

SYMPOSIUM

FIRST MONDAY - CIVIL LIBERTIES IN A POST-9/11 WORLD

MONDAY, OCTOBER 7, 2002

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I. Speaker Biographies

Professor Mark Alexander

Associate Professor, Seton Hall University School of Law

Professor Alexander received his B.A. and J.D. from Yale University. After law school, he clerked for Chief Judge Thelton Henderson of the United States District Court for the Northern District of California and was a litigator with Gibson, Dunn & Crutcher in San Francisco before joining the Seton Hall Law School faculty in 1996. He was the 1996-1997 Student Bar Association Professor of the Year. Professor Alexander also has extensive political experience, having most recently served as Issues Director for the Bill Bradley for President campaign in 1999-2000. He was Issues Director for Senator Edward Kennedy's re-election in 1988, and before that, a legislative assistant to Senator Howard Metzenbaum. He also served a two-year term as an elected official in the Washington, D.C. government.

Magdy Mahmoud

*President, Co-Founder, Human Rights Education and Law Project
(HELP)*

Mr. Mahmoud is a civil rights activist who participated in many civil rights and civil liberties events. He has delivered messages expressing concerns of minorities in the U.S. to many officials including the National Director of the Department of Justice, New Jersey and New York senators and congressmen, county sheriffs and more. Mr. Mahmoud has two Masters degrees in Engineering and is working as a Computer Engineer for a U.S. Fortune 100 company. HELP is a non-profit organization established after the tragedy of September 11 to educate Americans in general, and immigrants in particular, about their rights; to assist those individuals that had been detained after the tragedy in protecting their civil rights, and to prevent arbitrary treatment by the government. HELP also seeks to prevent the unjust detention of others around the nation.

Mark W. Smith, Esq.

Mark W. Smith currently works as a trial attorney in private practice in New York City. Mr. Smith graduated from New York University Law School and then clerked for a federal district court judge. Mr. Smith has worked as an adjunct professor of law at the University of Kansas School of Law and is listed as a legal expert in JOURNALIST'S GUIDE TO LEGAL EXPERTS, POLICY EXPERTS 2000, and 2003 POLICY EXPERTS: THE INSIDER GUIDE TO PUBLIC POLICY EXPERTS AND ORGANIZATIONS. Mr. Smith appears frequently as a legal commentator on the Fox News Channel, Court TV, and MSNBC. *New York Times* best-selling author and attorney Ann Coulter describes Mr. Smith as "one of the fastest rising legal stars in the country." Coulter said, "Mark Smith is an accomplished attorney, a professor of law, and a political pundit."

Edward Barocas, Esq.

Legal Director, American Civil Liberties Union of New Jersey

Mr. Barocas has served as Legal Director for the ACLU of New Jersey since May 2001. He manages a docket of more than thirty cases, which touch every corner of civil liberties including free speech, religious freedom, equal protection, privacy, reproductive freedom, and due process of law. Prior to working for the ACLU-NJ for almost six years, Mr. Barocas served as Special Counsel for the Special Hearings Unit of the Office of The Public Defender in Newark. He has also taught a course at Rutgers Law School, which presented four areas of constitutional law in the context of Megan's Law. Before that, Mr. Barocas was Assistant Deputy Public Advocate for the Division of Mental Health Advocacy in Wall, NJ. Mr. Barocas attended Rutgers College in New Brunswick, and received his J.D. in May 1992 from the National Law Center at George Washington University.

John Malcolm, Esq.

Deputy Assistant Attorney General, United States Department of Justice

Mr. Malcolm is currently a Deputy Assistant Attorney General in the Criminal Division of the Department of Justice. An honors graduate of Columbia College and Harvard Law School, Mr. Malcolm served as a law clerk to judges on both the United States District Court for the Northern District of Georgia and the Eleventh Circuit Court of Appeals. For seven years, Mr. Malcolm was an Assistant United States Attorney in Atlanta, where he was assigned to the Fraud and Public Corruption Division. While an AUSA, Mr. Malcolm received numerous awards, including the Director's Award for Superior Performance by an AUSA. Mr. Malcolm also served as an Associate Independent Counsel in Washington, D.C., investigating fraud and abuse at HUD. Prior to rejoining the Department of Justice in August 2001, Mr. Malcolm was a partner at the Atlanta law firm of Malcolm & Schroeder, L.L.P.

II. *Opening Remarks*

Paul Mazer, Organizer: Thank you all for coming this afternoon. First Monday is an annual event by the Public Interest Network at Seton Hall Law School to mark the beginning of the Supreme Court calendar year. Every year a topic is chosen that we believe will be litigated before the Court during the corresponding term. In coordination with over 150 law schools across the country, this year's topic is the future of civil liberties in a post-9/11 world.

While listening to today's panelists, I ask you to balance two images in the back of your mind. First, the words of Emma Lazarus in 1883 engraved in the Statue of Liberty: "Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tost to me. I lift my lamp beside the golden door!"¹ These words welcomed the millions of immigrants that arrived upon our shores for over 100 years.² Many of them came to this nation escaping war, religious persecution, or in the hope of creating a new opportunity for themselves and their families.³ The words of Emma Lazarus acted as a reassurance that past persecutions by dictators were behind them.⁴ Moreover, these words inscribed on Lady Liberty acted as a guarantee that they would be treated as free and equal people, regardless of background or religious practices.⁵

¹Emma Lazarus, *The New Colossus*, Nov. 2, 1883 at <http://www.nps.gov/stli/teachercorner/page5.html> (last visited Apr. 11, 2003). The poem was written by Lazarus in a literary campaign designed to raise money to complete the Statue's pedestal. *Id.* The poem was cast in a bronze plate and placed inside the pedestal in 1903. *Id.* However, the bronze plate was moved in 1986 to the Statue of Liberty Museum where it is currently housed. *Id.*

² See The National Park Service's website, at <http://www.nps.gov/stli/serv02.htm#Silent> (last visited Apr. 9, 2003). The Statue of Liberty is located next to Ellis Island, which was the principal port of entry into America between 1892 and 1954. *Id.* According to the National Park Service, over twenty-two million immigrants came through Ellis Island and the Port of New York between 1892-1924. *Id.*

³ The National Park Service's website, at <http://www.nps.gov/stli/serv02.htm> (last visited Apr. 11, 2003). During the sixty-two year period of 1892 to 1954, immigrants came to America from primarily Europe where two world wars were fought. *Id.* Likewise, in that sixty-two year period, several countries, including Germany, Poland, and Russia codified many of their policies sanctioning religious discrimination into law. *Id.*

⁴ See *supra* note 1. "*The New Colossus*" soon became viewed as a universal symbol for freedom, giving millions of immigrants the hope for a better future in a land where they would be welcomed by a goddess (statue) of Liberty. *Id.*

⁵ See *id.*

In recent history, the face of these immigrants has changed while their experiences and motivations have remained remarkably similar.⁶ The golden door that Emma Lazarus wrote about has been opened wider to welcome immigrants from the Middle East and Asia.⁷ These people have come to America yearning for the opportunity to start over in a free society.

In contrast, a second image of American prosperity and accomplishment stood less than a mile away from the Statue of Liberty. On September 11, 2001, Americans witnessed this image transform into one of terror and tragedy. We all know or have heard the tragic stories of friends and neighbors whose lives ended decades before their time. To their rescue were the hundreds who rushed through the doors of the towers but never came out. Within a few hours television sets around the country were illuminated with images of a crater burning in Pennsylvania,⁸ and the impression of the invincible Pentagon consumed by flames and ash.⁹ While our nation spent the year mourning and digging for victims, the country was swept up in the fear that ordinary aspects of our society could be manipulated into weapons of terror. After the U.S. mail fell prey,¹⁰ fear spread that our water systems, power plants, bridges, tunnels, ports and arenas could be a terrorist's next

⁶ IMMIGR. AND NATURALIZATION SERV., U.S. DEP'T OF STATE, TABLE 2: IMMIGR. BY REGION AND SELECTED COUNTRY OF LAST RESIDENCE, FISCAL YEARS 1820-2001, 2001 STAT. Y.B. OF THE IMMIGR. AND NATURALIZATION SERV. 17-20 (2003). The 2001 Statistical Yearbook provides a detailed account of the number of immigrants from the different nations of the world between 1820-2001. *Id.* Between the years 1871-1900, there were 11,466,800 immigrants and 10,562,761 were from Europe. *Id.* Thus, Europeans were 89.99% of the total immigrant population of the United States during that period. *Id.* However, between 1991-2000, of the 9,095,417 total immigrants to the United States, 1,748,526 or 19% were from Asia. *Id.* The composition of Asia for purposes here consist of immigrants from Iran, Israel, the Philippines, Turkey and the category, "Other Asia." *Id.*

⁷ *See id.*

⁸ Ellen Goodman, *Awful Mission Accomplished*, BOSTON GLOBE, Sept. 13, 2001, at A31.

⁹ Ann McFeatters, *Laura Bush Discards Her Low Profile To Console The Nation About Tragedy*, PITTSBURGH POST-GAZETTE, Sept. 19, 2001, at A-19.

¹⁰ Elizabeth Shogren, *Response to Terror; the Anthrax Threat; Mail Quarantine Hobbles Government; Bureaucracy: From Legal Cases to Passports, The Interruption of Postal Service Complicates Operations Across Washington*, L.A. TIMES, Nov. 2, 2001, at A4; National Desk. The article details how the slowdown impacted the efficiency of government weeks after Robert Stevens, photo editor at American Media, Inc., was diagnosed and died as a result of inhaling anthrax. *Id.* It was determined that he contracted the virus from a piece of mail containing spores of the Anthrax virus. *Id.* In the following months other media companies, the U.S. Supreme Court, and the Hart Senate Building all received letters containing Anthrax spores. *Id.*

target.¹¹

In balancing these powerful images, we should ask ourselves as a nation what type of society will we create for our children after the ashes of September 11th have settled? Will our children be safer or will they be required to carefully watch their neighbors? Will they be wary that what they say to their friends at a restaurant may be misconstrued as a terrorist threat?¹² Will the principles of Martin Luther King, Jr.'s dream be expanded upon? Or will we see a repeat of the Palmer Raids¹³ and the McCarthy hearings under the new mantra of "protecting America from terrorists?"¹⁴

How will the Supreme Court handle the many constitutional challenges it will encounter this year? Will it interpret the Constitution in the spirit of the Declaration of Independence: "All men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness?"¹⁵ Or will the Court rely upon the precedent established in *Korematsu*?¹⁶ There, the Justices upheld the detainment of Japanese-Americans in

¹¹ R.G. Edmonson, *A Laughable Idea No More; Port Security Bill, Scoffed At Before, Now Takes Center Stage As Congress Takes On Terrorism*. J. COM., Sept. 24, 2001, at 30. Senator Fritz Hollings (D. - S.C.), Chairman of the Senate Committee on Commerce, Science and Transportation, in a hearing on the Port and Maritime Security Act of 2001, discusses fears that terrorists could ship a sea container with a nuclear weapon through an American port with little detection. *Id.*

¹² Tim Collie, *Terror Talk Kicks Alert Into Action: Alligator Alley Closed While Officials Held Three Men Reported to Have Made Threats*, ORLANDO SENTINEL TRIB., Sept. 14, 2002, at A1. Three medical students of Middles Eastern descent were accused of making jokes about terrorism in Shoney's Restaurant in Calhoun, Georgia. *Id.* They were overheard by another restaurant patron who alerted the authorities. *Id.* The Florida Highway Patrol shut down a twenty-one mile stretch of Interstate 75 for more than seventeen hours as they searched the vehicle and arrested the three students. *Id.*

¹³ Sarah Feldman, *Seeing Red*, at <http://www.msu.edu/course/mc/112/1920s/Palmer/newsandpalmer.html> (last visited Apr. 11, 2003) (discussing the period in 1919-1920, during which the U.S. Department of Justice, under the direction of Mitchell Palmer, conducted raids in response to threats of Communism). Palmer was later called before the House Rules Committee and the Senate Judiciary Committee and convicted of using government funds in an improper manner. *Id.*

¹⁴ *Joseph McCarthy*, EDUC. ON THE INTERNET & TEACHING HIST. ONLINE, at <http://www.spartacus.schoolnet.co.uk.USAmccarthy.htm> (n.d.) (discussing Senator Joseph McCarthy's view that the Democratic administration had been infiltrated by communist subversives). McCarthy investigated various government departments and questioned a large number of people about their political affiliations. *Id.* This anti-communist hysteria became known as "McCarthyism." *Id.*

¹⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁶ *Korematsu v. United States*, 323 U.S. 214 (1944).

internment camps, based on the fear that Americans of Japanese ancestry could compromise America's security during a time of war.¹⁷

If, in fact, the Court were to rely upon the rationale of *Korematsu*, when does a war on terror end?

In a speech at Hebrew University Law School in Jerusalem in 1987, Supreme Court Justice William J. Brennan, Jr. stated: "for as adamant as my country has been about civil liberties during peacetime, it has a long history . . . of failing to preserve civil liberties when it perceived its national security threatened."¹⁸ This series of failures is particularly frustrating in that they appear to result not from an informed and rational discussion of whether protecting civil liberties would expose the United States to unacceptable security risks, but rather from the episodic nature of our security crises. After each perceived security crisis ended, the United States has remorsefully realized that the abrogation of civil liberties had proved unnecessary; but has nevertheless been unable to prevent itself from repeating the error when the next crisis comes along.

Before we begin, I would like to take a minute to thank those who have worked very hard to make this afternoon possible. First, the co-sponsors of this event, the Seton Hall Legislative Bureau, Phi Alpha Delta, The Rodino Society, The American Constitutional Law Society, The Women's Law Forum, The Federalist Society, The Latin American Law Students Association, The Environmental Law Forum, The Student Outreach Society, The Association of American Trial Lawyers, The Black Law Students Association, Westlaw, F&B Fine Catering, Paul Hastings Janofsky & Walker, and Court TV. Specifically, we also would like to thank Dean Patrick Hobbs and Kathleen Boozang, Associate Dean for Academics. A special thank you goes out to Assistant Dean for Student Services, Cara Herrick-Foerst, Director of Law School Communication, Christine Quinn, Executive Director of the ACLU-NJ, Deborah Jacobs, Gina Fondetto, Rosemarie Garrido, and Professors John Jacobi, Paula Franzese and Rachel Godsil.

Also, special thanks to the Public Interest Network Executive

¹⁷ *Id.* at 216-18.

¹⁸ Justice William J. Brennan, Jr., Associate Justice of the United States Supreme Court, *The Quest to Develop A Jurisprudence of Civil Liberties in Times of Security Crises*, Address Before the Hebrew University Law School, Jerusalem, Israel (transcript available through the Brennan Center for Justice, New York University at http://www.brennancenter.org/resources/downloads/nation_security_brennan.pdf) (Dec. 22, 1987)).

Board, Erin Callahan, the Treasurer, Holly Peterson, the Vice President, and the PIN President, Deirdre Bussom. Finally one person has worked tirelessly to ensure that today's program would come off flawlessly. I would like to give an extra special thanks to Rita R Munglioli, the co-chair of today's event. Thank you.

III. Symposium

A. Remarks by Professor Mark Alexander, Moderator

We have a wonderful group of people tonight who will discuss a pressing topic that we will soon be encountering everywhere. As we start the program, what makes this a slightly different First Monday program than any you have seen before is that we are looking at issues today which are not going to be particularly confined to the U.S. Supreme Court. We talk about First Monday as being the beginning of the Court term, but what we are really seeing are issues that will confront the courts at all levels for virtually every day of this term. More particularly, what we will talk about today with our wonderful experts is the conflict between keeping security and protecting civil liberties.

When I woke up this morning, I picked up my newspaper and thought about this program as I looked through the headlines that talked about the successful capture of four individuals in Oregon alleged to be operating a terrorist cell.¹⁹ Over the weekend the headlines were of John Walker Lindh and his plea, and every day I see another story about some action the government has taken to pursue suspected terrorists, and to try to protect all of us from further terroristic threats.²⁰

As I looked at the newspaper, I thought we should breathe easier. There are four people they found with evidence to believe they are involved in terroristic activities,²¹ and I should breathe easier because my life is a little more safe, my children are a little more safe, and my friends are a little more safe.

But at what cost to my own individual liberty did these four individuals get caught? There is something happening that challenges

¹⁹ Patrick McMahon, *Man, Woman to Enter Pleas in Alleged Plot to Fight with Taliban*, USA TODAY, Oct. 7, 2002, at 7A.

²⁰ Katharine Q. Seelye, *Threats and Responses: The American in the Taliban; Regretful Lindh Gets 20 Years in Taliban Case*, N.Y. TIMES, Oct. 5, 2002, at A1.

²¹ See McMahon, *supra* note 19.

my own individual freedoms, restrains us in some way. As Paul spoke earlier about the Statue of Liberty, I think it is a particularly important image to think about: what freedoms we seek in this country, and whether they are being constrained in some way.

As we think about this, we have to turn to the Constitution and Bill of Rights, which are our foundation for thinking about individual civil liberties. The framers of the Constitution specifically reacted to practices they saw as being offensive to individual liberty. Concepts of general warrants, perhaps, were on their minds when they wrote the Fourth Amendment calling for search warrants to try to restrain the government from going house to house, searching anybody in any way, thinking what it would mean to their own privacy, their own individual liberty.²² But we must also realize that the protections that keep us private in our own homes are the same protections that were afforded to the individuals who lived in this country and were protected in their homes as they carried out a terrorist plan. They had the ability in their homes because they are protected by the Fourth Amendment, and had conversations that, perhaps, enabled them to more effectively carry out an attack on individuals in the World Trade Center and the Pentagon. So, there is a price that is paid.

As we look forward we must ask ourselves how we are going to seek out those people who are responsible for carrying out terrorist acts. How are we going to make sure that there are not future terrorist acts? We must ask ourselves what protection the government should provide and what can be swept aside, if any? We have this conflict, and there is a balance that we need to strike. Do we balance more heavily toward state interests, because this is a particular threat of terrorism that we are concerned with, or should the balance not change at all?

As we strive to arrive at this balance, we have to ask ourselves what the value of individual liberty is if we are a country under siege. On the other hand, what is the value of a country that is free of threats if

²² 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.* (emphasis added). See also *Andresen v. Maryland*, 427 U.S. 463, 480 (1976). "General warrants, of course, are *prohibited* by the Fourth Amendment. [T]he problem [posed by the general warrant] is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings . . . [The Fourth Amendment addresses the problem] by requiring a 'particular description' of the things to be seized." *Id.* (emphasis added).

you have no individual liberty? We have to confront these conflicts, and right now I think this is a particularly wonderful time to be in a law school, and I'm glad that we have our four panelists coming to visit here in our school today.

It is a great time to be in law school, because this is a time when lawyers really need to think about their place in society as we face this new set of challenges. And I think today is the first time in a very long time that the role of lawyers is coming up to prominence in terms of what we expect in protecting what makes this country a great country—not because it's a liberal cause or conservative cause, but because we have a rule of law. We have a Constitution that protects individual liberties, and we have a strong country that will respect our rule of law and the Constitution. So what I think we can do today is hear these wonderful speakers. What does it mean for us? What does it mean for us in terms of how to strengthen society, strengthen the fabric of society and recognize that there are needs that must be balanced? We are going to hear wonderful comments, and I am sure there will be plenty of questions to be resolved.

This is a basic outline of how they will confront the inherent problems and questions in balancing civil liberties after September 11th. In the process, they will talk about questions involving closed immigration proceedings, the USA PATRIOT Act, the TIPS program, racial profiling, and the system of checks and balances of power. I am sure we will have much food for thought here. And without further ado – the speakers have been introduced—the first speaker will be Madgy Mahmoud from the Immigration Rights Project.

B. Remarks by Magdy Mahmoud

It is a pleasure to be with you. I am Magdy Mahmoud. I emigrated to the United States twenty years ago as a Ph.D. candidate, after receiving two certificates from my schools in UNIX System Administration. I presently work for a Fortune 100 company, and my permanent residency in the United States was granted under the category of rare expertise in computers.

I am married with five children, all of whom were born in the United States. My wife is a public school teacher in Paterson, and we live in Upper Montclair. I decided to get involved in politics and started encouraging and devoting time to candidates running for office, including Congress and Senate. I was appointed to the Inner Circle of

the Republican Senatorial Committee, and had the privilege of shaking hands with President George W. Bush at a dinner in Washington D.C.

On September 11, 2001, I watched the events of the day on TV and was so shocked. Why? Because I worked for eight years a couple blocks from the World Trade Center, and many of my colleagues were dead as a result of the tragedy. A few good friends of mine died on September 11th. Therefore I suffered, as did many Americans in this country.

In late September 2001, I started seeing a new phenomenon in the United States: over three thousand people of a specific race or religion were being bashed by the Department of Justice ("DOJ").²³ Thirty thousand others were interviewed and interrogated by the DOJ.²⁴ They were all of the same race or religion, namely Arabs, Muslims, and South Asians.²⁵ I was shocked by the straying away from the founding principles of the United States, of equality and justice for all. I had to do something about the intrusion suffered by these minorities after the tragedy.

A number of leaders in the community reacted by forming a new organization, Human Rights Education and Law Project ("HELP") to bring justice and equality to all, without regard to race, religion, or national origin. As of today, HELP has assisted sixty post-September 11th detainees with legal representation, of which thirty have been released. The group's main goal is to achieve security in our country and everywhere else. Recent polls show that fifty to seventy percent of the American people are willing to give up part of their liberties to gain security. However, I believe that this willingness to sacrifice liberty is wrong, because we can attain both if we do our job right.

Signs of this sacrifice manifested themselves with the detainment of three thousand individuals, who found themselves on the receiving end of racial profiling.²⁶ To detain such a large number of people because of a crime committed by individuals of the same race or religion is not right. The extreme ideology of David Koresh did not

²³ See Christopher Drew, *Interviews Set for 86 Visitors in Terror Sweep*, N.Y. TIMES, Dec. 5, 2001, at B7. See also Fox Butterfield, *Police are Split on Questioning of Mideast Men*, N.Y. TIMES, Nov. 22, 2001, at A1.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*; see also Sam Howe Verhovey, *Americans give in to Race Profiling*, N.Y. Times, Sept. 23, 2001, at A1.

result in the indictment of Christians,²⁷ and the heinous crime of Timothy McVeigh in Oklahoma did not criminalize white people.²⁸ Certain individuals today, however, have experienced severe punishments for minor civil violations, such as spending nine months in jail for exceeding their visa by a month or so.²⁹

Jails in New Jersey are packed with INS detainees, and the conditions are not pleasant.³⁰ Typically, daily meals are a little cereal at 4:30 a.m., two pieces of bologna between two pieces of bread at 11:30 a.m., two hotdogs between two pieces of bread at 4:30 p.m., and chicken served once a week.³¹ From 4:30 p.m. until the next morning, the detainees must suffer with no meal.³² The cells are packed and the beds are three or four levels above each other, with the person at the top level in the worst position because he cannot raise his head without hitting the ceiling. The detainees are taken from one cell to another

²⁷ *Koresh Planned Waco Attack, Report Says*, N.Y. TIMES, Oct. 3, 1993, at A28.

²⁸ John Kifner, *Terror in Oklahoma: The Suspect; Authorities Hold a Man of 'Extreme Right-Wing Views'*, N.Y. TIMES, Apr. 22, 1995, at A9.

²⁹ Elizabeth L. Lorente, *Amnesty Assails INS Detention: Report Cites Secrecy & Alleges Abuses at Passaic Jail*, THE RECORD, Mar. 15, 2002, at a4.

³⁰ See Zahida Pirani, *Choosing Between Death and Detention*, DIGITAL FREEDOM NETWORK, at <http://www.dfn.org/news/usa/ins-detention.htm> (June 21, 2002).

³¹ See Pam Belluck, *A Nation Challenged: Civil Liberties; Hue and Murmur over Curbed Rights*, N.Y. TIMES, Nov. 17, 2001, at B8. Amnesty International reports documented harsh conditions where detainees are being held that "violate international standards and civil liberty rights guaranteed by the United States." *Id.* Violations under international standards include "protection from arbitrary detention, such as the right of anyone deprived of their liberty to be informed of the reasons for the detention; to be able to challenge the lawfulness of the detention; to have prompt access to and assistance from a lawyer; and to the presumption of innocence." *Id.* The report states that the jails and detention centers are holding detainees under conditions of "cruel treatment, including prolonged solitary confinement, heavy shackling of detainees (including use of chains and leg shackles) during visits or court appearances and lack of adequate outdoor exercise. *Id.* There have also been allegations of physical and verbal abuse." *Id.* Although INS Detention Standards guarantee adequate medical treatment and accommodations for religious diets, INS officials have refused to fulfill these guarantees. *Id.* See Anne-Marie Cusac, *Ill-Treatment on Our Shores*, at <http://www.progressive.org/0901/amc0302.html> (Mar. 2002). Waheed Khalid, the vice president of HELP, stated,

We've been monitoring the detainees in New Jersey, mostly in Passaic and Hudson Counties and Middlesex . . . almost everybody said they were taken to 26 Federal Plaza in New York City—the INS building, the federal building there. The place where they were kept was very, very cold. Everybody said it was extremely cold. They could not even sleep for a moment. When they asked for blankets, they were refused.

Id.

³² Cusac, *supra* note 31.

using guard dogs, which is a frightening action. Communication to the outside world is limited to expensive collect calls. Names of the detainees are not revealed to organizations wishing to provide legal assistance or representation.

Many detainees sit in jail for up to six months without being charged. A good example is Abraham Turkmen, a Turkish fellow who came to the United States on a visa and was, in fact, detained for six months. Other detainees have sat in jail for months after receiving their judgments, which are typically deportations, wondering what will happen to them tomorrow. An example of this is M. Abu-Shaker, who had sat in jail for over one year. A petition for habeus corpus was filed on his behalf a couple of times, but the judge refused to release him. Then suddenly, he received a call that he would be released on bail of five thousand dollars.³³

The checks and balances principle, as was mentioned earlier, is being violated. In INS hearings, typically the INS judge and the prosecution belong to the same organization, namely the Department of Justice, evidencing prejudice through a prior relationship.³⁴ Even if the detainees are not U.S. citizens, they deserve fair and just treatment according to our Constitution.

On February 19, 1942, President Roosevelt signed Executive Order 9066, which resulted in the forcible internment of 120,000 people of Japanese ancestry.³⁵ More than two-thirds of those interned under the Executive Order were citizens of the United States, and none had ever shown any disloyalty to our country. These people were forcibly evicted by the army from their homes in Washington, Oregon, California, Arizona and Alaska, and sent to nearby temporary assembly centers.³⁶ From there, they were sent by trains to American-style

³³ Zahida Pirani, *Choosing Between Death and Detention*, DIGITAL FREEDOM NETWORK, June 21, 2002, at <http://www.dfn.org/news/usa/ins-detention.htm> (June 21, 2002). See also Alison Leigh Cowan, *A Nation Challenged: Civil Rights; Detainees' Lawyers Complain of Unfair Treatment*, N.Y. Times, Oct. 21, 2001, § 1B, at 6.

³⁴ INS Discusses Non-disclosure, Other Prohibitions Relating to Battered Aliens, 74 No. 18 INTERPRETER RELEASES 783 (May 12, 1997).

³⁵ Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942); See also Philip Tajitsu Nash, 1985 *Book Review: Moving for Redress and Justice For All: An Oral History Of The Japanese-American Detention Camps*. By John Tateishi, 94 YALE L.J. 743 (1985).

³⁶ See *War Relocation Authority Camps in Arizona*, at <http://www.library.arizona.edu/wracamps> (August 1995); Roger Daniels, *Executive Order No. 9066: Executive Order Authorizing the Secretary of War to Prescribe Military Areas*, available at <http://www.english.uiuc.edu/maps/poets/gl/haiku/9066.htm> (n.d.).

concentration camps at remote inland sites, where many of them remained until the end of the war.³⁷ Congress expressed regret of such action in 1987, taking over forty-five years to realize the mistake we had made. This means our next regret will be in 2046.

Mass deportation is coming again. On June 26, 2002, one hundred and thirty-one Pakistani detainees were put on a charter plane and deported to Pakistan.³⁸ Likewise, on August 21, 2002, one hundred and one Pakistani detainees were collected from five or six New Jersey jails, moved to an INS detention center in Louisiana, put on a chopper plane and deported massively.³⁹ Similarly, in Maryland, Ali Gilani was deported. He had been in the country fourteen years with his wife and two young daughters, who still live in Brooklyn.⁴⁰ He was granted asylum three years ago, and we do have the documentation for that.

Arab, Muslim, and South Asian communities fear public participation in events, including attendance to houses of worship,

³⁷ See Nash, *supra* note 35, at 744. The Supreme Court accepted fallacious arguments of "military necessity" in *Hirabayashi v. United States*, *Yasui v. United States*, and *Korematsu v. United States*, decisions that effectively allowed the ordeal of incarceration to continue even beyond the end of World War II. *Id.* Victims were kept behind barbed wire for an average of thirty months. *Id.*

³⁸ See Steve Fainaru, *U.S. Deported 131 Pakistanis In Secret Airlift; Diplomatic Issues Cited; No Terror Ties Found*, WASH. POST, July 10, 2002 at A1; see also Duncan Campbell, *US Moves Nearer to Law Allowing Pilots to Have Guns*, THE GUARDIAN (London), July 11, 2002 available at <http://www.guardian.co.uk/bush/story/0,7369,753207,00.html>; Susan Sachs, *Traces of Terror: The Detainees; U.S. Deports Most of Those Arrested in Sweeps after 9/11*, N.Y. TIMES, July 11, 2002, at A20.

³⁹ *About 100 Pakistanis Removed From U.S.*, ASSOCIATED PRESS NEWSWIREs, Aug. 21, 2002. See also *101 Pakistanis Detained at L.A. Center Deported*, BATON ROUGE ADVOC., at 2002 WL 5042462 (Aug. 22, 2002).

⁴⁰ See Zahida Pirani, *Choosing Between Death and Detention*, DIGITAL FREEDOM NETWORK, at www.dfn.org/news/usa/ins-detention.htm (June 21, 2002):

Omar, whose real name cannot be used, is a 58-year-old Pakistani man whose story demonstrates that the rights guaranteed under international and domestic ordinance continue to be violated. The INS has held Omar at the Passaic County Jail in the state of New Jersey for over seven months for overstaying his visa. He was arrested at a mosque in Brooklyn, New York that INS officers targeted shortly after September 11. He was held in detention without probable cause for over two weeks and has no connection to the events of September 11. He tells the story of how he was arrested: 'they were waiting for us outside the mosque when we came out in the morning. They checked our identifications, searched us and then took us downstairs to search our belongings. After that, we went into the mosque. We performed the ablutions and prayed. Then we were shackled and taken away.'

Id.

because they are afraid of being profiled.⁴¹ We strongly believe that security and democracy are not the responsibility of the government alone, but are the responsibility of the people as well. We all have to participate in the process to achieve the ultimate goal.

Psychologists say there are three types of people: those who make changes, those who watch changes, and those who wonder what has changed. By the same token, we can say if we see a variation in the fundamentals our country is founded on, we either can sit and watch silently or expressly reject it with our hearts and minds to our elected officials.

Thank you very much.

C. Remarks by Mark Smith, Esq.

Good afternoon. I would like to thank the Seton Hall Law School for inviting me to speak today.

1. We Are At War

Ladies and gentlemen, like it or not, we are at war with terrorists and the states that sponsor them. The United States did not start this war. This war visited our shores preemptively and violently on September 11, 2001. Now that war is upon us, we must win and thwart those that seek to destroy America. We must act now to prevent future terrorist attacks against the United States and its citizens. Terrorism poses a serious threat not only to the United States but to civilization itself. As President Bush told us, the war we fight today is unlike any we have fought in the past.⁴² The terrorists against whom we fight show

⁴¹ See Zona Hostetler, *From the Chair*, 28 FALL HUM. RTS. 1, 2001 (discussing how Americans whose ancestry lies in Middle Eastern or South Asian countries are being viciously attacked, harassed, and worse, simply because of their religion, ethnicity, or because they "look different").

⁴² President George Bush has stated "Americans should not expect one battle, but a lengthy campaign, unlike any other we have seen." Doyle McManus, *Bush Calls Nation to "War on Terror,"* L.A. TIMES, September 21, 2001, A1. See also *Combating Terrorism: A Proliferation of Strategies: Subcomm. On Nat'l Sec., Emerging Threats, and Int'l Relations, Before the House Comm. On Gov't Reform, 108th Cong. (2003)* (testimony of Andrew F. Krepinevich, Executive Director, Center for Strategic and Budgetary Assessments) available at http://www.csbaonline.org/4Publications/Archive/T.20030303.Combating_Terroris/T.20030303.Combating_Terroris.htm (last visited Mar. 3, 2003) (stating, "Following the [September 11 attacks], the United States finds itself engaged in the first war of the 21st century. This war against international terrorist aggression . . . presents a very different set

no respect for innocent civilian life or for civilization itself, it is my humble opinion that practices such as criminal profiling and programs such as Operation TIPS constitute effective arrows in the quiver of options necessary to help us win this war.

2. The Airport Screener Hypothetical

I begin my remarks by discussing the concept of *so-called* – that’s right – *so-called* racial profiling. Now, I do not understand how there can be two sides in the debate over *so-called* racial profiling. Frankly, that law enforcement should be allowed to consider race, ethnicity, gender, eye color, height, weight, or any physical-identifying characteristic that would allow them to prevent and solve crimes or terrorist acts is, to me, common sense. Unfortunately, as many sage observers have noted, “if common sense is so common, why don’t more people have it?”

To place my remarks in the framework of the real world, please consider my comments in the context of a realistic hypothetical situation. My hypothetical is as follows: assume you work as a passenger screener at Newark Liberty International Airport. Assume it is your job to ensure that a flight from Newark, New Jersey, to Los Angeles, California, arrives safely, and your family – that’s right, your family – will be on that flight.

Now, let me show you some exhibits I prepared to illustrate what you, as an airport screener -- indeed, as any moderately educated American -- knows to be factual and true. Please look at my Exhibit Board 1. We know as fact that the individuals pictured on Exhibit Board 1⁴³ have either hijacked planes and flown them into buildings, or are so dangerous as to earn a place on the FBI’s Most Wanted Terrorists

of challenges, and requires a wholly different response from the more traditional conflicts that have dominated America’s recent history.”). Dinesh D’Souza, *WHAT’S SO GREAT ABOUT AMERICA* 4-5 (2002) (“[W]e find ourselves at war against the forces of terrorism . . . [T]his is a new kind of war against an enemy that refuses to identify himself.”).

⁴³ Exhibit Board 1 displays photographs of: Anas Al-Liby, Ali Saed bin Ai el-Hoorie, Saeed Alghamdi, Khalid Shaikh Mohammed, Fahid Mohammed Ally Msalam, Ayman Al-Zawahiri, Abdullah Ahmed Abdullah, Nawaf Alhazmi, Hamza Alghamdi, Mohand Alshehri, and Mohamed Atta. The photographs of these individuals appear either on the FBI’s Most Wanted Terrorists list, *available at* www.fbi.gov/mostwanted/terrorists/fugitives.htm (last visited Mar. 3, 2003); or were 9/11 hijackers. See Jim Crogan, *The Terrorist Motel: The I-40 Connection Between Zacarias Moussaoui and Mohammed Atta*, at www.twin-tower.net/terrorists.htm (last visited Mar. 3, 2003).

list. That is what we know to be true. These are facts. These facts are—whether we like it or not — our reality.

As an airport screener, you operate under the same constraints that inhibit law enforcement. Like law enforcement, you lack omniscience and omnipotence. You can interrogate and investigate only so many passengers for only so long. You cannot stop every passenger and interrogate and investigate each one for hours. There is simply not enough time. You operate under the constraints of scarce resources, scarce time, scarce money, and limited technology. Because of these natural and inevitable limitations, you can choose only a select few passengers to whom you will devote more time and effort to ensure they do not pose a threat to the plane and the other passengers' lives. Thus, reality gives you no choice but to either (1) subject no passengers to extra scrutiny, (2) subject random passengers to extra scrutiny, or (3) use what you "know to be true" to rationally differentiate among the passengers to identify those who may pose a greater danger than others.

Refocusing on my hypothetical scenario, because of limited time and resources, assume you as an airport screener have only enough time to investigate with greater scrutiny only one of the following five individuals whose photographs appear on Exhibit Board 2.⁴⁴ I ask you which of the five individuals here (whose photographs appear on Exhibit Board 2) would you subject to greater scrutiny based upon what you know to be reality? You do not have to tell me your answer; you only have to answer the question honestly to yourselves. And in considering this question, please remember that the lives of your family and others depend upon you making the right, most intelligent choice.

3. Criminal or Terrorist Profiling -- Not Racial Profiling

I would like to change the topic tonight. In discussing the use of race or any other identifying physical trait, we should not use the politically charged and misleading concept of *so-called* racial profiling.⁴⁵ Instead, we should be talking about the concepts of

⁴⁴ Exhibit Board 2 displays the photographs of: Kermit the Frog, comedian Bill Cosby, a Dallas Cowboy cheerleader, World War II flying ace and Congressional Medal of Honor recipient Joseph Foss, and most-wanted terrorist Khalid Shaikh Mohammed. Of note, months after this panel discussion, the United States captured Khalid Shaikh Mohammed. James Risen, *Tied to Many Plots, an Elusive Figure Who Came to U.S. Attention Late*, N. Y. TIMES, March 2, 2003, at 10.

⁴⁵ Some commentators have noted that the concept of "racial profiling" has been defined by only "cop-bashers" and that "the police have never endorsed the term." See

“criminal profiling” or “terrorist profiling.” Law enforcement should be permitted and encouraged to engage in both criminal profiling and terrorist profiling. That’s right, law enforcement should be permitted to consider any identifying characteristics whatsoever -- whether based on an individual’s physical appearance or otherwise -- in deciding how best to deploy scarce societal resources to thwart crime and terrorism.

To illustrate, if you want to find Osama bin Laden, would it make sense for law enforcement to devote time and money searching for his henchmen by raiding Saint Patrick's Cathedral in New York? By infiltrating Black Baptist churches in the South? By sneaking around Hindu temples in California? No, of course not. Based upon the facts we know which comprise the criminal or terrorist profile of bin Laden and his followers, we know they are not Catholic priests, not black Baptists, not Hindus, not blond cheerleaders, not green frogs, and they are certainly not Jewish rabbis. They are, instead, Muslim fundamentalists of Arab descent who are male.⁴⁶ In making this point, I am not trying to pick on Arabs. It simply makes sense to look at certain individuals within the Arab community if you want to win the current war on terrorism.⁴⁷ If you want to thwart Al Qaeda and other similar terrorist groups, then law enforcement should be permitted to at least consider whether an individual boarding an airplane is a male Muslim fundamentalist of Arab descent.⁴⁸

HEATHER MACDONALD, ARE COPS RACIST? 165 (2003). See also Clayton Searle, *Profiling in Law Enforcement*, at <http://www.inia.org/whats-new-presidents.htm> (last visited Mar. 3, 2003) (“This nation has recently been in an emotional discussion concerning the use of profiles by law enforcement officers. Unfortunately, this debate has been entitled ‘racial profiling.’ There is a saying in debating, ‘If you can define the terms, you win the contest.’ Utilizing the term, ‘racial profiling,’ ensures that the debate will be negative in tone and divisive in nature.”).

⁴⁶ “All 19 of the September 11 hijackers were young Arab men. The vast majority of Al Qaeda members and Taliban fighters are Afghan or Arab men. All 22 people on the FBI’s most wanted terrorist list are Muslims and virtually all are Arab.” Prof. Jonathan Turley, *Profiling Isn’t Always Wrong*, L.A. TIMES News Service, January 22, 2002. See also Krepinevich, *supra* note 42 (stating “The United States now confronts radical Islamic terrorist organizations . . .”).

⁴⁷ Obviously, if a group of the Pennsylvania Amish or blonde haired, blue-eyed women from Minnesota commence a series of coordinated suicide bombings against American targets, then perhaps the profile of those groups trying to destroy the United States would need to change.

⁴⁸ Criminal profiling can save lives. In 1999, U.S. government officials were “on the look out for Middle Eastern men when they stopped Ahmed Ressaym, an Algerian.” Ressaym had in his car bomb-making materials that prosecutors later alleged were intended for an attack on an American airport. See John Stossel, *Rethinking Racial Profiling*, October 4,

The consideration of race or ethnicity is hardly new in criminal profiling.⁴⁹ For example, if you want to thwart the Italian mafia, you should look at Italian males. If you want to thwart the Japanese crime organizations such as the Yakuza, you should look at Japanese males. If you want to thwart a Jamaican drug posse, then you should consider if someone is Jamaican. And if you want to stop the Irish Republican Army, you should consider white males with brogue accents. In each of the examples I have just given you, race and ethnicity are critically important, but despite these considerations, this is not “racial profiling.” Instead, this is criminal profiling or, in the case of Osama bin Laden, terrorist profiling.

4. Reactive and Proactive Profiling

To understand how criminal or terrorist profiling works, please understand that there are two types of profiling: reactive and proactive. Considering race as an identifying physical trait in helping law enforcement stop and solve crimes and save lives is wholly appropriate when engaging in either reactive or proactive profiling.

Reactive criminal profiling occurs when a police officer responds to the report of a specific crime. In such instances, of course, the police should use any and all available facts to catch the criminal. Obviously, the most efficient way for law enforcement to respond to a reported crime is to search for a person who fits the description of the perpetrator.

To illustrate, let us say that a crime victim calls the police after being robbed. Doesn't it make sense for the victim to tell the police what the robber looked like? Doesn't it make sense for him to identify the robber's height, the robber's sex, the robber's age, the robber's hair color, whether or not the robber had scars, whether or not the robber had tattoos? And believe it or not – and shocks of all shocks to some – doesn't it also make sense to tell the police the race of the robber, too? In fact, it would almost be as criminal as the robbery itself to foolishly waste resources – resources that could be spent stopping other criminals from shattering other innocent lives – by depriving police of any salient

2001, available at http://abcnews.go.com/sections/2020/2020/2020_011002_racialprofiling_stossel.html (last visited Mar. 3, 2003).

⁴⁹ *60 Minutes: That Dirty Little Word “Profiling”* (CBS television broadcast, Dec. 2, 2001). Steve Kroft stated, “[U]sing race as a factor in criminal investigations is both commonplace and supported by the highest courts in the land.” *Id.*

facts that could be used to solve and thwart criminal activity.

Police should also be permitted to consider race and other physical traits when engaging in proactive criminal profiling. Proactive criminal profiling occurs when the police are on patrol and encounter a situation that causes them to become suspicious. Suspicious, that is, to the point of deciding to devote police resources to investigate the situation further. The question presented is whether police may become suspicious of a particular situation in part because of the race, ethnicity, or other physical-identifying traits of one of the people they see at the scene. Once again, law enforcement should be allowed to consider race in determining whether a particular situation is suspicious enough to warrant further investigation.

Now, I want to make one thing clear. I do not believe, nor do the courts hold, that race alone justifies investigating somebody of a crime. That's right. Suggesting someone is guilty of something solely because of race is immoral, wrong, stupid, and should be outlawed. For example, there is no justification for a police officer patrolling the highway searching specifically for minority drivers to stop and harass.⁵⁰

In contrast, however, an airport screener who decides to interrogate an Arab-looking man attempting to board a plane is not engaging in racism. Instead, the airport screener is engaging in rational and proactive criminal profiling. Comfortable with it or not, ladies and gentlemen, there is a higher probability that an Arab might attempt a suicide hijacking while traveling by plane than a randomly-selected white, black or Hispanic passenger doing the same.⁵¹ Now, I appreciate that some people like to pretend we live in a fantasy world, where there is no correlation between race and ethnicity and modern day terrorism. That viewpoint is not reality.

⁵⁰ See 60 Minutes, *supra* note 49. Randy Means, attorney, explained that singling out people for investigation solely on race is illegal, but noted that using race or ethnicity as one aspect of a criminal profile is legal and a valuable tool. *Id.*

⁵¹ Stuart Taylor, Jr., *The Case for Using Racial Profiling at Airports*, NATIONAL JOURNAL (2001) ("Racial profiling of people boarding airliners ... done politely and respectfully - may be an essential component (at least for now) of the effort to ensure that we see no more mass-murder-suicide hijackings."); Michael Kinsley, *Racial Profiling is Sometimes Appropriate -- Now, For Example*, PITTSBURGH POST-GAZETTE, October 2, 2001, at A11 ("An Arab-looking man heading toward a plane is statistically more likely to be a terrorist. That likelihood is infinitesimal, but the whole airport rignarole is based on infinitesimal chances."). See also 60 Minutes: *That Dirty Little Word "Profiling"* (CBS television broadcast, Dec. 2, 2001). During this broadcast, Floyd Abrams stated, "[I]t would be crazy not to consider what people look like when we're looking for people who may be involved in hijacking." *Id.*

5. Muslim Fundamentalists of Arab Descent

In the real world we are at war with terrorists who killed thousands of people on September 11, 2001. In the real world, we know that these terrorists have followers and supporters right here in the United States continuing to this day,⁵² and both the search for bin Laden and Daniel Pearl's murderers⁵³ show that we still lack much information about the terrorists who seek to destroy the United States, where to find them, or even how to find them. Thus, should we really ignore those few facts that we do know about these terrorist threats, *i.e.*, that they consist predominantly of Muslim fundamentalists of Arab descent who are males?⁵⁴

To illustrate, let's do a pop quiz.

In 1983, the United States Marine barracks in Beirut was blown up and two hundred forty-three United States Marines were killed.⁵⁵ By whom?

In 1985, the Achille Lauro cruise ship was hijacked and an

⁵² Recent events, including the guilty plea of Faysal Galab (who was one of six men arrested in a Buffalo, New York suburb for allegedly having terrorist links to Al Qaeda), demonstrate that bin Laden's network still has connections within the United States. See John Riley, *Guilty Plea in Upstate Terror Case: Al-Qaida Camp Attendee will Cooperate with Probe*, NEWSDAY (New York), Jan. 11, 2003, at A6. Galab, who was one of six young Yemeni-American men arrested for attending an Al Qaeda training camp in Afghanistan, admitted that he knew he was going to a "military training camp before leaving Buffalo in mid-2001 and knew that it was illegal, that he purchased a military uniform before going to camp, and that he performed 'guard duty' for Al-Qaida while receiving terrorist training at the camp." *Id.* See also D'Souza, *supra* note 42, at 5 ("Our enemy is a terrorist regime that inhibits many countries, including the United States.").

⁵³ Pearl was a Wall Street Journal reporter who was kidnapped and killed by Islamic militants in Pakistan in February 2002. *Tests Show Body Found in Karachi is Pearl's*, WALL ST. J., July 22, 2002, at A12.

⁵⁴ Kinsley, *supra* note 51, at A11 ("[T]oday we're at war with a terror network that just killed [3,000] innocents and has anonymous agents in our country planning more slaughter. Are we really supposed to ignore the one identifiable fact that we know about them? That may be asking too much.").

⁵⁵ Max Boot, *The End of Appeasement: Bush's Opportunity to Redeem America's Past Failures in the Middle East*, THE WEEKLY STANDARD, February 10, 2003. On April 18, 1983, a Shiite suicide bomber killed 63 people including 17 Americans. On October 23, 1983, another Shiite suicide bomber attacked the U.S. Marine barracks in Beirut, killing 241 soldiers. *Id.* See also *Hezbollah Summit Presence Sends Signal?*, UNITED PRESS INTERNATIONAL, Oct. 19, 2002 ("Hezbollah, which supports Islam even over Arab nationalism . . . claimed responsibility for the 1983 bombing of the Marine barracks that killed 241 Americans"); Walter Williams, *We Need To Profile*, at www.townhall.com/columnists/walterwilliams/ww20020612.shtml (last visited June 12, 2003).

elderly wheelchair-bound American was murdered.⁵⁶ By whom?

In 1988, Pan Am flight 103 was bombed, and two hundred fifty-nine innocent people on that plane and eleven people on the ground were killed.⁵⁷ By whom?

In 1993, the World Trade Center was bombed.⁵⁸ By whom?

In 1995, the military barracks in Saudi Arabia were bombed and two hundred ninety-two people were killed.⁵⁹ By whom?

In 1997, American embassies in Kenya and Tanzania were bombed – two hundred ninety-three people were killed and over five thousand injured.⁶⁰ By whom?

In 2000, the naval ship U.S.S. Cole was bombed and 17 American sailors were killed.⁶¹ By whom?

And on September 11, 2001, four airliners were hijacked, turned into missiles, and aimed at the World Trade Center in New York City and the Pentagon in Washington, D.C.,⁶² and used to kill over three-thousand people. By whom?

Was it the pizza deliveryman? No. Was it the Little Old Lady from Pasadena? No. Was it the Pennsylvania Amish? No. Or was it male Muslim extremists, mostly between the ages of 17 and 40?⁶³ You tell me. You know the answer as well as law enforcement. Now, given what we know, ask yourselves whether these undeniable facts and this

⁵⁶ See *Achille Lauro Hijacking, October 7, 1985*, at www.terrorismvictims.org/terrorists/achille-lauro.html (last visited Mar. 3, 2003).

⁵⁷ Radical Muslim terrorist groups blew up Pan Am Flight 103 over Lockerbie, Scotland. Ron Wheeler Albany, *Why No Protests When Americans are Killed?*, THE TIMES UNION (Albany, NY), March 31, 2003, at A6. In fact, “[o]ne Muslim terrorist was sentenced to life in a Scottish jail” and the “other was acquitted and returned to a hero’s welcome in Tripoli.” *Id.* See also Williams, *supra* note 55.

⁵⁸ *Timeline: Al Qaeda’s Global Context* (Public Broadcasting System), available at www.pbs.org/wgbh/pages/frontline/shows/krew/etc/cron.html (last visited Mar. 3, 2003). See also Williams, *supra* note 55.

⁵⁹ Hezbollah attacked a Saudi National Guard facility in Riyadh in 1995, killing five Americans. Boot, *supra* note 55.

⁶⁰ Radical Islamic terrorist groups bombed the U.S. embassies in Africa in 1998. See Krepinevich, *supra* note 42; Boot, *supra* note 55 (“Islamist operatives bombed . . . two U.S. embassies in Africa in 1998.”).

⁶¹ “Islamist operatives bombed . . . the USS Cole in 2000.” Boot, *supra* note 55.

⁶² “All 19 of the September 11 hijackers were young Arab men.” Turley, *supra* note 46.

⁶³ See Williams, *supra* note 55. “Daniel Pipes estimates that even before the costliest terrorist strike in history occurred on September 11, 2001, Islamist violence directed at Americans had killed 800 people – ‘more than killed by any other enemy since the Vietnam War.’” Boot, *supra* note 55.

undeniable history should be used and considered in attempting to thwart future terrorist attacks and to save innocent lives. I say, as do the majority of Americans, that these facts should be considered.⁶⁴

6. Operation TIPS

Let's turn our attention from criminal and terrorist profiling to another arrow in law enforcement's quiver against terrorism: Operation TIPS.⁶⁵ Frankly, the hubbub against the TIPS program is much ado about nothing. Operation TIPS was created by the Department of Justice as a clearinghouse for information about suspicious and potentially terrorist activity.⁶⁶ The program encourages people who are in a unique position to observe possible terrorist activity to report it.⁶⁷

In essence, the program encourages people such as the TV repairmen, mail deliverers, and Federal Express drivers to take simple steps to help prevent future terrorist attacks. These workers are frequently invited -- I repeat -- invited into people's homes to deliver mail, to deliver packages, to pick up packages or to install cable systems. They enter these homes with the consent of the occupants. If someone does not want to let these workers into their home, they do not have to. Operation TIPS does not change this dynamic. The program is completely voluntary.⁶⁸ No one has to participate, and all it does is simply encourage people if they see something suspicious to report it to

⁶⁴ See Ann Scales, *Polls Say Blacks Tend to Favor Checks*, BOSTON GLOBE, September 30, 2001, at A6; Pete DuPont, *Arab-Americans and Racial Profiling*, National Center for Policy Analysis, at <http://www.ncpa.org/edo/pd/fp2001/fp110601.html> (last visited Mar. 3, 2003). "71 percent of Blacks in a recent Gallup poll and 54 percent of Blacks in a Zogby poll said Arab-Americans should be singled out for extra security at airports." Dennis Niemiec & Shawn Windsor, *Arab Americans Expect Scrutiny, Feel Sting of Bias*, DETROIT FREE PRESS, October 1, 2001. 60 percent of Arab-Americans in Detroit area said "extra questioning or inspections" of Arab Americans is justified. *Id.*

⁶⁵ The "TIPS" in Operation TIPS stands for "Terrorist Information and Prevention System." See White House, *"President Creates Citizen Corps,"* January 2002, at <http://www.whitehouse.gov/news/releases/2002/01/20020130-8.html> [hereinafter White House Release].

⁶⁶ Operation TIPS would enable transportation workers, postal workers, and public utility employees to identify and report suspicious activities possibly linked to terrorism and crime. See *id.*

⁶⁷ *Id.*

⁶⁸ Operation TIPS is a "voluntary reporting system through which information can be maintained and analyzed in a single database." Department of Justice, *Statement of Barbara Comstock, Director of Public Affairs, Regarding the TIPS Program,* July 16, 2002, available at www.usdoj.gov/opa/pr/2002/July/02_ag_405.htm (last visited Mar. 3, 2003).

the federal government.⁶⁹

Critics of Operation TIPS purportedly worry that the program will encourage people to “spy” on their neighbors. These critics are either disingenuous or blind to the facts. Such “spying” can already occur in the status quo. Indeed, substantial economic incentives already exist for people to “spy” on their neighbors.⁷⁰ Anybody, including the workers targeted by Operation TIPS, can already report suspicious activity, even without Operation TIPS. For example, let's say a mailman goes into a home and sees a teenage girl bound, gagged and tied to the radiator. Don't you think it is acceptable if he calls the police to report he just saw “something suspicious” in a customer's home? In fact, don't we want the deliveryman to call the police if he happens to come across a teenage girl bound, gagged and tied to the radiator? After all, maybe the girl has been kidnapped.⁷¹

⁶⁹ *Id.*

⁷⁰ Rewards seeking information about domestic criminals, missing persons and terrorists are already part of the American landscape. Those who argue that the adoption of Operation TIPS would somehow generate a tidal wave of “spying by neighbors on neighbors” strains credulity and constitutes unfounded hyperbole. Regardless of the adoption of Operation TIPS, ample financial incentives already exist for citizens predisposed to spy on their neighbors in the name of crime fighting to do so in the status quo. *See, e.g., Crimestoppers Catching More Felons*, HERALD-SUN (Durham, N.C.), May 12, 2003, at B1. The Durham CrimeStoppers program provides cash awards to anyone tipping police about offenders in felony cases and has “significantly boosted the number of people . . . nab[bed] during the last nine months.” *Id.* *See also, COP SHOT'S \$10,000 Bounty Helps Apprehend and Deter Shooters*, PBA MAGAZINE, at www.nycpba.org/newsletter/mag-02-fall-shot.html (last visited Mar. 3, 2003). COP SHOT is a program that offers an automatic standing \$10,000 cash reward for information leading to the arrest and conviction of anyone who shoots or shoots at a New York City police officer.” *Id.* Ben English, *Where's Saddam: U.S. Puts Price on his Head*, DAILY TELEGRAPH (Sydney, Australia), April 18, 2003 (the U.S. has offered a \$200,000 reward for Saddam Hussain's capture); FBI National Press Office, “FBI's Ten Most Wanted Fugitives – James J. Bulger”, November 29, 2000, at www.fbi.gov/pressrel/pressre/100/bulger.htm (last visited Mar. 3, 2003) (the FBI offered a reward of up to \$1 million for information leading to arrest of James J. Bulger, one of the FBI's Ten Most Wanted Fugitives); FBI Ten Most Wanted Fugitives, www.fbi.gov/mostwant/topTen/fugitives/laden.htm (FBI offers up to \$25 million reward for information leading to capture of Usama Bin Laden); www.elizabethsmart.com (last visited Mar. 12, 2003) (rewards ranging from \$3,000 to \$250,000 were offered concerning various aspects of the Elizabeth Smart case).

⁷¹ One could hardly be upset with the prospect of individual citizens (who happen upon a suspicious scene) contacting law enforcement. After all, two concerned citizens are responsible for discovering the kidnapped girl Elizabeth Smart. *See, e.g., Elizabeth Smart Found Alive in Utah*, March 12, 2003, FoxNews, available at www.foxnews.com/story/0,2933,80930,00.html (last visited Mar. 12, 2003) (“Police were tipped off by members of the public who spotted the drifter on a street.”).

Likewise, is it really a civil liberties concern if a delivery man calls the telephone number provided for Operation TIPS to report that he entered a home to deliver a pizza and saw dozens of AK-47 rifles, a large box of fuses, a large stockpile of fertilizer and an infrastructure diagram of Disneyland? Why shouldn't the deliveryman be encouraged to report to the police what he saw? Indeed, regardless of the existence of Operation TIPS, a delivery man may and should report such suspicious activity to the police.⁷²

A deliveryman reporting suspicious activity to law enforcement can and does happen today. If you see something suspicious or a mail carrier sees something suspicious, you and he can report it to the police. Operation TIPS does nothing more than tell these people where to report the suspicious information. Right now if a worker sees suspicious activity, they report it to the local police department or state police, and it might filter up to the Department of Justice or FBI.⁷³ Operation TIPS would encourage people, if they see suspicious activity or potential terrorist activity, to contact the federal government directly – thereby reducing the risk that vital information might not find its way into the hands of those most responsible for thwarting terrorist attacks.

6. Conclusion

To close, ladies and gentlemen, we as a nation cannot afford to ignore reality. Law enforcement should not be forced to stick its head in the sands of political correctness just because a handful of bookish academics are uncomfortable with reality. Banning criminal profiling and discouraging American citizens from voluntarily reporting suspicious activity to law enforcement will help nobody except criminals and terrorists.

Thank you very much.

⁷² See *supra* note 70.

⁷³ It is ironic that many liberals who oppose Operation TIPS are also upset by the apparent lack of communication between the law enforcement and intelligence communities before 9/11. The Bush Administration seeks to use Operation TIPS as a means to enhance the coordination, stream, and analysis of information to prevent future terrorist attacks. Unfortunately, some prefer to complain about the mistakes of the past while also thwarting the enactment of meaningful solutions.

D. *Remarks by Edward Barocas, Esq:*

Hi. I am Edward Barocas, legal director of the American Civil Liberties Union of New Jersey. I am a bit blown away by Mr. Smith's remarks. I must say I have a little talk prepared, but I do not know what to say in response, because I do not want to give it too much credence. I think what we just heard embraces what occurred in the 1940's: namely, that the interning of Japanese-Americans is okay. Why? Because they were Japanese. That the racial profiling of Italian-Americans is okay. Why? Because they are more likely to be involved in organized crime. I think we heard Mr. Smith say that if you are a young Irishman and you want to go into a federal building, you will be stopped - he did not say a white person would be stopped, but let us assume that would naturally flow from the statement. A black man on the New Jersey Turnpike should expect to be stopped. Why? Because blacks are more likely to commit drug-related crimes. You know what? That is not only immoral, that is not only unconstitutional, it is un-American.

What Mr. Mahmoud said is that the Constitution does not look to the color of the skin. What the Constitution says first is that we are American. We do not assume, because a criminal is of a particular race, that all people of that race are imbued with those same criminal traits. If that was the case, then we are all suspect.

Turning now to what I was going to originally say - I think this is actually going to be an interesting court year in the Supreme Court - not because of cases that are currently there, but because of cases that we expect are going to be there shortly that involve September 11th and responses to it.⁷⁴

In times of crisis we have seen excesses of government power, and they have often been tolerated. In fact, we look back at them with a great deal of regret, and that goes for many times throughout the twentieth century: the Palmer Raids following World War I,⁷⁵ internment of Japanese-Americans in World War II,⁷⁶ McCarthyism,⁷⁷

⁷⁴ See, e.g., *Carrasca v. Pomeroy*, 313 F.3d 828 (3d Cir. 2002) (alleged racial profiling of Spanish-Americans, who were caught swimming after-hours at state-park lake); *Bradley v. United States*, 299 F.3d 197 (3d Cir. 2002) (alleged racial profiling of African-American woman, who arrived in America from non-stop flight from Jamaica).

⁷⁵ See *Feldman*, *supra* note 13.

⁷⁶ *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the constitutionality of the relocation of Japanese-Americans to internment camps during World War II).

the Vietnam War,⁷⁸ and surveillance for free speech purposes of civil rights activists such as Martin Luther King, Jr.⁷⁹ I think that the racial profiling that has occurred, as well as much of the Patriot Act⁸⁰ and other acts of the government, we will look back on with regret. The main areas we will regret involve secrecy in government, and the limitations placed upon the courts that impair our checks and balance system. Since we are at a law school, and this is the First Monday program, I will focus on the cases that will hopefully go up to the United States Supreme Court, and also the counterpart cases that were filed here in New Jersey by the New Jersey ACLU.

The first case, which Mr. Mahmoud alluded to, involves government secrecy. We were contacted by certain organizations because people could not find their loved ones.⁸¹ Their loved ones were arrested and they were not told where they were taken.⁸² Some of those arrested did not have access to groups that could help them. According to immigration law, you have a right to an attorney; but unlike criminal law, you do not have a right to an appointed attorney. What the ACLU tried to do, along with other groups such as American Friends and Center for Constitutional Rights, was to go to the jails to find out who had and who did not have representation, and to try to help afford them representation. We were stymied in every avenue that we took. In fact, we asked first to meet with people in the Hudson and Passaic County jails because, just so you know, New Jersey housed more detainees than any other state.⁸³ New Jersey was the center for much of this litigation

⁷⁷ See McCarthy, *supra* note 14.

⁷⁸ HARRY G. SUMMERS, *ON STRATEGY: A CRITICAL ANALYSIS OF THE VIETNAM WAR* 3 (Presidio Press 1995) (1982).

⁷⁹ DAVID J. GARROW, *THE FBI AND MARTIN LUTHER KING, JR.* (Yale University Press 2002) (documenting the FBI's surveillance of Martin Luther King, Jr., showing how the FBI employed electronic eavesdropping devices, paid informants, and anonymous letters in a vicious but unsuccessful effort to destroy the civil-rights leader).

⁸⁰ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 155 Stat. 272 (2001) [hereinafter "USA Patriot Act"], available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:pub1056.107 (n.d.). The USA Patriot Act passed Congress 98-1 in the Senate and 357-66 in the House on October 26, 2002, in response to the September 11th attacks, and is intended to give law enforcement new tools to track down terrorists. *Id.*

⁸¹ *Due Process Must Survive*, L.A. TIMES, Nov. 6, 2001, Part 2, at 12.

⁸² *Id.*

⁸³ Wayne Parry, *Hundreds of Sept. 11 Detainees Still in Jail*, Associated Press, at <http://www.nctimes.net/news/2002/20020303/55827.html> (Mar. 2, 2002).

for a number of reasons, one being that we are so close to New York. So we went to the jails and we asked to meet with these individuals, but we were told that we could not see them unless we had their names. We said, "You have their names. Please give us the names, or at the very least, give us the names of those that are not currently represented." They would not give us the names.

Under New Jersey law it specifically says - not only under our right to know law that says we have the right to information⁸⁴ but under a specific law that was passed - that the keeper of any county jail must disclose the names of anyone who has been arrested and held in that jail.⁸⁵ That makes sense; New Jersey has a long history of trying to avoid secret detentions. Nevertheless, we were told by the counties that they would not disclose the names we sought, and that we had to direct our inquiries to the INS. The INS refused to disclose them, and so we went to New Jersey State Court because this dispute involved state law, and these were state records of detainees in New Jersey jails being held by New Jersey officials.⁸⁶ The federal government sought to intervene in the case and was granted permission by the judge.⁸⁷ Thereafter, the government argued that this information should be secret, should be private, and that no one should know who was arrested. Under New

⁸⁴ Open Public Records Act, N.J. STAT. ANN. § 47:1A-1, *et. seq.* (West 2002).

⁸⁵ N.J. STAT. ANN. § 30:8-16 (West 2002).

⁸⁶ ACLU of New Jersey, Inc. v. County of Hudson, 352 N.J. Super. 44 (App. Div. 2002).

⁸⁷ *Id.* at 65. The Appellate Division did reverse the lower court's judgment; however, the appellate panel also acknowledged and affirmed the lower court's order granting the federal government to intervene under New Jersey Rule of Court. *Id.* Specifically, the Appellate Division stated:

In granting the government's motion to intervene, Judge Gallipoli correctly noted that such applications should be entertained with liberality. He found that the United States had substantially complied with R. 4:33-3, because an answer had been filed as of the time of the hearing on the motion, and because the certification attached to the moving papers clearly set forth the reasons why the United States sought intervention. The judge further found that the interests of the United States could not be protected by the counties because 'the real party in interest here is the United States of America and presumably it has the intimate knowledge as to what is going on with regard to the continuing investigation and why it believes . . . that the names of these particular detainees should not be disclosed.' We agree substantially with Judge Gallipoli's reasoning.

Id. at 64-5.

Jersey law, we won.⁸⁸ Judge D'Italia in Hudson County noted that secret detentions are odious to a democracy.⁸⁹

Two days later, while the case was on appeal, John Ashcroft, through INS director Ziegler, issued a regulation which stated that federal law will trump all state law to the contrary, and no information could be divulged.⁹⁰ Basically they said, "if you want it, come to us."⁹¹ Irrespective of what state law said, and irrespective of the fact that these people are held in state jails, they are not allowed to give any information out under the regulation. Therefore the appeal came from New Jersey state law to this particular regulation, and it was upheld by our Appellate Division.⁹² Our Supreme Court declined to get involved.⁹³

In another case involving freedom of information, the ACLU sought disclosure of names under Federal law, namely the Freedom of Information Act.⁹⁴ The government again opposed a request for inmate

⁸⁸ *Id.* See N.J. STAT. ANN. § 30:8-16 (West 2003) (Record of Prisoners in Jails or Other Penal or Reformatory Institutions); N.J. ADMIN. CODE § 10A:31-6.5 (West 2003); N.J. STAT. ANN. § 47:1A-1 (West 2003) (Right-to-Know Law).

⁸⁹ Brian Donohur, *Court Rules Detainees ID's Must Be Released – Secret Arrests Violate 104-Year Old Law*, STAR-LEDGER (Newark, NJ) Mar. 27, 2002, at 5. (That law, Judge D'Italia noted, was crafted "to prevent secret arrests – a concept odious to a democratic society." The 1898 statute, he added, "could not be more clear or direct.").

⁹⁰ Information Regarding Detainees, 8 C.F.R. § 236.6 (2003), applying to information regarding detainees. The section reads:

No person, including any state or local government entity or any privately operated detention facility, that houses, maintains, provides services to, or otherwise holds any detainees on behalf of the Service (whether contract or otherwise), and no other person who by virtue of any official or contractual relationship with such person obtains information relating to any detainee, shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee. Such information shall be under the control of the Service and shall be subject to public disclosure only pursuant to the provisions of applicable federal laws, regulations and executive orders. Insofar as any documents or other records contain such information, such documents shall not be public records. This section applies to all persons and information identified or described in it, regardless of when such persons obtained such information, and applies to all requests for public disclosure of such information, including requests that are the subject of proceedings pending as of April 17, 2002.

Id.

⁹¹ *See id.*

⁹² *ACLU of New Jersey*, 352 N.J. Super. at 89-90.

⁹³ *ACLU of New Jersey, Inc. v. County of Hudson*, 174 N.J. 190 (2002).

⁹⁴ *Ctr. for Nat'l Sec. Studies v. United States Dept. of Justice*, 215 F. Supp.2d 94 (D.C. Cir. 2002).

information that was directed to the INS, and we were successful in the lower court. That case is also on appeal. Again, Judge Kessler, the district court judge from the D.C. Circuit, determined that these types of secret arrests are odious to a democracy.⁹⁵

Interestingly, for many years our government officials have spoken out about the heinous nature of disappearances in South America.⁹⁶ Well, that is essentially what we have here. We have individuals who are arrested in secret, and individuals who want to help them are not permitted to do so. They are transferred from jail to jail without any information being provided to the public.

I think the government looks at both the public and the courts post-9/11 in the wrong manner. It views them as inconvenient obstacles to government and executive action, rather than as essential instruments of accountability that defend the rights granted in our Constitution. There is a case that I am hoping will go up to the Supreme Court that is currently in the Third Circuit that addresses this very issue.⁹⁷ This perception of the courts and the public is clearly reflected in the Creppy memo,⁹⁸ which stresses the need for secrecy and for limiting the Court's ability to provide adequate checks and balances where detainees are concerned. Chief Immigration Judge Michael Creppy issued this memo to all immigration judges, stating that all immigration hearings for post 9/11 detainees that have been designated by the INS as "special interest" cases must be closed to the public.⁹⁹

⁹⁵ *Id.* at 96. "Secret arrests are a concept odious to a democratic society, and profoundly antithetical to the bedrock values that characterize a free and open one such as ours." *Id.* (internal citations omitted).

⁹⁶ Roseann M. Latore, Note, *Coming Out of the Dark: Achieving Justice for Victims of Human Rights Violations by South American Military Regimes*, 25 B.C. INT'L & COMP. L. REV. 419 (2002). "The military leaders of regimes in South America are only now being brought to justice for their crimes, which include widespread killing and 'disappearances' of political opponents." *Id.* See also Jamison G. White, Note, *Nowhere To Run, Nowhere To Hide: Augusto Pinochet, Universal Jurisdiction, The ICC, and a Wake-Up Call For Former Heads of State*, 50 CASE W. RES. L. REV. 127 (1999); Jorge Luis Delgado, *The Inter-American Court of Human Rights*, 5 ILSA J. INT'L & COMP. L. 541 (1999); David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CAL L. REV. 449 (1990).

⁹⁷ *Ctr. for Nat'l Sec. Studies*, 215 F. Supp. 2d at 94.

⁹⁸ See *New Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002).

⁹⁹ *Id.* at 202-3. The Department of Justice, which oversees the INS, has identified some aliens whose situations are particularly sensitive and designated their hearings "special interest" cases. *Id.* For example, "special interest" cases include aliens who had close associations with the September 11 hijackers or who themselves have associated with al Qaeda or related terrorist groups. *Id.* For those cases given a "special interest"

One of the journalists – who is here today – tried to get into those hearings, but he, as well as the Herald News, was denied access. They were denied access, irregardless of a First Amendment right that springs from *Richmond Newspapers*,¹⁰⁰ *Globe*,¹⁰¹ *Press Enterprises*,¹⁰² and other cases that say that hearings of this nature are to be made public.¹⁰³ Why should they be public? Specifically for two reasons: first, to promote the appearance of fairness and foster the public's trust of court procedure;¹⁰⁴ and second, to promote actual fairness.¹⁰⁵ The press does help ensure fairness. As the press says, they are representing the whole public, and the whole public has a need to insure this is a fair process.

The Creppy memo was challenged, because judges already have the authority to determine whether a case is so sensitive that it should be made confidential and kept secret.¹⁰⁶ However, that was not good enough for John Ashcroft and the INS. They said they did not want judges making that decision. Essentially, they said that they did not trust judges and, instead, wanted to make that decision for themselves. They wanted a power that would fundamentally disrupt the checks and balances system.

Sure enough, it was challenged in Detroit.¹⁰⁷ A representative from Congress and the Detroit Free Press brought suit and they were

designation, Chief Immigration Judge Creppy issued a memorandum (the "Creppy Directive") implementing heightened security measures. *Id.* The Directive requires immigration judges "to close the hearing[s] to the public, and to avoid discussing the case[s] or otherwise disclos[e] any information about the case[s] to anyone outside the Immigration Court." *Id.* It further instructs that "the courtroom must be closed for these cases—no visitors, no family, and no press," and explains that the restriction "includes confirming or denying whether such a case is on the docket or scheduled for a hearing." *Id.*

¹⁰⁰ *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555 (1980).

¹⁰¹ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

¹⁰² *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

¹⁰³ *See, e.g., Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984).

¹⁰⁴ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975) "[W]ith respect to judicial proceedings in particular, the function of the press serves to guarantee fairness of the trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice." *Id.*

¹⁰⁵ *Press-Enterprise Co.*, 478 U.S. at 9 (stating, "openness in criminal trials . . . enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system").

¹⁰⁶ N.J. Ct. R. 1:38; *see also* *Loigman v. Kimmelman*, 102 N.J. 98, 106-7 (1986) ("when reasons for maintaining a high degree of confidentiality in the public records are present, even when the citizen asserts a public interest in the information, more than citizen's status and good faith are necessary to call for production of the documents.").

¹⁰⁷ *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (2002).

successful. We brought that case here in New Jersey as well, as I mentioned, for the New Jersey Law Journal and Bergen Record.¹⁰⁸ We were successful in the lower court and, as it is now in the Third Circuit, this case may very well go to the U.S. Supreme Court. This will likely happen if the Court rules in favor of the government, because it would create a split between the Sixth and Third Circuits.

I would be remiss if I did not include a racial profiling case. The ACLU brought an airline profiling case - the problem Magdy was talking about - where selective enforcement bled into the private sector, and private sector individuals felt that they had the authority to racially profile as well.¹⁰⁹ New Jersey has a very strong law that protects against discrimination by private businesses.¹¹⁰ In this case, we had three individuals who boarded an airplane. One individual, Mr. Dasrath, is from South America and is Catholic.¹¹¹ He was flying from Newark to Tampa, and was bumped up to first class because his wife was an employee of the airline. The second individual, Mr. Cureg, was on the same plane; he is Philippine and Catholic.¹¹² He is a mathematics student from a Florida university. He was bumped up to first class because of his frequent flyer miles, and he happened to be seated in front of Mr. Dasrath. A man of Indian descent, a professor, sat next to Mr. Cureg while the plane was still at the gate, and he and Mr. Cureg were talking.¹¹³ Mr. Dasrath sat behind them, but did not know them.

A woman from the coach section came up to the first class section. She was notable because she was carrying a poodle under her arm. Perhaps it could have been Kermit the Frog. Kermit might have been on the flight, and perhaps that would have been suspicious as well. The poodle under her arm made her stand out in Mr. Dasrath's mind. She came up and looked at them - three brown-skinned men - called over the pilot, and said, "These three brown-skinned men look suspicious." Without more, these three brown-skinned men were kicked off the plane.¹¹⁴

Now, as we are talking about security - was *this* about security? No. How do we know that for certain? Continental apologized and put

¹⁰⁸ *N. Jersey Media Group*, 308 F.3d at 198.

¹⁰⁹ *Dasrath v. Continental Airlines, Inc.*, 228 F. Supp. 2d 531 (D.N.J. 2002).

¹¹⁰ N.J. STAT. ANN. § 10:5-3 (West 2003).

¹¹¹ *Dasrath*, 228 F. Supp. 2d at 535.

¹¹² *Id.* at 534.

¹¹³ *Id.* at 524-5.

¹¹⁴ *Id.* at 535.

them on the very next flight without any additional security check. This was not about security; this was about giving in to the prejudice of one particular woman. To me, the only suspicious activity was a woman carrying a poodle in first class.

The New Jersey Constitution says you are to be treated equally.¹¹⁵ You are not to be treated as a second-class citizen because of the color of your skin. You are not imbued with the same actions of other people just because they happen to look like you. We saw on the New Jersey Turnpike that racial profiling was not only improper and illegal - it also did not work. In looking at the statistics of all persons stopped on the New Jersey Turnpike, compared to African Americans stopped - guess what? African Americans were less likely than whites to present evidence of a crime.¹¹⁶ Hispanics, I believe, are five times less likely than whites to present evidence of a crime.¹¹⁷ Now, do I think this is such a great disparity that we should now start profiling whites on the Turnpike? No. What I think it shows is that a number of African Americans and Hispanics and other minorities were picked out for no other reason than that they were minorities, whereas whites were picked out for searches because there was a reason for suspicion. Therefore, I think we can come out of this with an understanding that, when we stop people for suspicion for their actions, that is better police practice than stopping someone because of the color of their skin.

Thank you very much.

E. Remarks by John Malcolm, Esq.

I must say that the disadvantage of going fourth is that I, too, like Ed, have to cast aside my prepared remarks. I think you will find a surprising amount of agreement between my beliefs and what Ed just said. We also have our differences, some significant, some marginal. Although tempted to address those issues now, I will resist that temptation and save those remarks for my rebuttal time and for Q&A.

A little over a year ago the United States experienced one of its darkest hours. On September 11, 2001, as the workday began in the Pentagon and the World Trade Center, terrorists, bent on the death of

¹¹⁵ N.J. CONST. art. 1, ¶ 5.

¹¹⁶ New Jersey Black and Latino Caucus, *A Report on Discriminating Practices Within The New Jersey State Police*, 26 SETON HALL LEGIS. J. 273, 279 (2002).

¹¹⁷ *Id.*

innocent citizens and the destruction of a way of life, executed the final step of a wicked conspiracy. The result was our country's deadliest day since our Northern and Southern forbearers fought each other at Antietam in 1862.¹¹⁸ That day the world lost over 3,000 friends, family members and loved ones in what was the most devastating single attack by a foreign enemy on our shores in our nation's history.

The terrorist attack against America was a shocking and completely unprovoked act of cowardice by a faceless enemy, an enemy against whom we had declared no war. This attack robbed all of us of our collective sense of security and invulnerability, and made clear that there were individuals abroad and within our borders whose mission was simply to kill as many Americans as possible, by whatever means available.

In the aftermath of this tragedy, the Department of Justice pledged to do everything within its power and within the bounds of our laws and our Constitution to protect our country against future attacks. Collectively, we vowed to fulfill the mandate that is set forth in the Constitution "to secure the blessings of liberty to ourselves and posterity,"¹¹⁹ and, "to ensure domestic tranquility."¹²⁰ I believe now, more than ever, this country realizes that security is an essential component of freedom, and that in a very real and tangible way, if we are not secure, we are not free.

Now, some of the measures that we have employed have been aggressive and controversial. I do not apologize for that. We are fighting an enemy who operates in the shadows - both here and abroad - who is well organized, who is patient, who looks for weaknesses to exploit, and who is utterly ruthless once they find them. At the same time, we have to be mindful of the lessons of history: The Palmer Raids after World War I, internment of innocent Japanese-Americans in World War II, and the FBI's counterintelligence program during the late 1950s and 1960s, in which the FBI kept files on people who were engaged in First Amendment-protected activity simply because they advocated unpopular positions.

There are some who believe that the Department of Justice and this

¹¹⁸ National Review Online Staff, NR Comment, *Worse than Pearl Harbor? The Fatalities*, at http://www.nationalreview.com/NR_comment091101.shtml (n.d) (The total number of battle deaths at the Battle of Antietam, the Civil War's bloodiest day, totaled 4,710.).

¹¹⁹ U.S. CONST. Preamble.

¹²⁰ *Id.*

Administration have forgotten these lessons, and that they are acting like some voracious Pac-Man, gobbling up civil liberties in its path. I respectfully disagree with that, and hope to allay some of those concerns. There are those who may argue as a matter of policy that the Department of Justice has gone too far. That is fine; that is your right and that is your prerogative. However, to those who contend that the Department of Justice is acting unlawfully, I contend that the Department of Justice is acting well within established legal boundaries. As the Attorney General has stated on numerous occasions, the ongoing war on terrorism has forced us to think outside the box, but not outside the Constitution. It is my belief that that is exactly what we are doing.

I would like to focus my prepared remarks on some of the more controversial surveillance provisions in the USA Patriot Act, and on the closure to the public of certain so-called special interest immigration hearings.¹²¹ Obviously, there are a lot of topics I could talk about, and I hope I have time to get to some of those which are of interest to you during the question and answer period that follows.

Six weeks after the attacks, Congress passed, and the President signed into law, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act - more commonly known as the USA Patriot Act.¹²² This legislation provides the law enforcement and intelligence communities with some new tools and resources to prevent terrorist acts, and to apprehend and punish those who perpetrate such acts.¹²³

¹²¹ See USA Patriot Act, *supra* note 80.

¹²² See *id.* There are ten separate provisions to the USA Patriot Act: Title I, Enhancing Domestic Security Against Terrorism; Title II, Enhanced Surveillance Procedures; Title III, International Money Laundering Abatement and Anti-Terrorism Financing Act of 2001; Title IV, Protecting the Border; Title V, Removing Obstacles to Investigating Terrorism; Title VI, Providing for Victims of Terrorism, Public Safety Officers, and Their Families; Title VII, Increased Information Sharing for Critical Infrastructure Protection; Title VIII, Strengthening the Criminal Laws Against Terrorism; Title IX, Improved Intelligence, and; Title X, Miscellaneous. *Id.*

¹²³ *Id.* The USA Patriot Act provides many additional tools to law enforcement. First, section 203(a) amends Rule 6 of the Federal Rules of Criminal Procedure to permit the sharing of grand jury information that involves foreign intelligence or counterintelligence with federal law enforcement, intelligence, national defense or national security officials. *Id.* at 203(a). Second, under sections 203(b) and (d), federal law enforcement officials and the intelligence community are able to share information between them. *Id.* at §§ 203(b), (d). Third, section 209 allows for the seizure of voicemail messages pursuant to a warrant. *Id.* at §§ 209(1)-(2). Furthermore, section 216 unambiguously allows law enforcement

There has been an unusual amount of skepticism expressed about the electronic surveillance provisions of the Act. I believe, however, that much of this criticism is based on misinformation and hyperbole about the scope of change brought about the USA Patriot Act. In addition, the Patriot Act includes provisions which enhance civil liberties,¹²⁴ including increasing civil penalties for improper disclosure of surveillance information,¹²⁵ and providing new reporting requirements whenever the government installs its own pen/trap device such as DCS1000,¹²⁶ better known as “Carnivore,” on a network. These have

officials to use a pen register and/or trap and trace device for Internet surveillance. *Id.* at § 216(c), *infra* notes 155, 163. Next, under section 217, the Act makes it lawful for law enforcement officials to intercept wire or electronic communication of a computer trespasser under certain circumstances. *Id.* at § 217(b). Fifth, section 219 amends the Federal Rules of Criminal Procedure to allow a magistrate judge in any district in which terrorism-related activities may have occurred to issue search warrants within or outside the district where the magistrate sits. *Id.* at § 219. *See also*, Jennifer C. Evans, Comment, *Hijacking Civil Liberties: The USA Patriot Act of 2001*, 33 LOY. U. CHI. L.J. 933 (2002) (providing an overview of the USA Patriot Act, especially Titles II, III, and IX, the additional powers it grants to law enforcement, and its potential restraints of civil liberties).

¹²⁴ USA Patriot Act § 102(b)(1) (stating that, “[i]t is the sense of Congress that—the civil rights and civil liberties of all Americans . . . must be protected, and that every effort must be taken to preserve their safety”); § 214(a) (prohibiting the use of pen register and trap and trace devices in any investigation to protect against terrorism that is conducted solely on the basis of activities protected by the First Amendment to the U.S. Constitution).

¹²⁵ USA Patriot Act § 223. Under section 223(a)-(b), the Act provides for administrative discipline of federal officers or employees who violate the prohibitions against unauthorized disclosures of information gathered under the USA Patriot Act. *Id.* Furthermore, section 223(c) provides for civil actions against the United States for damages by any person aggrieved by unauthorized disclosures. *Id.*

¹²⁶ USA Patriot Act § 216(b)(1). Section 216(b)(1) mandates that, when law enforcement officials seek to install or use their own pen register or trap and trace device on the network provider of electronic communication service to the public, the officials must:

“ensure that a record will be maintained which will identify (1) any officer or officers who installed the device and any officer or officers who accessed the device to obtain information from the network; (2) the date and time the device was installed, the date and time the device was uninstalled, and the date, time and duration of each time the device is accessed to obtain information; (3) the configuration of the device at the time of its installation and any subsequent modification thereof; and (4) any information which has been collected by the device.”

Id. at § 216(b)(1); see also Mark Elmore, Comment, *Big Brother Where Art Thou, Electronic Surveillance and the Internet: Carving Away Fourth Amendment Privacy Protections*, 32 TEX. TECH L. REV. 1053, 1077-80 (2001) (explaining that a DCS1000 is an Internet-type software similar to a pen register or trap and trace device); E. Judson Jennings, *Carnivore: U.S. Government Surveillance of Internet Transmissions*, 6 VA. J. L. & TECH. 10, 49, 96 (2001) (noting that the FBI originally named this type of pen register and trap and trace “Carnivore,” but due to unpopular public reaction renamed the device DCS1000);

largely been ignored.

While there are those who contend that the Patriot Act has dramatically expanded the powers of law enforcement, I would contend that the U.S. Patriot Act is actually a very measured piece of legislation. Two fundamental objectives animate its provisions: increase our ability to surveil terrorist networks, and increase our ability to swiftly track down and apprehend terrorists.

The Act (1) expands existing provisions that permit law enforcement, with judicial oversight, to intercept communications;¹²⁷ and (2) creates some new terrorism-related crimes such as developing, possessing or using biological weapons,¹²⁸ engaging in financial transactions with a terrorist organization or government,¹²⁹ and providing material support to terrorist organizations.¹³⁰ The Act also facilitates information sharing between the law enforcement and intelligence communities,¹³¹ so that they may better coordinate their

Robert Berkowitz, *Packet Sniffers and Privacy: Why the No-Suspicion-Required Standard in the USA Patriot Act is Unconstitutional*, 7 *COMP. L. REV. & TECH. J.* 1, 7, n.46 (2002) (providing a detailed account Internet communications and the specific software and procedures which are part of a DCS1000).

¹²⁷ USA Patriot Act §§ 209, 212, 216, 217. Section 209 allows the seizure of voicemail messages under a warrant. *Id.* at § 209. Under section 212, electronic communication and remote computing service providers are permitted to make emergency disclosures to a governmental entity of a customer's electronic communication to protect life. *Id.* at § 212(a). Section 216 allows pen register and/or trap and trace devices to be used on the Internet. *Id.* at §§ 216(c)(2)-(3). Under section 217, law enforcement officials can legal intercept the electronic communications of a computer trespasser. *Id.* at § 217(2).

¹²⁸ USA Patriot Act § 817(1). Section 817(1) amends the Federal Criminal Code by prescribing penalties for knowingly possessing biological agents, toxins, or delivery systems in certain circumstances. *Id.*

¹²⁹ USA Patriot Act § 376. Under section 376, the Act amends the Federal criminal code to extend the prohibition against the laundering of money to specified proceeds of terrorism. *Id.*

¹³⁰ USA Patriot Act §§ 805, 810. It should be noted that the USA Patriot Act did not create a new crime for supplying material support for terrorism, as this crime already existed in the Federal Criminal Code; however, the Act did amend several provisions dealing with supplying material support for terrorism. *Id.* For instance, Section 805 applies the prohibitions against providing material support for terrorism to offenses outside of the United States, and expands material support to include expert advice or assistance. *Id.* at § 805(a)(2). Under section 810(d), the Act increases the penalties for providing material support. *Id.* at § 810(d).

¹³¹ USA Patriot Act §§ 203(a)-(b), (d). Section 203(a) promotes the sharing of grand jury information between federal law enforcement and the intelligence community. *Id.* at § 203(a). Under section 203(b), federal law enforcement officials may disclose to the intelligence community "the contents of any wire, oral or electronic communication, or evidence derived therefrom . . ." *Id.* at § 203(b). Section 203(d) allows intelligence

efforts and “connect the dots” before terrorists act, and so they can apprehend and prosecute to the fullest extent of the law those who engage in terrorist activities.

The USA Patriot Act accomplishes many of its objectives by updating surveillance laws to take account of changes in communication technology, such as increased usage of e-mail, the Internet, and cellular phones.¹³² When viewed in this way, the USA Patriot Act is actually technology neutral. In other words, just because some new technologies have emerged should not mean that criminals should be provided with new ways to thwart legitimate law enforcement activities. Cyberspace should not become a safe haven for criminal activity. By the same token, the same privacy protections that were afforded to people during the heyday of the telephone have, for the most part, been extended to these new technologies too.

One of the more controversial provisions in the Patriot Act involves the application of the Pen Register and Trap and Trace statute to the Internet.¹³³ Congress enacted the Pen Register/Trap and Trace statute (hereinafter “Pen/Trap statute”) in 1986, and it requires the government to seek a court order for the production of so-called pen/trap information.¹³⁴ In rough terms, for those of you who are not technology-savvy, a pen register records outgoing addressing information and a trap and trace device records incoming addressing information. So for a telephone, for instance, the pen register would report the numbers dialed from a phone, and a trap and trace device would record incoming telephone numbers.

In 1979, the Supreme Court ruled in the telephone context that there was no reasonable expectation of privacy in this sort of non-content information, because it is shared between the user and user’s service provider.¹³⁵ This means that from a constitutional perspective,

information obtained as part of a criminal investigation to be disclosed to federal law enforcement officials. *Id.* at § 203(d).

¹³² *Id.* at §§ 210, 216, 220.

¹³³ *Id.* at § 216.

¹³⁴ Title III of the Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1868 (1986) [hereinafter “ECPA”]; *See also* 18 U.S.C. § 3123 (2002) (procedure for the court to allow the installation and use of a pen register or trap and trace device); Nathan C. Henderson, Note, *The Patriot Act’s Impact on the Government’s Ability to Conduct Electronic Surveillance of Ongoing Domestic Communications*, 52 DUKE L.J. 179 (2002) (providing a thorough examination of the United States’ electronic surveillance statutes from their original enactment in 1968 up to and including the USA Patriot Act).

¹³⁵ *Smith v. Maryland*, 442 U.S. 735 (1979).

no court order was necessary for law enforcement to compel the production of such information. When Congress enacted the Pen/Trap statute, it provided statutory protections that had not been accorded by the Constitution. However, at that time Congress did not anticipate the new technologies that we have today, such as the Internet. Indeed, some of the language that was drafted by Congress appears to relate only to the telephone, such as defining pen register by reference to “numbers dialed.”

The Patriot Act updates the Pen/Trap statute to make it technology-neutral, using language like, “dialing,” “routing,” “signaling” or “addressing” information.¹³⁶ It also makes explicit a previously implicit and constitutionally based distinction between content and non-content information. Thus, the Pen/Trap statute now unambiguously applies to Internet communications, and allows the government to get Internet protocol address information.¹³⁷ Yet this provision does not signify a major expansion of government power. In fact, it is hardly an expansion at all. Prior to the Patriot Act, the government had already been using the Pen/Trap statute, with the approval by the overwhelming majority of courts that considered the issue, to get non-content Internet information. The Patriot Act simply confirmed that this is proper.

Consider, for example, the case of James Kopp, who was indicted for the murder of Dr. Barnett Slepian, an abortion doctor in East Amherst, New York.¹³⁸ Mr. Kopp, who was wanted by law enforcement, would communicate with his cohorts through a shared Yahoo! account¹³⁹ by sending e-mail messages in the accounts drafts box, which they then accessed through the Internet.¹⁴⁰ Federal prosecutors sought a trap and trace order for the account and got information concerning the IP addresses from which the account was

¹³⁶ U.S.A. Patriot Act, at §§ 216(a), (c)(2)-(3).

¹³⁷ *Id.* at § 216(a).

¹³⁸ Jerry Zremski, *Did Kopp Have Help?*, BUFFALO NEWS, Dec. 29, 2002, at A1 (providing a detailed account of the murder of Dr. Barnett Slepian, the flight of James Kopp, and Mr. Kopp's confession to the shooting of Dr. Slepian).

¹³⁹ Niles Latham & Andy Geller, *Kopp a Mystery Man in Five Countries*, N.Y. POST, Mar. 31, 2001, at 6 (stating, “[The FBI] also read the messages the couple and Kopp left each other in a Yahoo! Email account.”); Michael Beebe & Dan Herbeck, *Capturing Kopp: Dogged Work Led to Arrests*, BUFFALO NEWS, Mar. 30, 2001, at A1 (reporting on the FBI procedure in obtaining search warrants for the apartment and email account of Kopp's co-conspirators).

¹⁴⁰ *Id.*

accessed. Through that information, Mr. Kopp was traced to France, apprehended, and extradited to this country, where he awaits trial for the charges. All of that occurred in February of 2001, in the early days of the Bush administration - long before the events of September 11th.

The Act also updates the Pen/Trap Act to permit the use of a single court order to trace a communication nationwide,¹⁴¹ even when that communication travels beyond the boundaries of the district that issued the order. It also expands the geographic scope of subpoenas and search warrants for stored or unopened e-mail, voice mail, and other evidence.¹⁴² Given the exigencies of these investigations and the inherently interstate nature of the communications we are talking about, it makes little sense, and does nothing substantive to enhance privacy, to force federal investigators to waste valuable time and resources getting separate orders in multiple jurisdictions.

As was the case with the telephone, in order to seize stored messages (in other words, content), law enforcement officers are going to have to establish probable cause before a judge in order to obtain a search warrant. In order to engage in real-time interceptions—whether conversations are taking place over the telephone or via e-mail – law enforcement authorities still have to go before judges and satisfy the more stringent dictates set forth in Title III.¹⁴³

Another provision of the USA Patriot Act that has generated a surprising amount of opposition is the Patriot Act's computer trespasser exception—also known as the hacker trespasser exception—to the Wiretap Act.¹⁴⁴ I believe a good portion of that resistance comes from

¹⁴¹ USA Patriot Act §216(b). Section 216(b) allows a court to authorize “the installation and use of a pen register or trap and trace device *anywhere within the United States*, if the court finds that the attorney for the [United States] Government has certified to the court that the information likely to be obtained by such installation and use is relevant to an ongoing criminal investigation.” *Id.* (emphasis added).

¹⁴² USA Patriot Act §§ 210, 220. Even though the geographic range for subpoenas did not change, section 210 did expand the scope of subpoenas for electronic communication records to include the length and type(s) of services utilized, temporarily assigned network addresses, and the means and source of payment. *Id.* at § 210. Under section 220, the Act provides for a nationwide service of search warrants for electronic evidence, including email. *Id.* at § 220.

¹⁴³ ECPA, *supra* note 134; 18 U.S.C. § 3123 (2002).

¹⁴⁴ USA Patriot Act § 217. This section defines a computer trespasser as a person (1) “who accesses a protected computer without authorization;” and (2) does not include a person who has “an existing contractual relationship with the owner or operator of the protected computer.” *Id.* at § 217(1). Furthermore, under this section, it is lawful for a law enforcement official to intercept the wire of electronic communication of a computer

people who simply do not know what this exception is. For example, there was one senator during debates who said the exception could be used to monitor the e-mails of an employee who used her computer to shop for Christmas gifts. This is simply untrue.

So what is the hacker trespass exception? To explain that I would like to give a brief overview of the Wiretap Act which provides the statutory framework governing real-time electronic surveillance of the contents of communications.¹⁴⁵

The structure of the Wiretap Act is surprisingly simple. It assumes every private communication can be modeled as a two-way connection between two participating parties, such as a telephone call between person "A" and person "B". The statute prohibits a third party, such as the government, from intercepting a private communication between the parties using an electronic, mechanical or other device, absent a court order, unless one of several statutory exceptions applies.¹⁴⁶

Under the general framework as it existed prior to the Patriot Act,¹⁴⁷ the communications of network intruders, which may be routed through a chain of compromised computer systems, could arguably be protected by the Wiretap Act from interception. In permitting government intervention, the Patriot Act enacted a sensible exception to that rule. The computer trespasser exception allows victims of computer attacks to authorize law enforcement to intercept the wire or electronic communications of a computer trespasser.¹⁴⁸ It includes

trespasser when (1) the interception is authorized by the owner or operator of protected computer; (2) the law enforcement officer is engaged in an investigation; (3) the law enforcement official "has reasonable grounds to believe that the contents of the computer trespasser's communication will be relevant to the investigation," and; (4) the "interception does not acquire communications other than those transmitted to or from the computer trespasser." *Id.* at § 217(2).

¹⁴⁵ 18 U.S.C. §§ 2510-2521 (2002).

¹⁴⁶ *Id.* § 2511 (2002). Except as otherwise specifically provided in the statute, it is unlawful for any person to intentionally intercept, endeavor to intercept, or procure any other person to intercept, or endeavor to intercept, any wire, oral, or electronic communication.

¹⁴⁷ See USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

¹⁴⁸ USA Patriot Act, § 217(2), 115 Stat. at 291 (amending 18 U.S.C. § 2511 (2000)). Sec. 217 Interception Of Computer Trespasser Communications, provides in part, that: (2) (i) It shall not be unlawful under this chapter for a person acting under color of law to intercept the wire or electronic communications of a computer trespasser transmitted to, through, or from the protected computer, if—

(I) the owner or operator of the protected computer authorizes the interception of the computer trespasser's communications on the protected computer;

several significant limitations to ensure that it does not expand beyond that core function. First, the owner or operator has to authorize the interception of those communications.¹⁴⁹ More importantly, the interception cannot acquire any communications other than those transferred to or from the hacker.¹⁵⁰ And finally, the exception may not be used when the party to be monitored has an existing contractual relationship with the owner or operator of the computer.¹⁵¹ Consequently, an entity's legitimate customers and employees may not be monitored under this exception. In sum, the statute has been carefully crafted to ensure that only genuine trespassers are being monitored. Although narrowly confined in scope, the computer exception is a significant new tool for law enforcement.

Some have criticized this exception for restricting the judicial role in investigations. It is true that without the exception, law enforcement authorities would have to make a probable cause showing before a magistrate judge before intercepting a hacker's communications. However, I believe the exception strikes the proper balance. When a citizen finds a burglar in the basement in the middle of night and wants to protect his family and find out who this person is and why that person is there, he calls the police and he wants and deserves immediate action. By being able to act immediately, the odds of catching the burglar before real harm occurs increase dramatically. When the law enforcement officer gets that call, there is no need to wake a judge in middle of night to get a search warrant. The burglar has no right to or reasonable expectation of privacy to prowl in the middle of the night in somebody else's basement. The same is true in the online world. There is no right to and no reasonable expectation of privacy to prowl in somebody else's computer system; therefore, just as there is no need to

(II) the person acting under color of law is lawfully engaged in an investigation;

(III) the person acting under color of law has reasonable grounds to believe that the contents of the computer trespasser's communications will be relevant to the investigation; and

(IV) such interception does not acquire communications other than those transmitted to or from the computer trespasser.

Id.

¹⁴⁹ See USA Patriot Act, § 217(2)(i)(I).

¹⁵⁰ See USA Patriot Act, § 217(2)(i)(IV).

¹⁵¹ See USA Patriot Act, § 217(1)(C). Computer trespasser "does not include a person known by the owner or operator of the protected computer to have an existing contractual relationship with the owner or operator of the protected computer for access to all or part of the protected computer." *Id.*

wake up a prosecutor or judge in the middle of night in the real world context, there is also no need to do so in the cyber-world context. No legitimate privacy interest would be served by requiring a court order and judicial oversight prior to intervention.

Moreover, just as with the burglar in the basement, when a computer hacker enters a sensitive network, it is usually impossible to tell at the outset whether this hacker is a prankster or "script kiddie" who is out to create minor mischief, or a cyber-terrorist who is trying to get critical information, creating imminent threat to life and limb. Under such circumstances time is of the essence. Being able to act immediately increases the chances of finding out who this hacker is and what that person's intent is, thereby preventing harm to the direct victim of the intrusion, as well as possibly to other innocent victims who might be affected.

While there is no question the USA Patriot Act has created new tools, it has also updated existing laws and continues to respect privacy rights enjoyed by all of us. The Act also continues to provide oversight by the judiciary and, ultimately, through sunset provisions, by Congress.

As I am sure you all know, and as you have just heard from Ed Barocas, the Department of Justice has declined to disclose the identities, locations, and other related information about certain immigration detainees, and contends that immigration hearings involving so-called special interest cases should be closed. Let me make it clear that the special interest cases are a small fraction of the immigration hearings that take place every day, and a special interest case is one where there is intelligence that suggests that the person involved has knowledge about or possibly participated in a past or planned terrorist act.¹⁵² Critics have argued that such a position by the Department violates the Freedom of Information Act and the First Amendment.¹⁵³ With all due respect, the Department of Justice believes that these arguments misperceive the broad constitutional authority the Congress and, by express delegation, the Attorney General exercise

¹⁵² See *N. Jersey Media Group*, 308 F.3d at 209. According to Dale L. Watson, the FBI's Executive Assistant Director for Counterterrorism and Counterintelligence, the designated aliens "might have connections with, or possess information pertaining to, terrorist activities against the United States." *Id.*

¹⁵³ See Susan M. Akram & Kevin R. Johnson, *Migration Regulation Goes Local: The Role of States in U.S. Immigration Policy: Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 332 (2002).

over immigration matters, and the fundamental difference between judicial proceedings and executive branch administrative proceedings.

While there is the rich history and common law tradition of openness with respect to civil and criminal judicial proceedings,¹⁵⁴ there is no rich history or tradition of openness with respect to administration matters. To the contrary, under immigration rules, removal proceedings can be and frequently have been closed to the public. Under regulations dating back nearly four decades, immigration proceedings may be closed to protect witnesses, parties, and the public interest.¹⁵⁵ It is hard

¹⁵⁴ See U.S. CONST. amend. VI. The Sixth Amendment gives a criminal defendant the right to a public trial. *Id.* See also *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555, 577-80 (1980) (finding that the press and public have a right of access to criminal trials even where the defendant expressly waived his right to a public trial and desires the proceedings to be closed.); *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) (stating, "First Amendment secures to the public and the press a right of access to civil proceedings; to limit the public's access to civil trials there must be a showing that the denial serves an important governmental interest and that there is no less restrictive way to serve that governmental interest"). However, "the history of access to political branch proceedings is quite different." *N. Jersey Media Group*, 308 F.3d at 209. In *North Jersey Media Group*, the court held that the newspapers had no First Amendment right of access to "special interest" cases. *Id.* The court found that extensive and compelling evidence shows that the framers rejected any unqualified right of access to the government and that the Congressional practice confirms that. *Id.* at 209. It is worth noting that in another very recent case which addressed the issue of whether the government's closure of "special interest" deportation cases violated the public's First Amendment right of access, the Sixth Circuit ruled that there is a First Amendment right of access to deportation proceedings. *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002). On the issue of whether there is a rich history or tradition of openness with respect to administration matters, the court believed that "the history of administrative proceedings is briskly evolving to embrace open hearings." *Id.* at 703 (quoting 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 14:13, at 58-61 (2d ed. 1980)). The court cited *Fitzgerald v. Hampton*, where the court found closing a civil servant's termination hearing violated due process, 467 F.2d 755, 766-67 (D.C. Cir. 1972). It also cited *Morgan v. United States*, in which the Supreme Court recognized that:

[T]he vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing,"—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an "inexorable safeguard."

304 U.S. 1, 14-15 (1938).

¹⁵⁵ See 8 C.F.R. §3.27 (2003) (mandating the closure of certain hearings, such as those involving abused alien children, and permitting the closure of all other hearings to protect

to imagine, frankly, a situation in which the public's interest in maintaining secrecy with respect to these special matters is any stronger.

Disclosure of detainee identities and the opening of immigration proceedings in special interest cases would reveal confidential sources and methods that we are using to fight the ongoing war in terrorism.¹⁵⁶ By piecing information together, terrorist organizations would be able to learn what we know, and, more importantly, what we don't know. And with such knowledge, terrorists might be able to alter or improve their plans in order to wreak havoc and avoid detection.¹⁵⁷

Such information might also reveal the identities of detainees who are cooperating, thereby limiting their usefulness, creating possible threats to those individuals and their family members, and jeopardizing the security of the locations in which they are being held.¹⁵⁸ Disclosure

"witnesses, parties, or the public interest.").

¹⁵⁶ *Detroit Free Press*, 303 F.3d at 705-6. In *Detroit Free Press*, the court agreed that the government demonstrated a compelling interest in closing the deportation proceedings. *Id.* The court cited the affidavit of James S. Reynolds, Chief of the Terrorism and Violent Crimes Section of the Justice Department's Criminal Division, which explained the rationale for prohibiting public access to the proceedings as follows:

1. [D]isclosing the names of 'special interest' detainees. . . could lead to public identification of individuals associated with them, other investigative sources, and potential witnesses. . . [and t]errorist organizations. . . could subject them to intimidation or harm.
2. [D]ivulging the detainees' identities may deter them from cooperating. . . terrorist organizations with whom they have connection may refuse to deal further with them." thereby eliminating valuable sources of information for the Government and impairing its ability to infiltrate terrorist organizations.
3. [R]eleasing the names of the detainees. . . would reveal the direction and progress of the investigation." and "[o]fficial verification that a member [of a terrorist organization] has been detained and therefore can no longer carry out the plans of his terrorist organization may enable the organization to find a substitute who can achieve its goals.
4. [P]ublic release of names, and place and date of arrest. . . could allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence.
5. [T]he closure directive is justified by the need to avoid stigmatizing 'special interest' detainees, who may ultimately be found to have no connection to terrorism.

Id. However, the court ruled that the government failed to establish a narrowly tailored restriction on the closure of special interest cases. *Id.* at 710; *see also* John P. Elwood, *Prosecuting the War on Terrorism: the Government's Position on Attorney-client Monitoring, Detainees, and Military Tribunals*, 17-SUM CRIM. JUST. 30, 33-34 (Summer, 2002).

¹⁵⁷ Elwood, *supra* note 156, at 33-34.

¹⁵⁸ *Id.*

might also serve as a disincentive to other detainees, who might otherwise have cooperated against terrorist organizations.¹⁵⁹

It is also worth remembering that, although the government has not disclosed who these detainees are, they are not - contrary to what you may have heard - being held incommunicado to the outside world. All are informed of their right to an attorney.¹⁶⁰ All have been provided with a list of attorneys who are available on a pro bono basis to them,¹⁶¹ and can even make free telephone calls and have private meetings with their attorneys.¹⁶² These people remain free at any time to out themselves. Some have; most have not. The privacy rights of those people who are being held who have not been publicly linked to the tragic events of September 11th should be respected. And just because the government has attempted to accommodate these detainees by allowing them to out themselves rather than relying on gag orders does not lessen the government's need to maintain secrecy.

In conclusion, let me say that in 1917 President Wilson sought a declaration of War from Congress with the exhortation that the United States must make the world safe for democracy.¹⁶³ Eighty-five years later, in a world brought closer together by instantaneous communications and air travel, we are again called upon to make the world safer for democracy by waging a war on terrorism, much of which is being waged on our shores. The Department of Justice, cognizant of its duty to follow the Constitution and the laws of the United States, is doing its part to win that war, to protect our citizenry and to preserve our freedoms and way of life.

Thank you.

F. Rebuttals

Mark Alexander, Moderator: Now, in the interest of a little bit of rebuttal, let me give everybody just the very shortest minute or two.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See Letter From President Wilson to the Senate and House Representatives of the United States (Apr. 2, 1917), 17 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 499, 8226 (James D. Richardson ed., 1987). Wilson's message of April 3, 1917 requested a declaration of war on Germany, in which he listed more than a dozen reasons for entering the war, including to "make the world safe for democracy." *Id.* at 8231.

Let's work from the order in which we started. A minute or two, and I think for this period we can also stay in our seats.

Rebuttal by Mr. Magdy Mahmoud: The message I got from Mr. Mark Smith is, for example, if you are born into a Cuban family, expect to be treated like a drug dealer for the rest of your life. Or if black and born into an African-American family, expect to be treated like a thief or slave the rest of your life. If you are born to an Arab family, expect to be treated like a terrorist for the rest of your life, regardless of what degree you gain, how good a citizen you are, what contribution you make to society, because of your ethnicity. This is the message I got. And this is really very weird. I never expected to hear such an idea in the United States. I would expect that idea to be proposed back in the Nazi era, in Germany. This idea that has been abandoned, banned and condemned by the entire world multiple times.

We know that these ideas of the execution of millions of Jews in Germany in World War II will lead to nothing but to segregate our community. This is not going to ensure against a terrorist act. We should preserve our unity. This is the fundamental basis for our success against terrorism. I cannot imagine such a message to be heard today. Given a vision of these ideas that are being promoted, I would expect ten years from now an announcement in the airports, "Ladies and gentlemen, U.S. Airlines are going to depart in forty-five minutes. Arabs and Blacks should stand on the right line for an extensive search." Later, you will find a program that affects all Chinese. Such an idea is completely rejected and is not accepted in the United States. We are not going to prosper and succeed if we adopt these ideas. This is really very seminal to similar statements by Rev. Falwell. I do not know if you heard him last night on 60 Minutes.¹⁶⁴ He stated any follower of Muhammad, the Prophet of Islam, is a terrorist.¹⁶⁵ One billion four hundred thousand people are terrorists, one-fourth of the world's population.¹⁶⁶ I cannot imagine that.

¹⁶⁴ Bob Simon, *Zion's Christian Soldiers; How Conservative Christians See Israel's Role in Bringing on the Second Coming of Christ*, 60 MINUTES, Oct. 6, 2002.

¹⁶⁵ *Id.* "I think Mohammed was a terrorist . . . that he was a . . . man of war . . . [a]nd I do believe that Jesus set the example for love, as did Moses. And I think that Mohammed set an opposite example." *Id.*

¹⁶⁶ *See May Allah Almighty bless the Christians for fighting Paganism!*, at www.answering-christianity.com/bless_the_missionaries.htm last visited Apr. 14, 1999. "The Arab and Muslim world consists of more than 1.2 to 1.4 billion

In my opinion, as I stated previously, if we really get to the bottom of the issue, security is our concern, and the concern of every single person in the United States and overseas as well. For instance, why did we ignore the fact that the head of the ICI in Pakistan wired \$100,000 to Mohammed Atta, the chief or head of the terrorists, one week prior to September 11th?¹⁶⁷ Why did we ignore this? Millions of facts like that we should point out, instead of just pointing because of race or religion or whatnot.

I am really very shocked, and I cannot really believe that I am hearing these ideas in the United States. Thank you.

Rebuttal by Mark W. Smith, Esq.: Reality and facts have always been quite upsetting to many purported thinkers who believe if we just wish enough, hope enough, enact enough “feel good” government programs, have enough intellectual conversations, then the world will automatically change for the better. The reality is that we all live – law enforcement lives – in the real world, and not in the world of the theoretical. In evaluating the efficacy of criminal and terrorist profiling, we need to discuss the effects thereof in the real world.

Using race, ethnicity, and other identifying traits is hardly new. In the 1960s, when terrorists of a different type – white supremacist terrorists – were going around the South burning black churches and terrorizing the black community,¹⁶⁸ what did the Justice Department under liberal icon Robert Kennedy, Attorney General at the time, do? He, with the FBI, went out and investigated groups of whites.¹⁶⁹ They did not seek to stop white terrorists by investigating blacks, Hindus, and Muslims. Of course, the FBI and DOJ did not investigate all whites. Instead, they investigated white supremacist groups, and they, in

people.” *Id.*

¹⁶⁷ Dawn the Internet Edition, *Gen Mahmud's Exit Due to Links with Umar Sheikh*, (2001), at <http://www.dawn.com/2001/10/09/top13.htm>. “Informed sources said there were enough indications with the US intelligence agencies that it was at Gen Mahmud’s instruction that Sheikh had transferred 100,000 US dollars into the account of Mohammed Atta, one of the lead terrorists in strikes at the World Trade Center on Sept 11, it adds.” *Id.*

¹⁶⁸ Curtis Wilkie, *Miss. Whites Recall 1964 Church Fires, Decry Latest Wave*, BOSTON GLOBE, June 27, 1996, National.Foreign at 1.

¹⁶⁹ Athan G. Theoharris, *Political Counterintelligence*, in *SPYING ON AMERICANS: POLITICAL SURVEILLANCE FROM HOOVER TO THE HUSTON PLAN 1* (Temple U. Press, 1978), available at www.icdc.com/~paulwolf/cointelpro/theoharris.htm (last visited Jun. 17, 2003). In response to the spread of the Ku Klux Klan, Attorney General Robert Kennedy sent a team to Mississippi to help identify individuals involved in terrorism. *Id.*

determining whom to investigate, obviously did consider the race of the suspected domestic terrorists. That's correct – Robert Kennedy, liberal icon, engaged in so-called racial profiling. But remember, the practice was not racial profiling; it was criminal or terrorist profiling.

Was it wrong, when the United States government was trying to track down the Unabomber,¹⁷⁰ to say, “we believe it is a white male with a scientific background?” Was it wrong to include the physical characteristic “white?” Ed Barocas talked about three clients on the plane. Because I am not aware of those facts, I cannot comment on that case or its effect. However, we know Richard Reid,¹⁷¹ the shoe bomber, was stopped at Charles de Gaulle Airport in Paris, France, and prevented from boarding a plane to the United States. The airline put him up overnight because they would not allow him on that flight.¹⁷² They did, however, the next day let him board a plane to the United States the next day.¹⁷³ Thank God two people who were suspicious of his activity and his appearance and conduct and, thus, acted to prevent him from detonating the explosives in his shoes.¹⁷⁴

When law enforcement fails to consider the facts available in the name of political correctness, then resources are utterly wasted and lives are placed at risk. For example, in December of 2001 in Arizona, airport screeners wasted time by investigating the eighty-six year old man who appears on Exhibit Board 2.¹⁷⁵ This eighty-six year old white man is General Joseph Foss. General Joseph Foss earned the

¹⁷⁰ Susan Schmidt, *Anthrax Letter Suspect Profiled*, WASH. POST, Nov. 11, 2001, at A1.

¹⁷¹ CNN.com Law Center, *Richard Reid Pleads Guilty; Faces Minimum Sentence of 60 Years*, available at <http://www.cnn.com/2002/LAW/10/04/reid.guilty.plea> (Jan. 22, 2003). “[Richard] Reid, 29, a British citizen and convert to Islam, was arrested for allegedly trying to light a fuse to set off explosives concealed in his sneakers while on American Airlines Flight 63 from Paris to Miami on December 22.” *Id.*

¹⁷² Nick Hopkins, *Basically, I Got on the Plane with a Bomb*, THE GUARDIAN, Oct. 5, 2002. “He [Reid] had also raised suspicions at Charles de Gaulle airport, Paris, only 24 hours before he boarded the plane on December 22. Although security officials stopped him from boarding on the first occasion, he was allowed on the next day. He traveled without luggage and had a one-way ticket.” *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* “He was seen trying to light the inner tongue of his sneaker, from which a wire was protruding, and was subdued by flight attendants and passengers, who pinned him down. In the struggle he bit a flight attendant.” *Id.*

¹⁷⁵ Mr. Smith points to the picture of eighty-six year old General Joseph Foss. See Joyce Howard Price, *Medal of Honor Fails to Impress Airline Security*, WASH. TIMES, Jan. 19, 2002 at A1. “‘I kept explaining that it was the highest medal you can receive from the military in this country, but nobody listened,’ General Foss said.” *Id.*

Congressional Medal of Honor by downing twenty-six Japanese fighter planes over the Pacific in World War II. In December, Joseph Foss – former president of the All-American Football Conference, and former Governor of South Dakota – was traveling from Arizona to visit the U.S. Military Academy at West Point to speak with cadets. General Foss brought his Congressional Medal of Honor to show the cadets. The Medal, which was encased, is in the shape of a star. The airport screeners in Arizona stopped and harassed General Foss for about an hour apparently because they were worried that this eighty six year old white man might use the Medal as a weapon such as a Chinese throwing star to commandeer the plane. Was interrogating and harassing an 86 year old Congressional Medal of Honor recipient a wise use of scarce law enforcement resources? I think not. Does spending an hour's worth of scarce law enforcement resources to investigate and interrogate General Foss make any of us safer? It does not. Thank you.

Rebuttal by Edward Barocas, Esq.: I think the real issue in use of resources is to focus on action, on what the person is doing. And I am sorry about the picture of Kermit the Frog and all, but if Kermit the Frog was showing suspicious action, then, yes, Kermit the Frog should be stopped. But you know what? He should not be stopped just for being green. It is not easy being green. Right now it is not easy being brown.

Mark W. Smith: It is not easy being liberal today.

Edward Barocas: You know, you said that reality is sometimes hard for liberals, but yet I think I have demonstrated a particular factual reality. The Attorney General, for example, admitted to racial profiling here on the New Jersey Turnpike.¹⁷⁶ What is happening is “scapegoating,” or stereotyping - saying that one person, based on the color of his skin, is more “suspect” not for what they do but what they look like. That is not only a scary thought, but something we specifically decided against when we passed the Bill of Rights. That is not right, not here in America. You do not treat someone as a second-class citizen because of the color of their skin, because of their religion, because of their gender. They include gender in New Jersey as well,

¹⁷⁶ Kathy Barrett Carter, *Trooper Chief Wants to Stay on the Job*, STAR-LEDGER, Dec. 17, 2001, available at 2001 WL 31290861.

because of gender identification or sexual orientation. They do not become second-class citizens. What we have learned in New Jersey - on the New Jersey Turnpike - is to focus not on race but the *actions* that make a person suspicious.

And finally, just in response - there are a number of obvious concerns with the U.S. Patriot Act.¹⁷⁷ One is that it conflates law enforcement and intelligence.¹⁷⁸ It is much easier for law enforcement to get things done under the Foreign Intelligence Act, and the Patriot Act has conflated the two by putting some general criminal investigations under the more singular process of FISA.¹⁷⁹ Consequently, it avoids the probable cause requirement, warrant requirement, the higher degree that law enforcement is held to under the criminal investigatory function, as opposed to the intelligence data.¹⁸⁰

As far as the proceedings go, it is true that the immigration proceedings are not criminal proceedings. They are immigration proceedings. And could they have been closed as we heard? Yes, they could have been. And do you look to history in determining whether a proceeding should have press access granted or public access granted? You do look to the history. But the history does not show that these proceedings *should* be closed. It shows that they *can* be closed by order of a judge, where a judge makes the determination to do so. In other words, the default position was that these proceedings be open, that immigration hearings be open, that the public has the right to know what is going on. Because if it looks like it, smells like it, acts like it,

¹⁷⁷ Pub. L. No. 107-56, 115 Stat. 272 (2001).

¹⁷⁸ Evans, *supra* note 123, at 973-84; Henderson, *supra* note 134, at 203-07; *See also* John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1088-96 (2002) (providing a constitutional analysis of several USA Patriot Act provisions under the First, Fourth, Fifth, and Sixth Amendments); Melissa K. Mathews, *Current Public Law and Policy Issues, Restoring the Imperial Presidency: An Examination of President Bush's New Emergency Powers*, 23 HAMLINE J. PUB. L. & POL'Y 455, 480-88 (2002) (examining the increase of President Bush's Executive powers under Executive Orders, the USA Patriot Act, and other anti-terrorism initiatives).

¹⁷⁹ Evans, *supra* note 123, at 975-78 (detailing how the USA Patriot Act violates notice and probable cause requirements of the Fourth Amendment by allowing law enforcement to circumvent these mandates through the Foreign Intelligence Surveillance Act of 1978 ("FISA")); *See also* Henderson, *supra* note 134, at 194-99 (focusing on the provisions of the USA Patriot Act that would allow law enforcement to use the lesser standards of FISA, rather than the heightened standards of domestic surveillance).

¹⁸⁰ *Id.*

well you know what? These proceedings look like and smell like quasi-criminal proceedings.

You are kicking someone out of the country. I am not saying that the individuals that we are trying to represent had a right to stay in this country. In fact, many of them were rightfully deported under the law. What I was saying is that the process should not be kept secret from the public, and that the process that they are due be afforded through legal representation.

Rebuttal by John Malcolm, Esq.: With respect to FISA, with all due respect, I disagree with that. Some things are easier and some more difficult. The circumstances under which the government can obtain a FISA order are dramatically circumscribed. We can talk about what FISA is for those interested.

I do have to say something about racial profiling. I do not speak for Jerry Falwell. I do not speak for Continental Airlines or whoever it was who booted the people off the plane, and I agree with Magdy and Ed in the sense that I do not believe, because of the color of one's skin or ethnicity or national origin, you should be presumed to be a criminal or second class citizen. I do speak for the Department of Justice with respect to what the Department of Justice is doing. And let me say this: the Department of Justice is *not* engaging in racial profiling, and here is why. We do have to use scarce resources intelligently. We have few of them. It is also a fact that we are at war with a particular organization, Al Qaeda; and that Al Qaeda operates in certain countries and targets certain demographics. People were being contacted, in the situations that Magdy referred to, not because of their race, their religion or ethnicity, they were contacted because of their travel patterns, where they began destinations, amounts of time in which they stayed in particular places, their age, and related demographic information that Al Qaeda targets. As well, just to put this in perspective, I believe the voluntary interview program involved five thousand participants. Magdy mentioned that eight thousand have been interviewed. I will not quibble. Approximately thirty million immigrants enter our shores every year. The number of people who were interviewed is a small fraction of this number. Nonetheless, those who were interviewed should be treated with respect, as I believe they were, and those who did cooperate with the voluntary interviews deserve our appreciation and thanks.