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PACE UNIVERSITY SCHOOL OF LAW

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PANEL DISCUSSION

THE LAW AND TERRORISM PANEL DISCUSSION

On October 17, 2001, Pace Law School hosted a faculty panel discussion where faculty members specializing in various areas of law addressed legal issues related to the terrorist attacks of September 11, 2001. Faculty experts discussed laws that relate to the terrorist attacks and then opened up the panel for questions from the public. The topics that were addressed included international law, laws relating to terrorism, acts of war, civil liberties, racial profiling, and national security.

Erin Kanterman: Hi, my name is Erin Kanterman and I am the President of the Pace International Law Society. I would like to thank you all for coming today.

Since the tragic events of September 11, 2001, America has been facing many previously unanticipated challenges. The impact of the terrorist attacks and its implications for our legal system is of critical importance. Today, we begin the first of a series of discussions dealing with these and other issues arising from the events of September 11. Now before I introduce the Dean, I would like to ask you all if we can take a moment of silence to remember those that were lost in these tragic attacks.

At this time I would like to introduce the Dean of Pace Law School and the moderator of this event, Dean David Cohen.¹

Dean Cohen: Thank you for your patience. I appreciate everybody coming today, those guests from outside the law school, students, faculty and friends. This is a very difficult time for America, indeed for any country faced with the challenges that we have experienced and continue to experience since September 11. Pace University² has a very special role to play in these times of difficulty and the role we play is to explore these issues, think about them seriously, offer our recommendations and suggestions to the government, to the judiciary and to learn about terrorism and the legal environment as we respond to these events. I am very proud that we have had a tremendous outpouring of interest in this event here at the law school.

Today we are going to discuss the domestic issues that arise when a country is terrorized, as America has been and continues to be. This is not a new issue. For those of you who have studied constitutional law, you know of the response by the United States in 1941 after Pearl Harbor and then, our reconsideration of that response, thirty/forty years later. It has taught us that we have to think very carefully as we try to protect the country and our citizens from the risk of death. I think it is very important that as a university we offer you the opportunity to share your thoughts and ideas in an open forum. So today, we are focusing on the domestic response to terrorism in the United States, and we have three faculty members who need very little introduction, but all three have unique experiences and insights into law as it applies in this situation.

¹ Dean David S. Cohen, a graduate from McGill University, received his law degree from the University of Toronto, followed by a Masters of Laws from the Yale Law School. After clerking at the Supreme Court of Canada for Mr. Justice Willard Estey, he joined the Faculty of Law at the University of British Columbia in 1980 until his appointment as Dean at UVic in 1994. Dean Cohen became the Dean of Pace University School of Law on July 1, 1999.

² On October 25, 2001, Pace Law School was presented with the Seventh Annual PSLawNet Pro Bono Public Award during the National Association for Public Interest Law Conference at Georgetown University Law Center in Washington, DC. Pace Law School received this honor in recognition of its outstanding example of public service as demonstrated by their contribution in the relief efforts in New York City after the September 11, 2001 tragedy.

Professor Gershman³ has been a faculty member here for twenty-five years, but has also had an extraordinary career as a prosecutor prior to and during his tenure here at the law school. He brings a very important perspective on this issue. Professor Stein⁴ was very active in the National Security arena for many years before he joined the law school and Professor McLaughlin⁵ is a lawyer who has dedicated his life to addressing issues of civil liberties in the United States. So the three professors will be able to offer us some very important thoughts. So I want to thank you again and without any further delay, I would like to introduce Professor Bennett Gershman.

Prof. Gershman: I would be remiss if I did not take a minute to acknowledge Erin Kanterman and Jennifer Riekert, who put this series of very, very important panel discussions together. I think it is going to be one of the most significant series of events that we have had at this law school in a long time. I also think I would be remiss if I did not make the following comment. For

³ Professor Bennett Gershman graduated from Princeton University in 1963 and received his Juris Doctor from New York University Law School in 1966. Professor Gershman served as an Assistant District Attorney in the New York County District Attorney's Office from 1967 to 1973. Professor Gershman then served in the New York State Attorney General's Office as a Special Assistant District Attorney and Chief of the Appeals Bureau. Professor Gershman has been teaching at Pace Law School since 1977, where he has taught Criminal Law, Constitutional Law, Criminal Procedure and Evidence. Professor Gershman has written two books *PROSECUTORIAL MISCONDUCT* (Westgroup 2001) and *TRIAL ERROR AND MISCONDUCT* (Lexis 2001) and numerous articles. In 1991, Professor Gershman received the New York State Bar Association's Award for Excellence in Criminal Law Education and has been voted Outstanding Professor of the Year at Pace Law School in 1998, 2000 and 2001.

⁴ Professor Ralph M. Stein is a Professor of Law at Pace University School of Law. Professor Stein teaches Constitutional Law, Criminal Procedure, White Collar Crime and a seminar in National Security Law and Terrorism. Professor Stein formerly served as a United States Army intelligence officer at both the operational and National Command levels.

⁵ Professor Randolph M. McLaughlin graduated from Columbia University in 1975 and received his Juris Doctor from Harvard Law School in 1978. Professor McLaughlin worked for the Center for Constitutional Rights as the Associate Legal Director/Staff Attorney for 8 years. From there he worked for the law firm Meyer, Suozzi, English & Klein. Professor McLaughlin joined the Faculty at Pace University School of Law in 1988. His course coverage includes Civil Procedure, Civil Rights Law, Civil Rights Litigation and Criminal Justice. Professor McLaughlin was voted Outstanding Professor of the Year in 1992. Professor McLaughlin received the William Robert Ming Advocacy Award from the National Association for the Advancement of Colored People in 2001.

the last five weeks we have been through possibly the most unbearable period that our country has ever gone through and so many people have shown such incredible heroism and courage and leadership. I just want to say that our law school, under the leadership of Dean Cohen, has shown remarkable courage and leadership. We are the only law school in the metropolitan area that has participated with the State and City Bar Associations in helping victims, or persons who believe they were victims of the tragedy. Our students, many of our students, a huge number of our students that I cannot even enumerate because there are just so many of them, have been leaving the law school and going downtown to ground zero and working with attorneys doing pro bono work for the potential victims of this tragedy and their family members who have suffered not just the trauma but serious other injuries. Our law school has helped our own students who were there, students who have been traumatized, students who lost their books. We have been paying benefits to them, and I think it is something extraordinary and I want to make sure we all recognize and appreciate this. Now let me just make a few observations about this general issue of the constitutional rights or whether our constitution can handle this crisis and how well it will handle it.

First, when we are thinking of how our law enforcement officials will address these issues, we have to recognize that sometimes constitutional limitations on law enforcement power as a tool of judicial control may be ineffective. The Supreme Court in one of its true landmark decisions in the case of *Terry v. Ohio*,⁶ the famous "stop and frisk" case, was decided by the Court at a time when our nation was undergoing considerable violence and trauma and the phrase "stop and frisk" was a euphemism for police interference and oppression of minorities in our society. The Supreme Court in trying to determine what the Constitution said about "stop and frisk" said "regardless of how effective the rule [constitutional limitations are on police power and how effective they] may be where obtaining convictions is an important objective of the police, it is powerless, [the constitutional limitations] to deter invasions of constitutionally guaranteed rights where the police either have no interest in

⁶ 392 U.S. 1 (1968).

prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.”⁷ We can recognize today that there will be situations where law enforcement may decide that protecting and preserving our security and our safety may trump constitutional protections for individuals. That is a fear; that is a reality.

In addition, at a time like this when we may not be in a declared war, but there is war, it is known that the judiciary shows a tremendous amount of deference to the law enforcement. Justice Holmes said in the famous case of *Schenck v. United States*,⁸ that when a nation is at war, a lot of protections will have to be submerged to that war effort.⁹ We also know that shortly after the Japanese invaded Pearl Harbor our government detained, forcibly relocated Japanese Americans who were living on the west coast placing them forcibly into detention camps and those experiences suggest that in a time of crisis the Constitution does not always give the kinds of protections we hope it will.¹⁰

In the hypothetical problem that I handed out (see Appendix A), I thought about some issues that we might want to talk about since this is a discussion where it is really more the questions that are important than the answers. The times now are fraught with confusion, uncertainty and fear. We do not have answers, we just have a lot of questions, and hopefully this dialogue will be the kind of thing that invites questioning. In this problem that I devised, obviously one issue that clearly appears is the question of racial profiling. As you can see in reading the problem it raises the question of the extent to which persons of certain ethnic backgrounds may be targeted by law enforcement.

To quote from a New York Times article referring to the more than seven hundred persons who had been arrested or detained by the FBI following the September 11 attacks, “so far federal authorities have not fully explained the arrests, refus-

⁷ *Id.* at 14.

⁸ 249 U.S. 47 (1919).

⁹ “When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.” *Id.* at 52.

¹⁰ See *Korematsu v. United States*, 323 U.S. 214 (1944).

ing to identify most of the detainees and offering few details about why the government wanted them behind bars. Almost all are non-citizens of Middle Eastern descent who have been held on immigration violations like over staying visas.”¹¹

The Supreme Court is going to be deciding a racial profile case this term, the case is *United States v. Arvizu*,¹² but the Supreme Court has addressed the question of racial profiling in the past. The Supreme Court has essentially said that racial profiling or taking the race of the suspect into consideration is a permissible factor in some circumstances. The case I am referring to is *United States v. Martinez-Fuerte, et. al.*,¹³ which involved border patrol arrests on the Texas-Mexico border. The Supreme Court, in an interesting and important footnote, said to the extent that “the Border Patrol relies on apparent Mexican ancestry at this checkpoint that reliance clearly is relevant to the law enforcement need to be served.”¹⁴ So, the extent to which taking ethnicity into account in enforcing the law is found by officials to be relevant to the law enforcement needs to be served, the Supreme Court has basically passed on it and given its assent and approval.

In addition, in this hypothetical (see Appendix A) there is a series of actions by government that involve arrest, search, search of home, placing an electronic monitoring device on a citizen's telephone, searching a motel without a warrant, and searching a home without a warrant. Warrantless searches appear throughout this problem and in any other circumstances, warrantless invasions like this would be unconstitutional, a vio-

¹¹ David Johnston, *A Nation Challenged; Detentions May Be Aimed at Detering Other Attacks*, N.Y. TIMES, Oct. 14, 2001, at B3.

¹² 122 S.Ct. 744 (2002). Ralph Arvizu, while driving on an unpaved road in a remote area of southeastern Arizona, was stopped by a border patrol agent. His car was subsequently searched and 100 pounds of marijuana was found. The Supreme Court held that the stop was reasonable within the meaning of the Fourth Amendment.

When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the “totality of the circumstances” of each case to see whether the detaining officer has a “particularized and objective basis” for suspecting legal wrongdoing. This process allows officers to draw on their own experience and specialized training to make inferences.

Id. at 751.

¹³ 428 U.S. 543 (1976).

¹⁴ *Id.* at 564, n.17.

lation of the Fourth Amendment,¹⁵ and the evidence obtained would have to be excluded. But, what this problem highlights is what we have come to see as the “national security” exception to the Fourth Amendment or the “spying” exception to the warrant requirement. In all of these cases, if you can show that this is a governmental action related to national security, foreign intelligence, or the fear that there is a foreign power that is related to the actions that might threaten the United States, the courts, even before the Foreign Intelligence Surveillance Act (FISA),¹⁶ and now under FISA,¹⁷ allow the government to engage in warrantless searches, warrantless eavesdropping, warrantless seizing and searching of computers, and the courts routinely affirm these actions.

Finally, as you can see in the last paragraph, the judge holds a secret, ex parte hearing to determine whether the government’s surveillance was reasonable. FISA,¹⁸ as well as the Supreme Court’s decision even before FISA, allows courts to hold secret, ex parte hearings where the defendant is not present, the defendant’s lawyer is not present, and for the judge to determine whether or not the government’s evidence will be admissible. So these are the areas and issues that are fairly dramatic departures from what we know as the general approach to constitutional criminal procedure. Again, when you are dealing with national security, foreign espionage or things like this, the constitutional rules often are tailored to these critical situations. Thank you.

Prof. Stein: Good afternoon. I second Ben Gershman’s congratulations to Erin and the people on the International Law Society for putting together a very impressive series of events that I think will help many here.

¹⁵ U.S. CONST. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

¹⁶ 50 U.S.C.S § 1801.

¹⁷ See *United States v. Bin Laden*, 2001 U.S. Dist. LEXIS 15484 (S.D.N.Y. 2001).

¹⁸ 50 U.S.C.S § 1801.

I offer two quotations, that will give us a foundation for approaching analytically, objectively, professionally, and hopefully helpfully, the very serious legal, ethical, moral, political challenges that we face now and we will face into an indefinite future. First, a quote that every law student and every lawyer has read at one time or another, is Chief Justice Marshall's comment in *McCulloch v. Maryland* "we must never forget that it is a Constitution we are expounding."¹⁹ His exhortation that we remember that the Constitution is a flexible document designed not just for the incidents of the moment, the political crisis of a particular time, but an adaptable frame work to regulate our lives in accordance with a democratic republic in which minorities are protected.

One of my favorite thoughts is from Justice Jackson's dissent in the First Amendment case of *Terminiello v. Chicago*,²⁰ which a number of judges have picked up and put into their opinions over the years, is that the Constitution is not a suicide pact.²¹ This reflects the degree of pragmatism that has attended constitutional adjudication, which, of course, some unfortunate opinions later have rejected, overruled. This pragmatism has formed our Constitutional doctrine for well over two hundred years and kept our Constitution not only vital, but a source for emulation for many countries around the globe.

On October 16, 2001, the two houses of Congress, engrossed a bill by compromise and sent to the White House, a national security omnibus act.²² In this Omnibus Act, a major compromise between those who were worried about the extension of government powers and those who were not, was to include a five-year sunset provision. I would not worry about the sunset provision, I guarantee you it is not only not going to be repealed in five years, I give you my assurance that over the next two or three years it will be amended and added to.

The issues that have been looked at in the redrafting and amending of past legislation, inform us about certain things we

¹⁹ 17 U.S. 316, 407 (1819).

²⁰ 337 U.S. 1 (1949).

²¹ "There is danger that, if the court does not temper its doctrine logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." *Id.* at 37.

²² USA Patriot Act of 2001, Pub. L. No. 107-56.

need to know. Let us start with one premise, and it is one that a lot of people do not like to hear: No national security measure of any significance in American history has ever been overturned as unconstitutional by the United States Supreme Court and that includes *Korematsu*. While the convictions of *Korematsu* and *Hirabayashi v. United States*²³ were actually overturned by District Court judges two years ago, this was only because of tainted evidence and other misconduct by prosecutors and appellant counsel.²⁴ The underlying doctrine of *Korematsu*,²⁵ that in war time the government may in fact take extreme measures based upon racial classification remains constitutional law today. Therefore, we need to focus on the reality that unconstitutionality usually comes in the administration of law rather than in the formation of its rules.

There are very specific and discreet issues emerging in the bill that was passed yesterday (October 16, 2001), which President Bush will without question sign.²⁶ The first, which is not too controversial, is jurisdictional extension for various federal agencies. The Secret Service has gotten a new boost in terms of jurisdictional authority. Second, is an extremely complex set of provisions dealing with money laundering which is not going to be controversial.

Lastly, are the issues of privacy, search and seizure and detention which are the critical policy issues that we need to be informed about. Though privacy is something we all care about,

²³ 320 U.S. 81 (1943).

²⁴ *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).

²⁵ *Korematsu*, 323 U.S. at 218, “. . . we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.” *Id.* at 218. “Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direct emergency and peril, is inconsistent with our basic governmental institutions. But, when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must commensurate with the threatened danger.” *Id.* at 220. “*Korematsu* was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders – as inevitably it must – determined that they should have the power to do just this.” *Id.* at 223.

²⁶ USA Patriot Act of 2001.

we cannot seem to come to a consensus as to what privacy we should have. There is a difference between privacy and confidentiality: that part of our lives which we can keep totally to ourselves and that information about us which has to be available but should only be available in a limited way, to appropriate authorities with proper safeguards. A big concern is the use of the military for law enforcement within the United States. There is a distrust of using military forces on civilian actions unless there is a particular need, such as a riot, which cannot be contained by the police or the national guardsmen, or in case of an emergency such as we have now in New York. Normally we do not want military involvement, and in 1878, Congress, through the Posse Comitatus Act,²⁷ made it clear that soldiers are not to regularly ride in the Sheriff's posse. It is now illegal to use those soldiers, sailors, airmen, and marines in that capacity. It is an idea that we need to look at very closely.

Another act that is very important to understand is the Classified Information Procedures Act (CIPA).²⁸ CIPA allows a court to redact classified information, upon a demand from the government, not allowing the material to be made public in a court proceeding. What does this do to a defendant's right to cross-examine, to confront witnesses against him? Does this load the prosecution's case in such a way that we might have problems with it? Under CIPA, a government monitor can actually halt a court proceeding if someone is about to divulge secret information. Maybe that is good, maybe that is bad, but we need to talk about it. We need to understand it.

There is also the issue of electronic surveillance, eavesdropping. Many of us know about Carnivore and Echelon, two extraordinarily technologically sophisticated operations that allow intrusion into private messages, both by telephone and over e-mail that was not possible even five years ago. The technology is leaping by bounds. This type of technology was debated before September 11, and now the new law that will be enacted as soon as President Bush signs it, extends the power of government to engage in surveillance.²⁹ In the new law, there is a "nodding" acknowledgement that government should not in-

²⁷ 18 U.S.C.S. § 1385 (Law Co-op 1996).

²⁸ 18 U.S.C. App. III § 1 (2001).

²⁹ USA Patriot Act of 2001.

investigate people when the only evidence is that they are engaged in the exercise of a First Amendment right. Those of us who have been in the First Amendment area, who teach it, who practice in it, know what the chilling affect is. People can be deterred, not by prohibition, but by inhibition through law. So we have to keep our eye on this and be very careful about it. We have to care about the fact that a wider range of lawyers will be involved with national security issues than ever before because so many cases will be brought that people in legal aide, public defenders office, and district attorney's offices, will be encountering classified information or federal agencies in the way they have not in the past.

Lastly, there is an ethical dilemma that under the new law there is a direction federal law has been moving in the last five or six years to holding federal courts accountable under state bar ethics rule. The Citizen's Protection Act³⁰ is a good example of this. The new law specifically allows a government lawyer to act with deception, with misrepresentation, as long as he or she does not violate federal law. In this case, state disciplinary rules have no applicability and they have no jurisdiction. Maybe that is good, maybe that is bad, but we need to talk about it and not just in panel discussions like this but as part of an ongoing and continuing dialogue. Thank you.

Prof. McLaughlin: I echo and I agree with the comments of my colleagues who have gone on before me that these are dangerous times, these are times, the likes of which we have never seen before in this country. In one day, in eighteen minutes, thousands of people lost their lives.³¹ The question is where do we go from here and to what levels are we willing to think to achieve our security? My concern is that if we do whatever we have to, to ferret out these criminals, these terrorists, then we might not be able to stand when the Constitution has been eroded in the face of national security. I do not minimize the need for national security, but the phrase national security was used in the Nixon administration to cover up all sorts of things. So it causes me concern. I am a child of the sixties; I always

³⁰ 28 U.S.C. § 530(B) (Supp. IV 1998).

³¹ As of June 2002, the total number of victims was 2823.

question authority and we must still question authority even in these days and times.

I am a supporter of security, but on a Constitutional level it concerns me when I drive into New York City and I pass a checkpoint and I see the officers looking into my car, looking at me. I have a suspicion that if I looked Middle Eastern they might pull me over, just because of my appearance, not that I have given them any other cause to pull me over. Many of the individuals who are being stopped are American citizens.³² *Korematsu* involved American citizens, not resident aliens, although resident aliens were swept up as well. No matter how much money the *Korematsu* victims received in damages, the victims of that kind of concentration camp experience, cannot be compensated for what they were subjected to.

The issue of racial profiling has been around for a long time. Not too long ago they were just racial profiling black people, now they are racial profiling people who are not black and all of a sudden black folks have a leg up on everybody else. Isn't it funny how times change? Police officers were stopping a huge percentage of black people on the New Jersey Turnpike and they were catching some drugs, but do they think drug dealers are stupid? If I am a drug dealer and I know that a car with a black man driving will probably be stopped, then I will just get a white man to carry the drugs and put it in the car with him. The car will not be stopped and the drugs will go right on by.

It is a myth that all Muslims look like Arabs. Go to Bosnia and you will discover that they do not look like the stereotypical image of a Muslim. You might say that being pulled over by a police officer who is racial profiling is a minor deterrence, but there are people now being thrown off of planes who have purchased tickets because they are Middle Eastern, Arab or Indian and the pilot says I am not flying with you, get off the plane.³³ Is that the Constitution operating? No, that is sheer racism. So

³² Professor McLaughlin teaches a class in Civil Rights Litigation that discusses issues such as these.

³³ Matthew L. Wald, *At Airports, New Watchdog is Taking Over*, N.Y. TIMES, Jan. 27, 2002.

Already the security personnel and other aviation professionals, seem more assertive. In the last few weeks they have stripped Representative John D. Dingell, Democrat of Michigan, 75, down to his underwear to assure that the metal he was carrying was actually an artificial hip, and

again, I am not suggesting that we should not ferret out terrorists and deal with criminals, but Osama Bin Ladin and his followers, are not stupid; these are very smart sophisticated people. They knew to go get the planes that had the largest payload and wait eighteen minutes to hit the second tower so the television cameras could watch.³⁴ When Bin Laden wanted to give a statement, he gave it to an Arabic television station and CNN so the entire Arab world could see it. These are very sophisticated people. They may be riding around on horseback and hiding in caves, but in those caves they have the most hi-tech weapons you can imagine. Since we know they are not stupid, do we think by checking out only those people who look Middle Eastern that we are going to catch all the terrorists? Smart terrorists will recruit Bosnian or Czechoslovakian Muslims while law enforcement keeps profiling the Arab Muslim. That is the problem whenever you racial profile, your net catches too many fish and sometimes the real fish slip through because the net is not closely tied enough.

We need to balance security against the stigmatization of groups of people. We are calling these folks "Muslim terrorists." This is an interesting terminology. We never called David Koresh and his cult "Christian terrorists." We do not call Timothy McVeigh and Terry Nichols, who blew up the federal building in Oklahoma, "Christian terrorists." We all know about the IRA (The Irish Republican Army) but no one calls them "Catholic terrorists."

Osama Bin Laden is a member of a group called the Wahabi,³⁵ and he is in a particular group within the Wahabi which is essentially a cult. If you read the Koran, there is nothing in the Koran that supports what he is doing. I guarantee that there are people who have read the Bible to support slavery, and you can find any interpretation you wish. If you ask most

denied boarding to an [Arab-American] Secret Service agent whom the airline said was presenting inconsistent paperwork.

Id.

³⁴ See Transcript of Osama Bin Laden Videotape, Dec. 31, 2001, available at <http://www.cnn.com/2001/US/12/13/tape.transcript/index.html>.

³⁵ "Bin Laden's faith is a strict, puritanical form of Islam called Wahabism, which was founded in the 18th century in Saudi Arabia" *CBS's 60 Minutes Interview with Shaykh Hamza, Imam Siraj Wahaj, Farid Esack, Faisal Abdur Rauf Transcript*, http://web.utk.edu/~msa/60Mins_Transcript.htm.

practicing Muslims, this is not what they believe in.³⁶ So, we have to be aware and conscious that America is not a monolithic, monochromatic, monoreligious state. We are a diverse population and if we succumb and allow the Constitution to be twisted and manipulated by the Supreme Court in the name of national security, it may be Muslims and Arabs today, it may be Jews tomorrow. You never know where the line is drawn.

I am a real First Amendment advocate. Why? I believe that the racists have a right to call me any name they wish, preach their hatred, because I do not want someone drawing lines about what I can and cannot say. Similarly, if they are going to attack and stigmatize people of Middle Eastern descent, just like I expect them to protect my constitutional rights, I would be less than a constitutional civil rights lawyer if I pushed them over the edge and did not carry the net around them as well.

There's a wonderful quote, by a German Lutheran Pastor:

In Germany, the Nazi's first came for the Communists, and I didn't speak up because I wasn't a Communist. Then they came for the Jews, and I didn't speak up because I wasn't a Jew. Then they came for the trade unionists, but I didn't speak up because I wasn't a trade unionist. Then they came for the Catholics, but I didn't speak up because I was a Protestant. Then they came for me, and by that time there was no one left to speak for me.³⁷

So again watch the signs. Beware that the Constitution can be changed and watered down in times of national security and times of national crisis, but we have to be very vigilant that we do not lose sight of who we are and we do not succumb to the terrorists' desire to change us as a nation.

And before I finish I just want to acknowledge the presence of three members of the National Security Guard. I am happy that you are here and I am happy you are out there doing the job you guys do.

³⁶ See *id.* Faisal Abdur Rauf: "fanaticism and terrorism have no place in Islam. That's just as absurd as associating Hitler with Christianity, or David Koresh with Christianity. There are always people who will do peculiar things, and think that they are doing things in the name of their religion." *Id.* "In the simplest term, Islam says that human life is the most sacrosanct, and there is no way that Islam would allow a suicide mission, and would allow the killing of innocents." *Id.*

³⁷ See Reverend Martin Neimoeller.

Dean Cohen: Food for thought. Before the discussion begins, I want to also thank Erin Kanterman, Professor Gayl Westerman and Jennifer Riekert for the work they did in putting this together. Now we have time for questions.

Question: Hearing this, I think back to high school when I learned about how Adams fought for the British soldiers' rights to have a fair trial amidst the Boston Massacre. I was wondering, since constitutional rights are changing now, how much will that change a trial? Will we still have fair trials when these men are brought to justice?

Prof. Gershman: I certainly think they will have a fair trial. This morning we saw Judge Leonard Sand, the Federal District Court Judge in Manhattan, sentence four terrorists to terms of life imprisonment for their role in the bombing of the American Embassy in Africa.³⁸ I do not think anyone anywhere suggested that they did not receive fair trials. I do not think anyone suggested that the terrorists convicted after the 1993 World Trade Center bombing did not receive a fair trial. There is no question that once the terrorists are indicted they will have highly competent lawyers representing them and I think in those cases where they face the death penalty, our system of criminal justice provides the most scrupulous processes for these individuals. So I am not sure that the problem is with the trial. I think the problem may be with the investigation and the acquisition of evidence. I share Professor McLaughlin's serious concerns that considerations of national security and the idea that the end justifies the means might lead law enforcement to bend the rules. Then, if the courts are overly deferential, people will be brought to trial after processes that the Constitution would not otherwise tolerate for other defendants charged with ordinary crimes. It may be that the trial is anti-climactic once the investigation is complete and the evidence is obtained. The experience we have had, our trials with terrorists, whether it is the terrorists of the World Trade Center bombing of seven years ago, the American embassy, or the prosecution of Timothy McVeigh and Terry Nichols (the bombers of the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995), they re-

³⁸ Benjamin Weiser, *A Nation Challenged: The Courts; 4 Terrorists Ordered to Pay Restitution to Victims*, N.Y. TIMES, Oct. 18, 2001, at B11.

ceived eminently fair and very scrupulous protections in their trial.

Prof. Stein: There is a big difference between the bending of the rules in a law enforcement situation by a rogue police officer and recognizing that the law has to adapt to the reality of the society we live in. For example, take a look at any of the white-collar crime statutes enacted in the last 20 to 30 years with regard to money laundering. These are complex devices to reach a kind of crime easily committed today with offshore banking and electronic fund transfers. Fifty years ago, the problem did not exist, so the law did not exist. When we talk about terrorism today, we are dealing with the reality of Anthrax and suicide bombers; therefore, new laws will need to be enacted to deal with these new realities.

I really do not think any of the terrorists who died on September 11 ever gave a thought that maybe they might need a lawyer some day. Their commitment was very similar to what we saw in World War II, when we were almost stymied in the Pacific by Kamikaze planes. That does not mean we jettison our concern for a fair trial. That does not mean we give carte blanche to the FBI, the Secret Service or the police department, but what it means is, if these terrorists can creatively find ways to threaten our society and inflame passions and make us fearful of even going to a concert, a show or shopping, then we need intelligent, well thought-out laws that are responsive to the contemporary threat.

Prof. McLaughlin: I agree with Ben Gershman that there will be very well paid, very high profile, and very highly skilled criminal defense lawyers handling these cases. My concern is the jury. I think it will be very hard in these days and times, no matter how rigorous you are in jury selection, to find fair and impartial juries anywhere in this country that are willing to give these folks a fair trial in that sense.

Question: Prof. Dorfman I wanted to comment on what Randy McLaughlin just said. Interestingly enough, it was the jury in the case of the bombing of the U.S. Embassy in Africa that actually rejected death and came in for life imprisonment.³⁹ Subsequent discussions with the jury showed more of a

³⁹ See Tom Hays, *The Associated Press*, *The Record*, July 11, 2001 at A5.

balance in their approach to that case than the prosecutor showed.⁴⁰

Prof. McLaughlin: I want to respond to that. I think it is going to be very different from a bombing case way over in Africa as opposed to a bombing where they knocked down the Twin Towers and killed thousands of people.⁴¹ While the jury may try very hard to be impartial, it is going to be hard to find a fair jury here given the exposure.

Prof. Gershman: Do not forget that while one jury in Oklahoma City sentenced McVeigh to die⁴² another jury sentenced Nichols to life imprisonment.⁴³

Prof. McLaughlin: Where was that trial held?

Prof. Stein: Denver.

Prof. McLaughlin: Denver. Not in Oklahoma City.⁴⁴ The United States right now, given the breadth of coverage of this issue, round the clock, day to day, every city in the country is now facing this issue. I think there is no experience we have had before that is like this one.

Question: Under normal circumstances, is there any differentiation in the rights of privacy afforded to a non-resident alien as opposed to an American citizen?

Prof. Stein: The triggering mechanism is the statute under which the government seeks information. In fact, under the bill passed yesterday, aliens, resident or non-resident, may be investigated based upon believed association with terrorists.⁴⁵ It is the nature of the inquiry that triggers off the degree to which there has to be compliance. I would not use the word normal,

⁴⁰ See *id.*

⁴¹ As of June 2002, the total number of victims was 2823.

⁴² See *United States v. McVeigh*, 2001 U.S. App. LEXIS 11804 (10th Cir. 2001). District Court's denial of a stay of execution was affirmed and appellant's emergency application for stay of execution was denied.

⁴³ See *United States v. Nichols*, 169 F.3d 1255 (10th Cir 1999), *cert denied*, 528 U.S. 934 (1999).

⁴⁴ See *United States v. McVeigh*, 918 F. Supp. 1467 (1996) "There is no disagreement among the parties. . . about a trial in Oklahoma City. The effects of the explosion on that community are so profound and pervasive that no detailed discussion of the evidence is necessary. The motion for change of venue is granted." *Id.*

⁴⁵ See USA Patriot Act of 2001.

but routine procedures. For example, under FISA,⁴⁶ if someone is believed to be an agent of a foreign power, a spy or a terrorist, not only can a search warrant be obtained from a special court, the FISA court, but in fact the Attorney General or the President can authorize non-warrant eavesdropping and capture conversations that would not be possible in an ordinary criminal investigation. That can easily be abused, but on the other hand, there are sensitive issues involved with national security investigations that are greater than the issues involved with ordinary criminal investigations. That is the reality. Again, how we decide to draw the line is critical. Most people would say that a national security investigation, if it is not a bogus cover for some illegal or corrupt purpose, is inherently different.

Question: Normally one has a legitimate expectation of privacy, but in situations like this, would that legitimate expectation be lowered, and if so, how low do you think it will go and will the courts recognize it?

Prof. Stein: (Holds up a cell phone) See this cell phone? Until recently, a search warrant had to specify if it was for an electronic interception of phone messages and for a particular phone line. Under the new bill, it is the person's communication devices.⁴⁷ For example, if I was a target of an investigation, the warrant would specify the telephone conversations of Ralph M. Stein, and would apply to my office phone, home lines, and my cell phone. So, statutorily, the expectation of privacy is clearly reduced.

Prof. Gershman: The fact of the matter is the government does not need a warrant if they are engaging in national security electronic surveillance. It is a good question given the incredibly changed circumstances today, whether the expectation of privacy will be viewed differently. We'll just have to wait and see how this evolves over the short term.

Question: With regard to racial profiling and insensitivity to infringement on one's rights, how do you think that we should approach this especially when there is a tremendous amount of fear that terrorist cells are waiting to be activated?

⁴⁶ 50 U.S.C.S § 1801.

⁴⁷ See USA Patriot Act of 2001.

Prof. McLaughlin: There is no prohibition in using race as one of the many factors to determine whether a person can be stopped, frisked, or arrested. In terms of race, it has to be race, plus. So if we identify a suspect and he is a black male, 5'3" driving a red car, and then I see a black male driving a red car, I can stop that person, inquire, and proceed a little further. So, in the case of the terrorists, we have to have some other indicia. Looking at the problem here (see Appendix A), the police ask the man for identification, they are lawful residents, then they are arrested. I read this problem sequentially and up to the point of the arrest, these men have done nothing wrong and there is no reason to arrest them. The car had not been searched yet. So the question is, what information do the police need in order to stop someone and how far should they go before they get a warrant? If the police are stopping people solely because they appear to be Middle Eastern, that is when I have a problem.

Another problem I have is that on the one hand I doubt that the government is providing us, the public, with all the information they have at their disposal at this point in time. So they have more information at their disposal to decide who the targets are, who they should investigate and with the new Act, they can start to use technological means to develop more information on whom they should stop. The material witnesses that they have, the 700 detainees,⁴⁸ are not sitting in some nice penitentiary having tea and crumpets. They are having day-to-day meetings and interrogations with FBI agents and CIA agents. So information is developing that will lead us to the right people. My concern is using a blanket approach to target people just because of the way they look.

Prof. Stein: Whether or not racial profiling at airports has been successful is a totally separate question from the legality of the profile of terrorists. But we are running into a particular problem with regard to the reality of profiling. We have been oversold the bill of goods that profiling in general will allow us to identify people before they commit crimes. This is not so much a legal issue as it is an operational failure issue.

⁴⁸ See Johnston, *supra* note 11.

Another problem that everyone has admitted from the President of the United States on down, is that we are lacking what we call "human intelligence."⁴⁹ We have satellites that will tell you if a professor at this school is illegally parked in the faculty parking lot, but we do not have an ability to know what is going on in these groups. There are two reasons for that. Terrorist groups are very clan-like, infiltration is very difficult as an operational matter. The other is, we have not devoted the resources to developing relationships with people within communities who do not support terrorists and who may have valuable information. It is too late at the airport. We have to identify these people when they are still in the planning stage. We cannot even wait for the attempt stage because at the attempt stage, if they are suicidal, they will still blow themselves up and take innocent people with them. So, we have to look at a panoply of constitutional lawful approaches that use the resources this country has to try to identify these people earlier in the game.

Question: There has been talk in the media about suing Bin Laden on a civil level. What is the possibility of doing that and can we attach his domestic bank accounts?

Prof. Stein: A \$1.1 trillion dollar lawsuit was filed against Bin Laden in the United States District Court in Florida three days ago.⁵⁰ I have to say in all candor, I have been litigating civilly for 27 years, I would not see a lawsuit like that on a contingency fee basis as advancing my future economic interest. I do not think it is possible to collect. The assets are going to be seized by the United States under the doctrine that Bin Laden and his terrorists are enemies of the country and they are not going to allow priority to civil litigants.

Prof. McLaughlin: Here is the other problem, seriously, for all of you civil procedure students in the room, since Bin Laden has not recently stepped foot into the US, we may have a personal

⁴⁹ See *Broad Reform in the Military, And Fast, Is Bush's Priority*, N.Y. TIMES, Dec. 12, 2001, at A14. "The last several months have shown that there is no substitute for good intelligence officers, people on the ground. . . . The United States must rebuild our network of human intelligence." *Id.*

⁵⁰ See *South Florida Men Sue Bin Laden for \$1.1 Trillion, Plus Court Costs*, ORLANDO SENTINEL TRIBUNE, Oct. 16, 2001, at A3.

jurisdiction problem, minimum contacts, due process, International Shoe.⁵¹

Question: I guess that means “no” to bringing a class action suit?

Prof. Stein: That’s right. The United States has the legal power to seize the assets of any enemy. Historically what that has meant, was that when we go to war, we seize the assets of the enemy. We did this in WWI, we seized assets of many other countries. For example, Bayer aspirin, this was a German company that we seized and then the foreign property custodian was authorized by statute to resell the enemy property to American businesses. That is how Bayer aspirin became as American as apple pie. Federal law does not allow a private plaintiff to come before the United States’ interests and in fact the Supreme Court has upheld an action in which those with claims against Iran following the negotiated release of the hostages, were estopped from pursuing claims where they were in fact creditors.⁵²

Question: From my limited knowledge thus far, I have seen the Supreme Court change from the Warren Court, where they expanded certain rights, to the Rhenquist Court, which is a little bit more conservative. There is an ebb and flow of the Supreme Court, and I wonder if our rights will ever again be given back to us. Under the guise of terrorism, do you think that September 11, 2001 will be the day that we look back and say, that was when our rights were taken away?

Prof. McLaughlin: I do not think that because of this situation the Bill of Rights will be scrapped or the Constitution will be torn up. Remember, the Supreme Court, like every other institution in our society, is a political creature and I think as the Supreme Court changes, their interpretation of the Constitution will change as well. So I am not concerned about democracy, I am concerned about right now.

Prof. Gershman: I just want to mention that the Supreme Court has rejected the government’s claim of national security in the past. In the landmark case that we call the Pentagon Pa-

⁵¹ See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁵² See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

pers case,⁵³ decided during the Viet Nam War, the government claimed that national security should prohibit the publication of a multi-volume history of the war in Indochina and our involvement in the Viet Nam War. The Supreme Court strongly held that the First Amendment freedom of the press would be abridged if the government was allowed to enjoin, get a prior restraint to prevent the publication of the Pentagon Papers. I think the Supreme Court was quite courageous in protecting the constitutional rights of the freedom of the press over the government's claim of national security. So, I do not think that the Supreme Court is going to lay down and play dead when government seriously oversteps freedoms and liberties that the Supreme Court sees are clearly being violated.

Prof. Stein: First Amendment protections today are far beyond anything that existed when I started college quite a few years ago. Secondly, the Pentagon Papers is a fascinating case but the court did examine the papers and a majority of the Justices came to the conclusion that the papers failed to reveal information that legitimately could be classified as national security. I happen to agree with the decision, but I do not dismiss the dissent that says the Court was taking an enormous step in declaring that the government was wrong by deciding a case a week or two after the initial matter came out.⁵⁴

Question: Your thoughts on national security trumping the fruits of the poisonous tree doctrine?

Prof. Gershman: National security is a way of trumping the requirement for a warrant. You do not need a warrant, and I think the courts give tremendous deference to the claims of national security. The fruit of the poisonous tree doctrine is able to be overridden by doctrines such as inevitable discovery, independent source and in the 4th Amendment context, the Supreme

⁵³ See *New York Times, Co. v. United States*, 403 U.S. 713 (1971). "We granted certiorari in these cases in which the United States seeks to enjoin the *New York Times* and the *Washington Post* from publishing the contents of a classified study entitled 'History of U.S. Decision-Making Process on Vietnam Policy.'" *Id.*

⁵⁴ "It seems reasonably clear now that the haste precluded reasonable and deliberate judicial treatment of these cases and was not warranted. The precipitate action of this Court aborting trials not yet completed is not the kind of judicial conduct that ought to attend the disposition of a great issue." *Id.* at 749 (Dissent by Chief Justice Burger).

Court has articulated a “good faith” exception that I think will be more easily shown in situations where the police are aggressively investigating terrorist activities and the police argue that their conduct, possibly mistaken or erroneous, was done in good faith.⁵⁵ In addition, there is the emergency or exigency doctrine⁵⁶ that I think may very well be used more often in a time when investigations are being undertaken and delay may hinder the investigation. So, I think there are a variety of doctrines that the government may use to override all sorts of evidentiary rules that may be invoked for criminal defendants.

Prof. Stein: I agree with Professor Gershman and I am just going to throw out a term that nobody has mentioned here, but those of us who have been in the national security community are well acquainted with, called “Black Bag Operation.” Black Bag Operations are specific operational means to obtain evidence, protect national security in ways in which you clearly could not act for ordinary criminal matters. Understand that it is a reality and it can be Constitutionally justified, that it will always be engaged in and it will always have, to a certain degree, the probability, not the possibility, the probability of polluting a subsequent judicial process; but it is like Winston Churchill said, “Democracy is the worst system devised by wit of man, except for all the others.” Black Bag Operations sometimes are the only way to catch people who are so far outside of the ambit of our laws and our morality that any other way would be frivolous.

Question: We talk about not watering down people’s rights and not profiling them, but at the same time these are exigent circumstances and the country is facing something we have never seen before. How can we blame law enforcement for overstepping their bounds or acting with almost knee-jerk reaction?

Prof. McLaughlin: Having litigated a number of police misconduct cases and having been involved in prosecution as a defense lawyer, I understand that police officers have to make

⁵⁵ For cases referring to the good faith see *United States v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *Arizona v. Evans* 115 S.Ct. 1185 (1995).

⁵⁶ For cases referring to the emergency doctrine see *Warden v. Hayden*, 387 U.S. 294; *United States v. Santana*, 427 U.S. 38 (1976); *Schmerber v. California*, 384 U.S. 757 (1966).

split second judgments in difficult situations. If they make the wrong decision, the World Trade Center can be blown up or the wrong person may be arrested. I do not envy the position they are in, but that is their job. I am not suggesting that anything we say or do is going to stop a police officer that is over-zealous from stopping someone because they think that person looks like they are from Middle Eastern descent and violating their constitutional rights. Nothing we say will do that. Most people in that situation will swallow their pride and go along their merry way and go home and have a good cry about it, and the police officer will go home and do what he does. That is the reality of the world. It is a practical issue. But what we are talking about here is how should we as a society think about that. Should we say to ourselves that the police officers have to do their jobs and that it is just the way it is or should we worry a little bit about them over stepping their bounds? A police officer will say better to be judged by twelve than to be carried by six. I understand that philosophy, but it is our job to evaluate their conduct. We as lawyers, judges, scholars, and academics, have to be frank and to judge that.

Dean Cohen: Closing remarks: I want to thank you all for coming. I want to thank you in particular for understanding the importance of not demonizing other people. What we have seen from our panelists and our audience is that this is not about Muslim people, it is about terrorists. And I think we have to keep that at the very forefront of our minds and I thank you for doing that.

APPENDIX A

The FBI receives an anonymous tip that two men driving a red van have just dumped a large quantity of a biological substance into the Croton Reservoir.

The police set up roadblocks in the area. They see a red van traveling south with two men — the driver and passenger — apparently of Middle Eastern origin. The police follow the van. They order the driver to pull over, and ask him for his license, registration, and immigration documents, and ask the passenger for his identification. Both men are lawful resident aliens. The police order the two men out of the car. The men are arrested and handcuffed. The police search the van. They discover a map with the croton reservoir circled in black, several documents in Arabic, a cell phone, a receipt from a motel in Ossining, N.Y., and traces of some unknown biological substance. (The van is subsequently brought to the FBI lab, tested, and found to contain significant traces of a harmful chemical substance).

The FBI immediately goes to the motel. Without a warrant, they direct the manager to let them in to the suspects' room, where the police find a handwritten note from an individual the police learn is a doctor residing in Scarsdale, N.Y. The police identify the doctor to be a U.S. citizen of Middle Eastern ancestry. Without any authorization, the FBI places an electronic listening device on his home telephone. That afternoon, they monitor and record a telephone call from him to an individual in a country in Northern Africa who has previously been identified by the FBI as connected to the international terrorist organization known as Al Qaeda. The doctor says: "The package was delivered." This, and other remarks, a law enforcement expert will testify, are codes that the reservoir action was successful. The FBI arrests the doctor and, without a warrant, searches his residence where the agents discover various items showing that the doctor is the head of an Al Qaeda cell in Westchester County.

The three men have been indicted by the U.S. Attorney for conspiracy and terrorism. After a secret, ex parte hearing, the trial judge admits all of the evidence described above for use by the prosecution in the criminal trial. Was the judge correct?