified restriction of freedom.

Attorney General Ashcroft said the need for roving wiretaps is that suspected terrorists might keep changing their cell phones, going from one cell phone to another. Now, the law had always been that a wiretap warrant is supposed to designate the numbers that are going to be listened to. A roving wiretap would let the police listen to any phone that the suspect reasonably might use. Think about this in terms of the invasion of freedom. If there was a roving wiretap for Erwin Chemerinsky, they could listen to not only the phone in my house, but also to all of the phones in the buildings where I work, all of the phones in the friends'

---

25. USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 412, 115 Stat. 272, 351–53.

26. *Id.* § 203, 115 Stat. at 279–81.

houses I visit, and in the stores where I shop. I had a debate on this with an FBI agent, and he admitted that with a roving wiretap, the FBI could even listen to the pay phones I walk in front of on the way to work.

Does this make us safer? The argument is that terrorists will keep changing their cell phones. But the problem with this is that the government can't listen to a new cell phone until they know a person has that cell phone. And once the government knows the person has the new cell phone, then they could add that number to an existing warrant. In several debates with FBI agents, they always respond by saying that it takes too long to add a new number to an existing warrant. That is a serious problem. But that calls for an expeditious procedure for adding new numbers to existing warrants, not the tremendous invasion of privacy that comes from roving wiretaps.

I've used my time, but I could go on with other examples. I could talk about the Attorney General's order that allows government lawyers to eavesdrop on conversations between a suspected terrorist and their lawyers. That strikes at the heart of the attorney-client privilege. I could talk about military tribunals, which show tremendous disrespect to the Article III judiciary.

I want to emphasize that I'm not absolute. I believe at times we do have to sacrifice freedom for security. But we should only give up freedom if it's truly necessary for a gain that makes it worth it. What's so dangerous here is that we're giving up our liberties for no gain.

I began by talking about history. There is, of course, the famous quote that those who ignore history are doomed to repeat it. One of the lessons that I draw from history is that in all of these past crises our courts failed us. The courts gave in to the hysteria of the moment and didn't stand up for the Bill of Rights. It was true in World War I; it was true in World War II, and it was true in the Korean War. If it's not going to happen now, it's going to be because of those who are judges in this room, who are willing to stand up to the administration and say that you've gone too far infringing the Bill of Rights, even though the goal is a noble one, security while fighting terrorism.

I'll end with two quotes from former Supreme Court justices. The late Robert Jackson said the Constitution is not a suicide pact.<sup>27</sup> And of course he was right. The late Louis Brandeis said the greatest threat to liberty will come from people who claim to be acting for beneficial pur-

---

27. *Terminiello v. Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J. dissenting) ("There is a danger that, if the court does not temper its doctrinaric logic with a little practical wisdom, it will convert the Bill of Rights into a suicide pact.").

poses.<sup>28</sup> Brandeis said people warned of freedom know to resist the tyranny of despots.<sup>29</sup> He said the insidious threat to liberty will come from well-meaning people of zeal with little understanding what the Constitution is all about.<sup>30</sup>

Thank you.

[*Applause.*]

DEAN MCALLISTER: Our next panelist will be Chris Stone. Chris is a graduate of Harvard College, the Institute of Criminology at Cambridge, and the Yale Law School. Chris currently is the Director of the Vera Institute of Justice, and has been in that position since 1994. The Vera Institute designs, operates, and evaluates innovations in the administration of justice. He works locally in New York and across the United States and indeed internationally.

Under Chris's direction, Vera has begun new programs on improving police accountability and police-community relations, reducing adolescent violence and improving school safety, reforming U.S. detention practices in deportation proceedings, providing drug treatment in the juvenile-justice system, strengthening prerelease services in prison, diverting foster children from jail, and improving the conditions of jury service. Welcome Chris Stone.

MR. STONE: Let me start with a question. What would you do if, say, next week you woke up in the morning to learn that your courthouse wasn't standing anymore, or that another terrorist attack had rendered the area of the courthouse inaccessible, phones and cell phones useless? What would you do in those first few minutes or the first hours? We can ask the question differently. Do judges in this country provide an essential public service—like police officers, firefighters, and doctors—a service that must remain up and running in an emergency, or are the courts suited only to ordinary conditions, appropriately stepping back during times of crisis to let those who provide essential services deal with emergency situations?

---

28. *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J. dissenting) ("Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent.").

29. *Id.* ("Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers.").

30. *Id.* ("The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.").

In the comfort of a classroom or around a dining room table, it's easy to assert that judges and courts provide an essential public service. But the assertion is rarely tested. On September 11th, in lower Manhattan, our assumptions in New York about the essential nature of the judiciary were tested. And it's my thesis this afternoon that the way the judiciary responded holds important lessons for all of us who devote ourselves to the proper administration of justice. I'm going to use my few minutes here to discuss the way the New York State Judiciary responded, because I think it was in the state system that lessons for all of us were more starkly revealed, and it's also often easier to see important lessons and important issues more clearly in someone else's system than in one's own. But I'll be happy to discuss the performance of the federal courts in New York as well in later discussions.

At 8:45 on the morning of September 11th, I was at my desk on the twelfth floor of the Woolworth Building, which is a couple of blocks away from the World Trade Center, when I heard the first plane crash into the north tower. A few seconds later, I was standing with about ten of my colleagues at our windows watching as the smoke billowed out from that tower, and as bodies began—one at a time and occasionally in pairs—to fall out of the building. A few seconds later, a second plane came into view briefly, and then crashed into the south tower. A few blocks away from where I stood watching that, sit the federal and state courts in Manhattan, within sprinting distance of the World Trade Center. Three New York State Court officers ran to assist in the rescue efforts that day, perishing when the buildings collapsed. The Court of Claims Courthouse at 5 World Trade Center was destroyed. By the end of the day, the courts around Manhattan had no telephone service, most computer connections were down, and the courts were situated deep within what became known as “The Frozen Zone,” an area city officials ordered evacuated to keep clear for rescue efforts.

Members of the police and fire departments had no doubt about what they had to do in that moment. They had to report to work, and they kept working on twelve-hour shifts for days afterwards. They knew that they provide an essential public service, and so they went into action.

What did the state judges do? I happen to know the answer to that question. In ordinary times, the hundred or so staff at the Vera Institute work with law enforcement of the government agencies in New York and elsewhere to work on innovations in the criminal justice system. But in the face of this emergency on September 11th, with our own operations suspended, we realized it would be important to redirect our energies. And I redeployed our staff to document how the courts responded

to that emergency, so that lessons learned there could be used in the future.

There were fundamental rights at stake in how the courts responded, and whether they remained open, adjudicating cases. For example, as there would be on any one day, literally hundreds of recently arrested prisoners sitting in the city jails, entitled to hearings in the next few days—those probable cause hearings we've just heard about—at which state prosecutors would normally be required to present evidence to justify further detention.

At the same time there were disputes arising from the disaster whose resolution was, in fact, part of the recovery process. As judges debated among themselves what to do, some argued there was no point trying to open the courts right away. Within a few hours of the attack, the police had sealed off lower Manhattan behind three rings of barricades with checkpoints established at each ring, beyond which only those with the right credentials could pass. Jurors and litigants would not be able to reach the court; prosecutors wouldn't be able to present evidence; computers and phones were out of service. Some judges argued, therefore, it was impractical for the courts to be active. Others argued that it would be inappropriate.

As the dust cleared and the horrific death toll began to come into focus, New York City went into a spontaneous period of mourning. The courts, some judges argued, should respect that period of mourning by remaining closed. Still others made a jurisprudential argument. They argued the court should defer to the executive branch in the emergency. The courts, some said, are not well suited to making decisions under pressure. The Mayor, the Governor, the President, the police, and other executive branch departments should make the immediate decisions that need to be made. Indeed, even if the courts opened, some argued, they should not hear individual cases of detainees for a few weeks, giving the prosecution time to recover from the disaster and for police officers to become available to provide evidence.

There was precedent in the New York courts to defer questions of individual liberties and other rights to the judgment of the executive. During a major blackout in the 1970s, and after civil disturbances in the 1960s, the courts had allowed police and prosecutors to keep defendants in detention without individual determinations of probable cause for more than a week.

Understandably, in the days after September 11th, there was great pressure on the state courts to allow the New York City prosecutors to continue to detain defendants without regard to statutory time limits and without individual judicial consideration of their cases.



What was most remarkable in the event was that the state courts didn't bow to these arguments. On September 11th itself, the supervising judge of the Manhattan Criminal Court stayed at work, sleeping in the courthouse, because he was worried that he would not be allowed back the next morning. The court managers took a seat in Mayor Giuliani's emergency command center, and began, that very day, difficult negotiations about making police officers available for hearings and organizing the transportation of detainees through the myriad checkpoints. Executive-branch officials from the governor's office, the mayor's office and prosecutors resisted many of these efforts, urging the courts to remain closed or at least not conduct individual hearings for the rest of the month.

The issue came to a head in the courtroom of the supervising judge of the criminal court on September 19th, when the Chief of the Trial Division for the Manhattan District Attorney personally appeared to argue for a blanket extension of detention for more than 1000 detainees, for what she described as a minimum of two weeks. It was one of those real-life dramas in a packed courtroom, with more than fifty lawyers crowded around the rail to hear the arguments. The tough, uncompromising prosecutor noted that her office had lost phone, fax, and computer service. She cited the unavailability of police officers who were still on duty at the World Trade Center and at checkpoints throughout the city. She argued that time limits on detention were not constitutionally required, and that the limits had not always been scrupulously followed in the past anywhere. She implied that if the court began to consider these cases individually, they would inevitably release dangerous people, threatening public safety, and she argued that prosecutors could be relied upon to free appropriate detainees on their own.

The supervising judge denied the motion, refusing to suspend statutory protections even in the middle of the crisis. He explained that the courtroom was full, the detention cells were full, and in his words, "we owe it to everybody to do each case, as laborious as it may be." And labor they did until late at night for several days running. To the great credit of the Manhattan District Attorney's office, once they lost the argument, the prosecutors threw themselves into the task and overcame all the obstacles that hours before had seemed insurmountable.

Indeed, by the time two weeks had passed—the period that the prosecutors had sought to detain everyone without any individual hearings—more than ninety percent of the detainees had been dealt with individually, many of them released, and prosecutors acknowledged to us that no major injustices had been done. It was, for those of us in New York at that time, a triumph of our justice system, the principle of indi-

vidual justice, and the ability of the executive and judicial branches to work together in even the most difficult circumstances. Not only did they maintain our system of justice in ordinary cases during extraordinary times, but the courts showed that they could play an important role in emergency cases as well, such as one involving the use of force at emergency checkpoints. In short, the New York courts learned just what it means to take seriously the assertion that the courts in this country are an essential public service.

It is not just a question of judicial will. For the courts to really serve the country as an essential public service requires at least three things. First, it requires the practical ability to mobilize judicial resources under emergency conditions, a feat that is accomplished effectively only through advance planning and even simulation.

Second, it requires continuous communication and coordination with other branches of government: that seat in the emergency command center. That's almost impossible to begin to organize after a disaster has occurred.

Third, and most important, it requires bold judicial leadership, confident of the importance of the rule of law and of individual justice.

A few weeks after September 11th, as I was working on the report that came out of these investigations, I found myself telling this story to a federal district judge in Manhattan, who immediately thought of his own reaction when he was stopped at one of the police checkpoints in Lower Manhattan in the days after the attack. As he showed the police officers his judicial credentials, he realized he had no idea if the rules permitted him access to Lower Manhattan. Indeed, he told me, it was unclear whether there were any rules at all. "What if there were another attack," he asked me rhetorically, "this time with biological agents and the checkpoints were thrown up around hospitals controlling who could get access to treatment? Would the courts even sit and would they be willing to review practices at those checkpoints or emergency regulations governing access to medical care or to vaccines?"

These are questions that the times demand we face. The threats today may seem unprecedented, but the fundamental question about the role of the courts in times of emergency is as old as the idea of democracy under law. In the words of the Kerner Commission, when it considered the challenge that civil disorder posed for the criminal justice system in the 1960s, "[t]he quality of justice which the courts dispense in time of civil crisis is one of the indices of the capacity of a democratic

society to survive. To see that this quality does not become constrained is therefore a task of critical importance.”<sup>31</sup>

Thank you for your attention.

[Applause.]

DEAN MCALLISTER: Our final panelist is Jeff Rosen. Jeff is an Associate Professor at the George Washington University Law School, and Legal Affairs Editor of the New Republic. He’s authored a book, *The Unwanted Gaze: The Destruction of Privacy in America*, which I think may relate to his topic and some of his discussion this afternoon. He is a graduate of Yale Law School, and after that clerked for Chief Judge Abner Mikva of the D.C. Circuit. He’s a frequent contributor, as many of you may know, to the *New York Times Magazine*, *The New Yorker*, and National Public Radio, which he was contributing to over the noon hour today.

MR. ROSEN: Thank you so much. It’s an honor to be here. I agree with aspects of what all of these spectacular speakers have argued so far. I agree with Viet that it’s possible to design security technologies that protect liberty and security at the same time. But I also agree with Erwin’s very powerful caution, that there is nothing inevitable about the fact that this balance will be struck in the right way, and we need judges and legislators and technologists to think about the complicated choices that we face in each of these areas, to ensure that we’re getting increased security without threatening privacy. I was very interested in Chris Stone’s fascinating reminder that judges have a crucial role to play in striking this balance.

I really want to use my brief time here to make a messianic appeal to you on the bench to recognize the complexity of the design choices we face. I want you to educate yourself about these technologies and realize there is nothing inevitable about the choice of one architecture rather than the other. And I want to challenge you to rise to the occasion of thinking creatively and rigorously about ways of translating eighteenth-century values, so that Americans can enjoy the same privacy in the twenty-first century as we enjoyed at the time of the founding.

Let me give a very concrete example of the kind of design choices I have in mind. At airports, as some of us have experienced, there are new

---

31. NAT’L ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NAT’L ADVISORY COMM’N ON CIVIL DISORDERS 337 (The New York Times ed., E.P. Dutton & Co. 1968) (1968).

holographic x-ray machines. They are the equivalent of electronic strip searches. And some airports are giving passengers a choice between waiting in line or going through the magical naked machine. The machine will show a gun or contraband, if you happened to be carrying it, and it will also reveal you naked to the customs inspectors. It's possible, with a very small design choice, to change this architecture. You can still reveal the gun, but you can scramble the bits of the body, so instead of revealing us naked, what actually is revealed is an unrecognizable blob, which obviously, in most of our cases, is an act of mercy. Not for federal judges, of course, but for ordinary people.

So why isn't there some incentive, perhaps a constitutional incentive or legislative incentive, to ensure that airports adopt the blob machine, rather than the naked machine? The blob machine is a silver bullet: you're getting exactly as much security, but without the egregious invasion of privacy, and it doesn't even cost any more. So we have to think about mechanisms of ensuring that those kinds of designs are adopted.

To contrast this happy example of the blob machine, which could give us privacy and security at the same time, I want to talk to you about another technology that I've been learning about, and that is surveillance cameras. I had the odd luck, I suppose, of being in Britain at the beginning of September last year. I was sent by *The New York Times Magazine* to explore an interesting question: how was it in the course of the 1990s, without anyone paying close attention, that Britain, the cradle of liberty, wired itself up with so many surveillance cameras that it now resembles the set of the Truman Show? I went and found that what I was experiencing in Britain was a vision of our post-September 11th world. In fact, it was fear of terrorism. It was IRA terrorism, in particular, a series of IRA bombs in this historic city of London in 1993. Because of fears of terrorism, the city rigged itself up with thirteen cameras on the so-called Ring of Steel, which are the gates that surround the historic core of the city. And then the cameras began to proliferate. It wasn't enough to have them in the city of London. Every tiny city and town wanted the cameras, even though their greatest threat to public safety were mad cows. The cameras proved to be extremely popular. As John Major said in his campaign, in a slogan anticipating one that's being used now, "if you've got nothing to hide, then you've got nothing to fear." The cameras proliferated so quickly that there are now, by some estimates, more than two million cameras in the city of London, although people have stopped counting, and the average Britain, by some accounts, is photographed 300 times a day.

What has Britain gotten in return for this transformation of its social space? There are unexpected and subtle, but interesting, transformations

that occur when people constantly walk through the streets unsure about whether they're being watched.

Have the cameras caught terrorists? They haven't. I actually asked the head press officer for the police in the city of London, "Have you got any terrorists?"

"Not using this technology, no."

"What, then, do you use it for?"

"Well, we record the license plate of every car that enters the city, the time that it comes in, and the time that it leaves the city, and we use this to go after car thieves; we use this to go after low-level unsolved warrant crimes."

But that's not the only purpose. The cameras are being demanded in a nearby London borough. They are not using them for car thieves; they are used to scare young teenage punks into thinking they are being watched even though they are not. The city has put up a series of dummy cameras that are actually never turned on.

What are the costs of this technology, which was justified for one purpose and is used for another? It's possible to imagine a camera system that could be set up in the silver-bullet-like way of the blob machine that I described at the beginning of my remarks. You could imagine a system set up not throughout the city, but only at airports. The database could reveal only the faces of suspected terrorists. If a match was made, then there would be an alert. If a match was not made, there would be no memory and innocent citizens would go free. That would be a silver-bullet-like design.

But in fact, I discovered that in the city of London, when biometric databases were used, the faces on the databases are not suspected terrorists; because we're often told terrorism has no face, authorities don't know who the terrorists are. Instead, they are low-level ticket scalpers, punks, kids who have been arrested for drunk driving and are being banned from the city center. This is a British idea. Can you imagine Americans banning someone from the mall? The parents would call Professor Dershowitz immediately. But Europe is far more deferential to authority, and the British are using these databases to go after low-level crimes. So there is a disconnect between the initial justification of the cameras—to catch terrorists—and the subsequent use—to catch low-level criminals.

What are the costs of this vast surveillance system? You could imagine these cameras as an alternative to racial profiling. If no human being watches the cameras and are only alerted when there were matches, you could avoid discriminatory surveillance. But in fact, the opposite has been found to be true. I was in the control room in the City

of Hull, which is an especially Dickensian city on the British coast, and sat there from 12:00 midnight until 6:00 in the morning behind the cameras.

What do a bunch of bored and unsupervised guys do when they are sitting in a room without anyone watching them at midnight? They zoom in on the teenagers who are making out in the town square. "Boy, they are really going at it," said one of the monitors. This has been proved to happen again and again. People have contests leering at attractive women, and also singling out minorities. Because what catches the eye is not the average-looking citizen, but anyone who looks different. So the risk of discriminatory surveillance is increased.

But this is all very low-level stuff compared to the challenges that we are going to be facing as a country. Just a few months ago, the city of Washington announced that it was going to start unifying all of the surveillance cameras that are now placed on the mall. They will be operated with a digital system, not with the 1970s-style British technology. Not only public spaces, but also schools and hospitals might be linked up to it, and neighborhoods, if they demanded it.

It's possible to imagine without too much imagination, that if this development goes unstopped, door-to-door surveillance could be linked digitally, monitored even from a room that might not be in the city of Washington itself, that would follow you from the time you left your house, through the metro, where cameras also must be placed, throughout an integrated network of cameras, to your final destination. And you can easily imagine the danger of a system where the authorities, without individualized suspicion, can surveil someone ubiquitously, merely because an ordinary member of the public, who had a \$200-million surveillance system could do the same thing, to use the Court's exquisite logic. Imagine the dangers of just clicking on any individual, back clicking to see where he'd come from, forward clicking to see where he'd gone to, and storing this in personally unidentifiable dossier that could potentially embarrass us in low-level divorce cases or civil cases.

This isn't a hypothetical. Go see the control room, to see that gleam—the techno-positivistic gleam in the eyes of those good cops—and they are good cops, and they want to do the right thing—but they know how useful these technologies could be, again not for terrorism, but for low-level crimes. We need a debate, as serious as the one that took place at the time of the American founding, about how to construct checks and balances that could recreate in this new age of cyberspace and technology the kind of requirements of individualized suspicion and prohibitions on unregulated data surveillance that Americans have expected since the eighteen century.

Let me just close with two other technologies that I want you to think about. One is data profiling. The FAA is now having discussions with Silicon Valley technologists, who have discovered that the same technologies that were useful before September 11th, for tracking and monitoring customers on Amazon, can now be used after September 11th for tracking and monitoring potential terrorists. And they are eager to consolidate databases, many of the private databases, including credit-card information, records of international phone calls, and records of personally identifiable credit-card purchases, many of which are currently restricted by privacy laws, to create profiles that would see whether or not purchase patterns or travel patterns resemble those of suspected terrorists. There are two objections to this project. The first is that it is potentially invasive of privacy; the second that it's unlikely to work.

Statisticians have explained to me that when you're looking for credit-card fraud, you're looking for tens of millions of suspicious patterns. People who steal credit cards, for example, often will use them to buy gas at a self-service station, and then clothes at a mall. So if this pattern is observed on your credit card, you're likely to get a call from the security people, because there is a decent chance that your card has been stolen.

By contrast, if you're trying to profile the nineteen terrorists of September 11th, there is such a small data set that you're likely to stop a lot of retired businessmen in Florida, who have used their credit cards to obtain flight lessons. There would be so many false positives; in other words, so many of the people pulled over will be wrongly stopped that the system can't possibly work. So we need to think of more effective ways of surveilling this information in ways that are traceable, but not identifiable. If we had confidence that this information would not be linked to me, unless there were a very high danger that I actually were a terrorist, then you could imagine making it available to the government. But if it's stored and accessible in ways that could lead to misinterpretation and invasions of privacy without catching terrorists, it seems like a bad bargain.

The last technology is biometric ID cards and consolidated databases. Viet talked about the virtues of databases, and Erwin recognized that they can be useful. But imagine the dangers in a system where all of our personal information were stored in a single place and linked to a biometric, such as a fingerprint. This could lead to abuses similar to the ones that led to the passage of the Privacy Act in 1974. Imagine a situation where the police could dust at a protest scene at the World Bank, take the fingerprints, plug it into the national fingerprint database, and identify all the protesters that were there. In the 1970s, this was called

The Nixon Effect. And it was this danger that led Congress to prohibit different agencies from sharing information without a good reason or a high standard of cause.

We can avoid The Nixon Effect. We could devise a biometric database in which the fingerprint is not centrally stored, but instead, is a private key that's used to unlock an encrypted packet of data that basically says, I've been cleared to cross the border. This architecture, this technology, unlike the centrally stored one I've described, doesn't threaten privacy because it can't be used for secondary identifications, but it can be used to assure that I am indeed the person I said I am, that I am Jeff Rosen.

So please resist the extremists on both sides, whether they're Professor Dershowitz, who is a civil libertarian, or Larry Ellison, the head of the Oracle Corporation, the former richest man in the world, whom I recently visited at his spectacular Atherton mansion and enjoyed his lovely Japanese pond. He expressed contempt for the privacy fears, because he said, "we need to create a single national database. And it will be an Oracle database, coincidentally." He went further to say he would donate the software for free. Coincidentally, the upgrades and maintenance weren't free. The extremes represented by Ellison and Dershowitz are not our choices, really. We can have more complicated design choices that strike a more reasonable balance between liberty and security.

And this is where—and I'll close on this—you judges may be the only ones who can save us. The technologists won't save us. You talk to them, they say, it's not my department. We just build the machines. We don't know what—how they are supposed to be designed. I'm not confident that Congress can save us either. The questions are so complicated, and the political pressures on the other side are so strong, that devising checks and balances may be beyond us. It's you, the judges, in cases like *Kyllo*,<sup>32</sup> where Justice Scalia so creatively translated the original Fourth Amendment to prevent this cutting-edge thermal-imaging terminology from invading the privacy of the home. This isn't judicial activism, I don't think. The most rigorous advocate of original understanding, the most principled libertarian conservative would recognize the importance of Scalia's principle just as eagerly as the most committed civil-libertarian liberal.

So what you need to do is make yourself aware of the choices. Recognize that technology can either protect privacy and security at the same time, or it can threaten privacy without making us more secure. Perhaps

---

32. *Kyllo v. United States*, 532 U.S. 27 (2001).



the latter search is less reasonable than the former, and perhaps the Fourth Amendment really requires the balance to be struck in reasonable rather than unreasonable ways. And I hope you'll rise to the challenge.

Thank you so much.

[*Applause.*]

DEAN MCALLISTER: All right. Judge Henry has just authorized that we may continue until 3:00. So we have just about ten minutes left. If there is anyone in the audience who has a burning question that you would like to direct to the panel, now would be our time to take advantage of this opportunity. Does anyone have a question you would like to direct to one of them?

AUDIENCE MEMBER: Is there any proposal or is there anything that's actually occurred where people of the differing views, as expressed today, are brought together to see if compromises can be accomplished?

MR. ROSEN: I don't know if this is breaking any news, but we're just among friends. It's such a worthy project. Let's just say a prominent Democratic senator, who may or may not be a presidential candidate, is hoping to authorize a bipartisan privacy commission, with the help of his Republican colleagues to select national experts, to think about precisely this question, to examine individual technologies, to identify the design choices that each of them face, and to think about architectures that would produce good technologies rather than bad ones.

That final question, of course, is an interesting challenge on its own. Would it be helpful to have some kind of administrative body, like the European Commissions Privacy Board to be set up by Congress to review this? Congressman Bob Barr, no liberal slouch, has proposed privacy impact statements that would identify in each of these technologies whether or not privacy is threatened or favored. So these are the kind of choices that we face, both technological and procedural. And something like a congressional commission would be a good step down the road.

PROFESSOR CHEMERINSKY: There is a wonderful organization in Washington called The Constitution Project. It's completely nonpartisan; its co-founders were Mickey Edwards, Republican Congressman from Oklahoma, and Lloyd Cutler, a Democratic prominent lawyer and counsel to the President, and it set up a project to look at the issues that we've talked about. And it's formed three task forces: one to look at military tribunals; one at the rights of detainees; and one at First

Amendment issues. Each task force is completely representative of every position on the ideological spectrum, and they hope to produce a series of papers that might reflect consensus of these ideologically diverse groups.

MR. DINH: I look forward to reading them before I go to bed at night.

Well, I think that the key—and it's a very, very good question, a very, very, very good question. I think that all the work that has driven our vision here, you know, doesn't come from my head at night or doesn't come from John Ashcroft when he sleeps. We're building on the excellent work of the Hart Rudman Commission. We're building on the excellent work of the Webster Commission's recommendations for law enforcement in the twentieth century. A lot of these problems were recognized throughout the 1990s; a lot of solutions were recommended throughout the 1990s. But unfortunately, we did not jolt out of the national malaise until September 11th. So we have to re-group in order to progress. Forums like these actually are very, very helpful because it is due to these conversations that misunderstandings are clarified. And at the end of the day, I do not think Erwin and I disagree that much. I think that there are some factual inaccuracies, and there are some mischaracterizations.

For example, the material witness warrant statute requires judicial supervision, it requires—not only probable cause, but various standards of time limitation. And it's not indefinite detention. It's for a limited purpose. The numbers are actually not as scary as everybody keeps making them out to be. Erwin asks, I'll give you the numbers. Jeez, don't sue us, just ask. We are a litigious society.

We have detained since 9/11 a total of 751 persons for immigration charges in connection with the investigation arising out of 9/11. Currently, seventy-four of those are still under INS custody. We have charged for criminal charges a total of 129 since September 11th, arising out of those investigations. And currently there are seventy-three pending criminal charges. Let me be very clear here. We arrest thousands, and tens of thousands of criminals and immigration violators every single day. You can imagine how many arrests we make. These are the only ones that seem to be of interest to us in the 9/11 case. And so let me assure you, even where the procedures are closed for national security reasons, the entire panoply of rights with respect to witnesses and representation and the like is preserved even under the Creppy memoranda.

MR. STONE: Let me say one thing. I think the question is really good, and that kind of discussion can produce better answers than any of the

policies. Plus, I have some hope anyway that the racial-profiling guidance that will be coming out of Justice, I think shortly, is at least the product—I don't know how it will read—but it at least is the product of that kind of discussion, where—and I think more of that would be great.

AUDIENCE MEMBER: Mr. Moussaoui, a foreign national is accorded due process in a federal court. Mr. Padilla, an American citizen, is held in a military stockade in detention without charges. How do you, Mr. Dinh, explain that contrast?

MR. DINH: That is a very, very good question. My answer will be limited, because obviously, the decisions were made higher than at my pay grade. And arguments are still being played out in the *Moussaoui* case, in the criminal proceeding itself, and indeed, in *Padilla* pending further action by the executive branch.

The explanation, if there is one, lies, lies in the one part of my statement that we are fighting this war in the murky areas between crime and war, whereby the traditional criminal justice system is simply ill-fitted to address some of these, basically, crimes of war. To call what happened on September 11th murder is an insult to murderers everywhere, because it is a mass slaughter of innocent civilians. And to call the terrorists combatants is an insult to men and women in uniform of all civilized nations. And so there is this gray area where the terrorists are exploited by their very own actions. I do not think that our systems of laws, both law of nations and the law of crimes in our domestic arena, are adequate in order to address this murky area. But the choice between the two avenues of prosecution, if you will, or of prosecution, either criminal prosecution or prosecuting the actual war against terror, is inherently an executive decision, and ultimately rests with the one person at whose pay grade that decision is; that is the elected President of the United States of America.

PROFESSOR CHERMERINSKY: Viet said, just ask for the numbers being held, don't sue us, and we all chuckled. Then I noticed he didn't tell us the number of people being held as material witnesses. So I whispered to him, I said, "how can you be held as a material witness," thinking he just made a mistake. He said, "I can't tell you that number."

MR. DINH: Let me tell you exactly why. This is obfuscation. We cannot tell you the number of material witnesses because those are done under grand-jury procedures, and we cannot disclose matters under the

grand jury under Rule 16. I'm sorry, Erwin, I'm not going to go to jail in order to satisfy your need for information.

PROFESSOR CHERMERINSKY: You shouldn't. But don't ridicule me for saying that we don't know what the numbers are. Because we don't. Don't pretend, as you did, in giving the numbers, that you're making full disclosure when you're not. And, of course, what the federal judge in New York said was, the material witness statute doesn't allow people to be held as material witnesses for grand juries.

The second point I wanted to make concerned whether or not the executive can say that somebody is engaged in an act of war, and then detain that person, completely immune to any judicial review. Many of you in the room lived with the terrible tragedy in Oklahoma City in 1996, the bombing of the federal building there. That could be called an act of war against the United States. It's a criminal act. Padilla has been arrested for plotting a bomb, a dirty bomb. It doesn't seem to me that the Constitution turns on whether it's called an act of war or a crime. What the Constitution is based on is that we don't trust the executive—not a Republican president, not a Democratic president—to make the decision unilaterally to hold a person without any judicial review. And what Viet said is, if the President wants to designate somebody that's being involved in an act of war, the President can hold that person in a military stockade, and no judge can review that decision. That can't be right under the Bill of Rights. It has to be that holding of any person has to be approved by a judge.

To allow the government to do that is what we equate with the most repressive regimes in the world that can pull people off the street and hold them with no judicial review.

AUDIENCE MEMBER: Just a comment. I want to correct Professor Dinh. The law is very clear, from 1973 on, that for grand-jury sessions, you may not reveal whether any witness is a material witness. But collective statistics are available. Your courts are able to ascertain that information and Congress is able to ascertain that information. I think what Mr. Chmerinsky is talking about is collective information about the numbers of individuals who have received material witness status. And that information is not secret under grand jury.

MR. DINH: This is an issue that we have looked at. And I do not think certainly that the advice given to me by our criminal division is that they do not think the law is sufficiently clear, at least in the various districts and circuits wherein these warrants are being issued, such that they

would be willing to take the risk. Indeed, we are taking steps in order to seek to clarify the law in this regard. You can just—you can imagine—let me put it this way: it is in the Department's interest to release these material witness numbers. It's fairly straightforward. And so I'd much rather do that, rather than take what I think to be unnecessary hits in this area. But at the same time, we're not going to ask our prosecutors to put themselves in legal jeopardy.

DEAN MCALLISTER: We are out of time. I ask you to join me in thanking our panel.

*[Applause.]*

