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**THE FEDERALIST  
SOCIETY**

*and*

**Pepperdine Law School**

*present*

**Combatting Terrorism and the  
Impact on Civil Liberties**

**February 6, 2002**

**Pepperdine University Law School**



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THE FEDERALIST SOCIETY  
Combatting Terrorism and the  
Impact on Civil Liberties

(6:30 p.m.)

MR. ROSEN: I'd like to take this chance to thank Pepperdine. I'd also like to give special thanks student the President of the Federalist Society chapter, Jason Jarvis, who has taken quite a bit of the laboring over for putting together tonight's event. He has placed on each row some note cards. You are all encouraged to write down some questions. And during the course of the evening as speakers finish, Jason will collect them and turn them in to Rick, our moderator, who will then ask them of the panelists at the conclusion of the evening. So, I would urge you all to take advantage of that.

I'd also like to also say a final thank you to Manny Klausner, who is the President of the Libertarian Law counsel. He's one of our co-sponsors this evening.

Without further ado, I would like to introduce our moderator this evening. We are very

1 fortunate to have Rick Druyan, who is a partner at  
2 Munger, Tolls and Olson, and former Chief Assistant  
3 U.S. Attorney on multiple occasions. He has also  
4 served the public of Los Angeles as both Assistant  
5 General Counsel of the Christopher Commission and as  
6 General Counsel of the recent Rampart Investigation.  
7 He has had a very long and distinguished career in Los  
8 Angeles, and there could not be a better choice for  
9 moderator.

10 I turn the program over to him.

11 MR. DRUYAN: Thank you.

12 The world certainly has changed since  
13 September 11. The attack on America and the ensuing  
14 war on terrorism have had a profound impact on the  
15 fundamental concerns in our country, the security of  
16 our country and the protection of civil liberties in  
17 the age of terrorism.

18 Last year, the nearly unanimous U.S. Congress  
19 passed the USA PATRIOT Act, which greatly expanded the  
20 powers of law enforcement to investigate criminal  
21 activity, and President Bush issued a Presidential  
22 Order for the detention, treatment and trial of non-

1 | citizens in the war on terrorism.

2 |           The PATRIOT Act and President Bush's order,  
3 | as well as many of the policies of the Administration,  
4 | such as the monitoring of attorney-client  
5 | communications, the mass questioning of individuals  
6 | from middle eastern countries, and preventive detention  
7 | have raised a host of difficult, unique and challenging  
8 | legal issues, such as, are the attacks on America acts  
9 | of war or are they criminal acts? Are the prisoners  
10 | captured by our military prisoners of war or unlawful  
11 | combatants? What constitutes the improper selective or  
12 | discriminatory enforcement of our immigration or  
13 | criminal laws? These are very, very difficult issues  
14 | with no easy answers. Each of our panelists tonight  
15 | brings a different perspective on the proper balance  
16 | between fighting terrorism and protecting civil  
17 | liberties.

18 |           It is my great pleasure to introduce the  
19 | distinguished members of our panel tonight.

20 |           To my far right, Steven Rohde, a partner in  
21 | the firm of Rohde and Victoroff; the immediate past  
22 | president of the ACLU of Southern California; a

1 constitutional lawyer; and the author of *American Words*  
2 *of Freedom*, which is a commentary on the Declaration of  
3 Independence, the Constitution and the Bill of Rights.

4           To my immediate right is Carl Manheim, a  
5 professor of law at Loyola Law School here in Los  
6 Angeles. He was taught at the University of  
7 International Business and Economics in Beijing; served  
8 as a legal advisor to the ACLU; and has an area of  
9 emphasis on constitutional, municipal and regulatory  
10 law.

11           To my far left is Robert Pushaw, professor of  
12 law at the University of Missouri and currently a  
13 visiting professor here at Pepperdine. He has an  
14 emphasis on constitutional law and federal  
15 jurisdiction; has received numerous, teaching awards at  
16 the University of Missouri; and was formerly an  
17 attorney at the Davis Wright and Freeman Law Firm in  
18 Seattle.

19           And then, to my immediate left, Abraham  
20 Sofaer, former United States district judge in the  
21 Southern District of New York; a legal advisor to the  
22 United States Department of State under Secretary of

1 State George Schultz; currently the George P. Schultz  
2 Distinguished Scholar and Senior Fellow at the Hoover  
3 Institute at Stanford; and the author of *War, Foreign*  
4 *Affairs and Constitutional Power*.

5 The format for tonight is as follows.  
6 Professor Pushaw and Manheim will first each speak on  
7 profiling and increased law enforcement powers in the  
8 age of combating terrorism. And that will then be  
9 followed by 15 minutes of questions. So, if you have  
10 questions for those two panel members, write them down  
11 and forward them to me.

12 After that, Professor Sofaer and Mr. Rohde  
13 will speak on mass detention and secret tribunals, and  
14 that will be followed by about 15 minutes of questions.  
15 And then for the last 30 minutes, we'll throw it open  
16 and we'll ask questions of all members of the panel and  
17 ask them to comment about the presentations by the  
18 other members of the panel as well.

19 So, with that, I think we are starting off  
20 with Bob Pushaw.

21 PROFESSOR PUSHAW: Thank you.

22 Let's assume that President Bush ordered

1 federal law enforcement officials to round up all males  
2 of Saudi Arabian and Egyptian descent living in  
3 America, and to detain them indefinitely. Would that  
4 be unconstitutional? Well, instinctively, you would  
5 say, 'of course'. But the answer is unclear under  
6 Supreme Court law. After all, in *Koromatsu*, the Court  
7 upheld President Roosevelt's order, ratified by  
8 Congress, to evacuate and imprison nearly all Americans  
9 of Japanese descent. Now, I am surely not defending  
10 *Koromatsu* here, which I think wrongly interpreted the  
11 equal protection clause. Rather, I am saying that even  
12 if Congress or the Bush Administration went way further  
13 than they have in the fight against terrorism, such as  
14 the hypothetical I gave, it is not clear that such an  
15 action would be unconstitutional. Of course, you would  
16 never know this by listening to the intelligencia who  
17 are still in a pre-September 11 -- I might say a 1960s  
18 -- mode of alarm over the supposed police state in this  
19 country.

20 I will concede that there have been -- after  
21 that unfair statement -- law enforcement abuses after  
22 September 11. Obviously, it always raises concerns

1 | when one person, in this case the President, exercises  
2 | such vast and often unchecked power, especially when  
3 | done out of the public eye. But no constitutional  
4 | rights are absolute. Rather, we must always balance  
5 | individual constitutional rights and liberties against  
6 | the magnitude of the crisis we are facing and the  
7 | threat to public safety. And there has been no graver  
8 | crisis, I think, in my lifetime. Suicidal mass  
9 | murderers pose an ongoing threat of the most serious  
10 | kind.

11 |           To assess the government's response to this  
12 | threat, let's start with some basic principles. The  
13 | Constitution contemplates the Congress and the  
14 | President will share power over policy-making, both  
15 | domestic and foreign. But the Constitution is unclear  
16 | about, number one, the scope of the President's  
17 | independent discretion under Article II to both execute  
18 | the law and act as Commander-in-Chief, and number two,  
19 | to Congress's ability to limit those powers  
20 | prospectively by statute or to oversee their exercise  
21 | retrospectively.

22 |           For better or for worse, however, the past

1 century has witnessed the inexorable -- and I would say  
2 irreversible -- growth of executive power. The primary  
3 cause was that, since World War I, America has been in  
4 one foreign crisis after another and the President is  
5 institutionally in the best position to address these  
6 problems. Moreover, the massive increase in the number  
7 of federal statutes has resulted in a corresponding  
8 increase in the President's discretion over enforcement  
9 priorities.

10           Actually, the huge expansion of executive  
11 power dates to Lincoln's handling of the Civil War.  
12 Now, to me, one of Lincoln's most profound insights was  
13 that the President would be justified in violating some  
14 individual constitutional provision if doing so was  
15 necessary to save the entire constitutional form of  
16 government. Let's remember that Lincoln had no prior  
17 congressional authorization when he issued executive  
18 orders blockading confederate forts and emancipating  
19 the slaves. And Lincoln suspended *habeas corpus*, even  
20 though the Constitution places that power in Article I,  
21 and that is presumably within the authority of  
22 Congress.

1                   Furthermore, Lincoln used military tribunals  
2 to try confederate spies, and he had no qualms about  
3 executing spies, or for that matter, about executing  
4 deserters from the Union army. Today, of course,  
5 Lincoln is revered, and you might ask yourself why. It  
6 sure isn't because of his deep commitment to civil  
7 liberties. It is because he saved the Union.

8                   Moreover, the greatest president of the 20th  
9 Century, Franklin Roosevelt, was not exactly a stickler  
10 for constitutional niceties, particularly during World  
11 War II. And I would add that the members of Congress  
12 who supported Lincoln are now praised, not vilified.

13                   I submit that the federal government's  
14 response to the September atrocities has really been  
15 far more sensitive to constitutional rights than have  
16 past wartime measures. Now obviously, the federal  
17 government has not always protected civil liberties.  
18 And they haven't since September 11. But I think that  
19 is an inevitable cost of any war.

20                   Congress is appropriately broadening and  
21 trying to coordinate the powers of various executive  
22 agencies, most importantly the Departments of Justice,

1 | Defense and State, and the FBI and the CIA, to make  
2 | sure they can protect all Americans against terrorism -  
3 | - for example, by beefing up airport and border  
4 | security; by enhancing surveillance procedures of all  
5 | types, especially electronic and computer; by  
6 | increasing access to telephone, financial,  
7 | transactional and educational records; and by  
8 | authorizing the sharing of information obtained through  
9 | surveillance and searches.

10 |           But Congress is hardly dismantling the  
11 | Constitution here. For example, the principle piece of  
12 | anti-terrorist legislation, which I think most of you  
13 | have in front of you, begins as follows, and I am  
14 | quoting: "(1) the civil rights and liberties of all  
15 | Americans, including Arab Americans, must be protected,  
16 | and every effort must be taken to preserve their  
17 | safety.

18 |           (2) Any acts of violence or discrimination  
19 | against any Americans must be condemned.

20 |           (3) The nation is called upon to recognize  
21 | the patriotism of fellow citizens from all ethnic,  
22 | racial and religious backgrounds."

1                   Moreover, the statute directs the Justice  
2 Department's Inspector General to review and respond to  
3 complaints alleging abuses of civil rights and  
4 liberties and to file summary reports to Congress.  
5 Furthermore, the statute specifically provides, not  
6 once, but twice, that the federal government can not  
7 use trap-and-trace devices, and they can not get  
8 various records when the investigation is "conducted  
9 solely on the basis of activities protected by the  
10 First Amendment."

11                   Moreover, the new law imposes penalties for  
12 the unauthorized disclosure of information. And  
13 finally, Congress has increased the number of judges to  
14 hear petitions for electronic surveillance. Government  
15 still needs to show that a significant purpose of the  
16 surveillance is to obtain foreign intelligence. In  
17 short, Congress is not authorizing lawlessness.

18                   Now, let me illustrate this point through one  
19 key statutory provision, which makes it easier to  
20 refuse to admit or to deport aliens who belong to  
21 groups politically endorsing terrorist acts, or to  
22 someone who has endorsed or supported terrorism or who

1 | has been associated with a terrorist organization and  
2 | intends to engage in threatening activities while  
3 | within the United States.

4 |           Many critics have charged that this is way  
5 | overbroad and it would sweep in people like, for  
6 | example, Nelson Mandela. But I would respond that if  
7 | Nelson Mandela planned to come to America with the  
8 | intent of threatening terrorist activities against  
9 | Americans, he should not be allowed in. Or if he got  
10 | in, he should be kicked out. Again, I think under the  
11 | circumstances here, Congress is being sensible. Enough  
12 | about Congress.

13 |           I also don't think that the Bush  
14 | Administration is running wild. The President and the  
15 | Attorney General have repeatedly emphasized that they  
16 | are not targeting Muslims; they are not targeting all  
17 | Arabs. But rather, they are trying to root out  
18 | terrorists. The President has not, for example,  
19 | ordered all mosques closed. He has not rounded up and  
20 | detained all those of Arab descent. So again, if you  
21 | compare it to World War II, I think it is a more  
22 | moderate and reasoned response.

1                   Of course, you would not know this, judging  
2 from mainstream media accounts, especially of the  
3 roughly 1,200 people who have been detained. These  
4 people are not exactly boy scouts. All of them have  
5 likely violated federal immigration law or committed  
6 other crimes. Now it is true that the vast majority of  
7 detainees are not terrorists, and they are not linked  
8 to terrorist groups. But the Justice Department has  
9 erred on the side of caution in detaining them until  
10 they are absolutely sure that they posed no threat or  
11 have no relevant information. And again, I think that  
12 is reasonable, given the possible harm that might ensue  
13 from an investigation or interrogation that is too  
14 cursory.

15                   Let's keep in mind that terrorists are not  
16 walking around the streets with "I Love bin Laden" tee  
17 shirts. They are trained to fit in, and it may take a  
18 while to determine who these people are. I would  
19 concede that some Arab Americans and Muslims have been  
20 treated terribly unfairly, and I would support the  
21 government giving them formal apologies and  
22 compensation for their injuries. There is no excuse,

1 | for example, for the officials who threw a suspect in a  
2 | jail cell with ten other men and allowed him to be  
3 | beaten.

4 |           Indeed, I think even those who suffer  
5 | relatively minor inconveniences, for example, searches  
6 | at airports for the sake of their fellow citizens,  
7 | might deserve some special benefit as Akil Omar has  
8 | argued. Like an upgrade to first-class or something  
9 | like that.

10 |           Unfortunately, the nature of this terrorist  
11 | threat means that law enforcement in the states are  
12 | going to be made, and they are going to fall  
13 | disproportionately on Arabs, even though I think the  
14 | federal government is trying to avoid abuses.

15 |           Finally, we should remember that the federal  
16 | courts are generally still available to remedy  
17 | constitutional violations. Courts can enforce the Due  
18 | Process Clause by freeing those who are being detained  
19 | indefinitely, where the government shows no special  
20 | justification for doing so, such as protecting the  
21 | public from truly dangerous individuals.

22 |           Courts can enforce the Equal

1 Protection Clause when they find that individuals are  
2 being singled out for unfavorable treatment solely  
3 because of their ethnicity or religious beliefs. I'll  
4 concede that the federal courts will be deferential to  
5 the political branches, but I submit that such  
6 deference is entirely appropriate in these  
7 circumstances.

8           Now, as to the Fourth Amendment, I agree with  
9 Professor Amar that the Supreme Court and civil  
10 libertarians have generally misinterpreted its meaning.  
11 The Fourth Amendment does not say that every search or  
12 seizure requires a warrant or must be supported by  
13 probable cause or individualized suspicion. Rather,  
14 the Constitution simply requires searches and seizures  
15 to be reasonable, which involves weighing the  
16 intrusiveness of the government's action against its  
17 legitimate interests.

18           So, to illustrate, nobody would argue that  
19 metal detectors are unconstitutional because the  
20 government's interest in protecting people from those  
21 carrying guns or other weapons obviously trumps the  
22 invasion of privacy that occurs. Strip searches are

1 another kettle of fish. Ultimately, the reasonableness  
2 of the search or seizure should be determined by a  
3 jury, which can determine whether the government's  
4 purpose justifies the intrusion.

5           Now, the other specific topic I've been asked  
6 to cover is profiling. In theory, everyone is against  
7 racial or ethnic profiling and stereotyping of all  
8 kinds. In practice, however, as Peter Schoek has  
9 pointed out, every one of us engages in stereotyping as  
10 an efficient way to process information. For example,  
11 when I'm driving around campus, I assume that student  
12 drivers are going to be a lot more reckless than older  
13 drivers. So, I may make an incorrect judgment about an  
14 individual student driver, and that's unfortunate. But  
15 overall I'm acting reasonably.

16           Likewise, I don't think government  
17 stereotyping is per se unconstitutional. The question  
18 is, what kind of government stereotyping goes too far?  
19 Let me illustrate.

20           Let's say it's right after the Oklahoma City  
21 bombings and the FBI has information that a tall,  
22 white, pale, blue-eyed male between 22 and 42 is the

1 | prime suspect, and he's planning to blow up an  
2 | airplane. Now, let's say I'm flying out of LAX;  
3 | security guards are targeting everyone who matches the  
4 | suspect description, without any individualized  
5 | suspicion, they grab me and subject me to a humiliating  
6 | strip-search, despite my protests, that I am an  
7 | innocent and harmless professor. Can I sue the FBI for  
8 | violating my constitutional rights? Most people would  
9 | say no. The government's action is reasonable and the  
10 | inconvenience to me pales in comparison to the possible  
11 | harm of blowing up a plane.

12 |                 So, too, I don't think it would be  
13 | unconstitutional today for the FBI to target men who  
14 | resemble bin Laden. If the government is looking for  
15 | an individual suspect within a reasonably targeted  
16 | group to prevent grave crime or other harms, it can  
17 | infringe individual privacy rights. Other people have  
18 | made this argument.

19 |                 Now, let's consider the opposite extreme.  
20 | Let's say the FBI director simply hates blue-eyed white  
21 | men who are tall and orders them all searched, or hates  
22 | middle-eastern men and does the same. Most people

1 | would say these would be clear constitutional  
2 | violations. I would say that. The hard cases fall  
3 | between these extremes, and I think that's the key in  
4 | the fight against terrorism. We know that almost all  
5 | the al Qaeda terrorists were from Saudi Arabia or  
6 | Egypt, but that does not mean that all Saudi Arabians  
7 | are terrorists.

8 |           So, what's the U.S. government supposed to  
9 | do? Are they supposed to treat everybody in the United  
10 | States exactly equally, for instance, by subjecting  
11 | everybody in every airport to a full strip-search, or  
12 | should they wiretap every single phone in America?  
13 | That would be intolerable. I mean, it would grind the  
14 | nation to a halt. It would also be silly. It's a  
15 | pretty safe bet that a frail grandmother of Norwegian  
16 | descent strolling through the St. Louis airport is not  
17 | a bin Laden operative. It is far more likely  
18 | statistically that a Saudi Arabian Muslim is.

19 |           Now, I would require something more than mere  
20 | ethnicity, targeting anyone who looks Arabic. That, I  
21 | think, is unconstitutional. It's too broad. But if  
22 | other factors creating suspicions are present -- say,

1 | buying a ticket with cash -- then I think ethnicity  
2 | necessarily has to be weighed into the calculus. I  
3 | think it is inevitable under the circumstances.

4 |           Overall, I think that the Bush Administration  
5 | is acting constitutionally. They are focusing on a  
6 | relatively limited number of people who might be  
7 | terrorists or who have terrorist links through  
8 | surveillance, questioning and searches of people and  
9 | property. Again, to the extent that they are  
10 | overboard, federal courts are usually available to curb  
11 | government excesses, except in special cases requiring  
12 | military tribunals, which, not surprisingly, I also  
13 | think are fully constitutional, but that's for my  
14 | fellow panelists to argue about.

15 |           In closing, let me say that I acknowledge  
16 | that these are very difficult issues on which  
17 | reasonable people can and will disagree. I am very  
18 | interested and looking forward to what my fellow  
19 | panelists have to say. Thanks.

20 |           MR. DRUYAN: Thank you, Professor Pushaw.  
21 | Our next panelist is Professor Manheim.

22 |           PROFESSOR MANHEIM: Thank you. I beg all of

1 | your indulgences. I have been teaching for several  
2 | years, and I am at the point where I really can't say  
3 | anything intelligent without having a PowerPoint slide  
4 | behind me, so please bear with me. Also, this will be  
5 | used in my upcoming course on terrorism and law, so if  
6 | you have any really good pointers for me, I would  
7 | appreciate it.

8 |           I have been asked to talk about racial  
9 | profiling and enhanced law enforcement power under the  
10 | USA PATRIOT Act. So, I'll start with profiling, and  
11 | I'll move through these things pretty fast. I should  
12 | say, however, don't take any notes and if you've missed  
13 | what I say, just go to this website -- it's a little  
14 | advertising for the law school. The PowerPoint slide  
15 | show is posted on this website, and you can download it  
16 | and play with it as you like.

17 |           Racial profiling. This is what the  
18 | prevailing ethic was in the United States before  
19 | September 11. "All our citizens are created equal and  
20 | must be treated equally. Earlier today, I asked John  
21 | Ashcroft, the attorney general, to develop specific  
22 | recommendations to end racial profiling. It is wrong,

1 | and we will end it in America." Of course, this was  
2 | President George Bush in his address to Congress in  
3 | February of last year.

4 |           This is what racial profiling looks like  
5 | after September 11. An unmistakable racial, ethnic  
6 | commonality of the terrorists who hijacked the planes  
7 | on September 11, all looking Arab, all of Arab descent  
8 | -- if you see someone who looks like Mohammed Attah.  
9 | But you shouldn't let these people on a plane either,  
10 | or anybody that looks like them.

11 |           These, too, (showing additional photographs)  
12 | are terrorists. They've killed American citizens. You  
13 | may recognize them. The fellow in the upper left is  
14 | John Walker Lindh, who was arraigned on ten counts,  
15 | followed by Terry Nichols, Ted Kazinski, David Koresh.  
16 | The ten men on the lower left are Eric Harris and  
17 | Dillon Friebold, who killed a bunch of students at  
18 | Columbine High School; William Harris and, of course  
19 | Sarah Jane Olson -- terrorists. And if you see  
20 | somebody like this, you certainly don't want him on a  
21 | plane or near a federal building.

22 |           Obviously I have exaggerated the point, but

1 | it's an important point. I have two reasons to oppose  
2 | racial profiling. First, it doesn't work, and second,  
3 | it's illegal.

4 |           But before we get too far into this, let's  
5 | get a definition of racial profiling. I take my  
6 | definition from a bill introduced into Senate last  
7 | year. It reads as follows. "Racial profiling is  
8 | defined as the practice of a law enforcement agent  
9 | relying, to any degree, on race, national origin or  
10 | ethnicity in selecting individuals to subject to  
11 | routine investigatory activities." This is from the  
12 | End Racial Profiling Act of 2001. It was part of the  
13 | same ethic and national sentiment that prevailed when  
14 | President Bush gave his address to Congress last year.

15 |           Now, I agree with a lot that my colleague Bob  
16 | Pushaw has said, but I'll take one issue with him.  
17 | That is the notion of describing a suspect for a crime.  
18 | He used the example of a tall, white, blue-eyed male  
19 | who has been identified as possibly involved in a crime  
20 | and a racial description. I mean, the description of  
21 | the suspect includes his race.

22 |           And here's a nice example; I just pulled this

1 | off the Internet, actually. Here's a suspect who's  
2 | described as a stocky built black male, approximately  
3 | 200-230 pounds, approximately six feet tall, wearing a  
4 | yellow tee shirt -- just the counterpart to what  
5 | Professor Pushaw gave you. This is not racial  
6 | profiling; it is a description of a suspect. It is not  
7 | being used for routine investigatory purposes, but this  
8 | could be, if you think that one of these men is more  
9 | likely to have committed a crime than the other, though  
10 | obviously it's the same person.

11 |           So, we have to be very careful when we talk  
12 | about racial profiling whether we're talking about  
13 | specific characteristics that have been identified  
14 | about an individual, or just a descriptor or predictive  
15 | behavior.

16 |           Racial profiling doesn't work. Race and  
17 | ethnic appearance are very poor predictors of behavior.  
18 | Profiling using other criteria such as Professor Pushaw  
19 | just mentioned -- the way you bought your ticket,  
20 | whether you're carrying any luggage, your general  
21 | appearance, and so forth -- is much more effective.  
22 | Focusing on Arabs, South Asians, or any other ethnic

1 | group will only provide a false sense of security. It  
2 | creates false positives and false negatives. We have  
3 | two very poignant examples of these. A false positive  
4 | is when an individual is falsely thought to be a  
5 | terrorist or pose a threat, such as the Secret Service  
6 | agent of Arab descent who was traveling from Texas to  
7 | be with President Bush.

8 |           It also creates false negatives, where,  
9 | because of a racial profile, we don't suspect people  
10 | who might in fact pose threats and dangers to us. A  
11 | recent example is the shoe bomber, Richard Reed.

12 |           Enhanced security at the airport or the  
13 | immigration office or wherever actually relies on a  
14 | fairly sophisticated economic theory, known as game  
15 | theory. Screening acts, both as a specific and general  
16 | deterrent. We are trying to deter a particular person  
17 | who might be approaching an airplane with the intent to  
18 | harm it and generally deter folks of that ilk so that  
19 | they don't even try. We want our screening efforts at  
20 | the airport to be so successful that no one even tries  
21 | to get through.

22 |           But if we profile Arabs, al Qaeda will use

1 Indonesians. If we profile Indonesians, they use  
2 somebody else. We have to predict using the next  
3 group, we have to profile using the next group; not the  
4 last group. The problem is, we don't know what the  
5 next group is. If you were Osama, you'd want to  
6 recruit different guys, and racial profiling isn't  
7 going to help.

8 In fact, the *Washington Post* said a couple of  
9 weeks ago, "U.S. intelligence agencies are increasingly  
10 concerned that future attempts by terrorists to attack  
11 the United States may involve Asian or African al Qaeda  
12 members, a tactic intended to elude racial profiles  
13 developed by the U.S. security personnel." One of the  
14 problems with racial profiling is it doesn't work.

15 "Well, let's have a reality check here,  
16 Manheim. Shouldn't we all be a little bit concerned  
17 when we sit next to some swarthy guy on the airplane  
18 who looks like Richard Reed? Don't you want to pay  
19 special attention to him?" My answer to that is no.  
20 After September 11, we want to be vigilant at all times  
21 and pay special attention to whoever is sitting next to  
22 us, including this fellow. This is the FBI profile of

1 D.B. Cooper, who hijacked a plane in 1981 wearing a  
2 business suit and short hair.

3 All right. It's also illegal. The authority  
4 of law enforcement to search and seize individuals is  
5 limited by the Fourth Amendment. For those of you who  
6 are criminal procedure aficionados, you will recognize  
7 the two leading Supreme Court cases on this -- *Terry*  
8 and *Mapp*. It is also limited by the 14th Amendment.  
9 The Supreme Court said that you cannot detain  
10 individuals for *Terry* stops; in other words, subject  
11 them to increased investigation or stop them based  
12 solely on race.

13 Despite the fact that racial profiling  
14 triggers Fourth Amendment and 14th Amendment concerns,  
15 maybe, as Professor Pushaw suggested, there is  
16 compelling reason to do it. After all, the degree of  
17 inconvenience and harm ought to be measured against the  
18 national need, the benefit to be derived. Let's assume  
19 for a moment, for those of you who know the  
20 constitutional. law routine, using race as a criterion  
21 subjects a law or law enforcement to strict scrutiny.  
22 Let's assume *arguendo* that the Government has a

1 | compelling reason to do this, namely, national security  
2 | and the avoidance of terrorism. We do not have to  
3 | assume that *arguendo*; we can assume that for real.  
4 | That's true. I don't think there's anybody on this  
5 | room who would deny that. But the other half of strict  
6 | scrutiny is "least restrictive means," and unless a  
7 | particular activity or particular action is necessary  
8 | to accomplish, to achieve, those compelling ends, it  
9 | can't be relied upon.

10 |           So, you're saying, "Well, Manheim, you don't  
11 | know all the facts. We don't know all the facts. One  
12 | of the hallmarks of protecting national security is the  
13 | need to maintain secrecy. Shouldn't we defer to the  
14 | judgment of law enforcement and intelligence  
15 | authorities when it comes to threats against the United  
16 | States?" I say yes, we should. But we don't write on  
17 | a clean slate here. So, here's a little case study.  
18 | It's actually a little case study that Professor Pushaw  
19 | gave.

20 |           This is an interesting memo that I think we  
21 | should all know and know well. "The Japanese race is  
22 | an enemy race. And while many second- and third-

1 generation Japanese born on United States soil  
2 possessed the United States citizenship have become  
3 Americanized, the racial strains are undiluted. It  
4 therefore follows that along the vital Pacific coast,  
5 over 112,000 potential enemies of Japanese extraction  
6 are at large today. "There are indications that these  
7 are organized and ready for concerted action at a  
8 favorable opportunity. The very fact that no sabotage  
9 has taken place to date is a disturbing and confirming  
10 indication that such action will be taken."

11 This is the report from western defense  
12 commander General John L. DeWitt to Secretary of War  
13 Henry Stinson in 1942. When that report was made, the  
14 Justice Department was in possession of substantially  
15 incontrovertible evidence that the most important  
16 statements of fact advanced by General DeWitt to  
17 justify the evacuation and detention of Japanese  
18 Americans were incorrect.

19 Despite that incontrovertible evidence, it  
20 was included in the brief to the Supreme Court in  
21 *Koromatsu* and *Hirabayashi*. And the Supreme Court  
22 bought it. They wrote in their decisions upholding the

1 | exclusion and detention, "We cannot say that the war-  
2 | making branches of the government did not have grounds  
3 | for believing, and that in a critical hour such persons  
4 | cannot be readily isolated and separately dealt with,  
5 | and it constituted a menace to the national defense and  
6 | safety, which demanded that prompt and adequate  
7 | measures be taken to guard against it."

8 |           I have a different view of the *Hirabayashi* and  
9 | *Koromatsu* cases. I do not think they are precedent for  
10 | anything except an unfortunate historical incident. I  
11 | think they have been relegated to the dustbin of  
12 | history, along with such cases as *Dred Scott* and *Plessy*  
13 | *v. Ferguson*. They are no longer good law.

14 |           Very quickly, because I'm probably running  
15 | out of time soon, I'll get to part two of what I've  
16 | been asked to talk about, and that is enhanced law  
17 | enforcement. There are really two aspects to that --  
18 | that is the terrorist crimes, new crimes that have been  
19 | added by the USA PATRIOT Act, and enhanced surveillance  
20 | powers.

21 |           There's a whole litany of existing crimes  
22 | that relate to terrorism and some new crimes added by

1 | the USA PATRIOT Act. The new crime of domestic  
2 | terrorism and a statute forbidding certain financial  
3 | transactions is an attempt to track down the money of  
4 | terrorist organizations. But in the interests of time,  
5 | I'll move on and talk about enhanced surveillance  
6 | powers.

7 |           The USA PATRIOT Act is an Act in ten titles.  
8 | Four or five of them relate to surveillance. Title 2,  
9 | most specifically, concerns enhanced surveillance  
10 | procedures. And so that's what I'll focus on.

11 |           The PATRIOT Act principally amends three pre-  
12 | existing statutes: the Wiretap Statute, the Foreign  
13 | Intelligence Surveillance Act and the Electronic  
14 | Communications Privacy Act. A piece of it, the Foreign  
15 | Intelligence Surveillance Act, has been around for  
16 | quite a while. It was enacted in response to President  
17 | Nixon's invocation of national security as a reason for  
18 | secretly tapping such dissident groups as the  
19 | Democratic Party.

20 |           SPEAKER: What's the problem with that?

21 |           PROFESSOR MANHEIM: I hope you don't sense  
22 | any judgment on my part. I'm just relating the facts.

1 FISA is an exception to the traditional  
2 Fourth Amendment safeguards. It allows for much lower  
3 standards for the use of surveillance, wiretapping and  
4 so forth, if a FISA judge makes a specific finding that  
5 the target of electronic surveillance is a foreign  
6 power or an agent of a foreign power. That is how FISA  
7 has existed in the past.

8 By the way, a FISA judge is one of seven --  
9 now 11, I believe -- judges specially appointed by the  
10 Chief Justice to hear and issue these warrants, these  
11 FISA warrants.

12 As amended by the USA PATRIOT Act, FISA has  
13 now expanded the use of intelligence surveillance. The  
14 purpose of the surveillance no longer has to be foreign  
15 intelligence. It can simply be a significant purpose,  
16 rather than the purpose. The periods of surveillance  
17 are much longer. The warrants that are issued under  
18 FISA are now blank. They can be filled in. They are  
19 roving wiretap warrants, which means, for instance,  
20 that if you suspect somebody might be using a library  
21 computer to access the internet and plan their  
22 terrorist activities, you can go tap all that library's

1 | Internet communications. And that's what happened in  
2 | the wake of September 11.

3 |           It also lowers the requirement for pen  
4 | register trap and trace. These were old mechanical  
5 | devices that were used to tap telephones that are now  
6 | being adapted to tap Internet communications. These  
7 | devices may be used in any investigation, including  
8 | ordinary criminal investigations, so long as foreign  
9 | intelligence information is thought to be contained in  
10 | them.

11 |           FISA now allows for expanded use of business  
12 | records. There are two points I want to make. The  
13 | first is that upon an application to the FISA judge,  
14 | the judge shall enter an *ex parte* order as requested.  
15 | One of the principle features of the USA PATRIOT is  
16 | that it reduces judicial scrutiny. As Professor Pushaw  
17 | said, that's our safeguard against abuses by our  
18 | overzealous law enforcement agents -- well minded but  
19 | overzealous. But the PATRIOT Act reduces the  
20 | opportunities for judicial oversight, and the order  
21 | shall not disclose that it is issued for purposes of  
22 | investigation. In other words, it's a secret order.

1 | It's a secret search. And in fact, secret searches  
2 | abound in USA PATRIOT. Normally, when the police  
3 | conduct a search, in fact, federal rules of criminal  
4 | procedure require them to leave a copy of the search  
5 | warrant, along with an inventory of the things they  
6 | take. In *Richardson v. Wisconsin*, the Supreme Court  
7 | augmented this by saying that the police must knock and  
8 | announce their entry before serving a warrant.

9 |           Some courts have authorized delayed  
10 | notification -- *i.e.*, a secret search -- and there is a  
11 | certain rationality there because if you know you're  
12 | being wiretapped, you're not going to give away clues.  
13 | But there is a constitutional problem with secret  
14 | searches; I'm not going to bore you with the case law  
15 | on it. However, I will just mention a recent case from  
16 | the Supreme Court, *Kyllo v. U.S.*, last term, where the  
17 | Supreme Court held that a thermal imager outside the  
18 | home to search for unlawful activity was a Fourth  
19 | Amendment search requiring a warrant. Okay, so PATRIOT  
20 | Act extends the authority for searches.

21 |           The pen register trap and trace is  
22 | affectionately called Carnivore, for those of you who

1 | follow the Internet. And it allows for the placement  
2 | of devices on ISP servers to track and monitor Internet  
3 | communications. In fact, one of the things that the  
4 | USA PATRIOT Act requires is that ISPs and other service  
5 | providers make their equipment "wiretap friendly" to  
6 | facilitate FBI or other law enforcement coming in and  
7 | placing such things as Carnivore.

8 |           Currently, the National Security Agency, for  
9 | instance, intercepts approximately 2 million  
10 | communications per hour. They obviously can not look  
11 | at all those. But at least under the old requirement  
12 | they had to have a specific target in mind, and they  
13 | weren't allowed to listen to non-criminal  
14 | conversations. Under the new approaches, Carnivore,  
15 | which allows them to sift through all electronic  
16 | communications for key words or patterns of activity,  
17 | they are going to be finding out a lot more about us  
18 | and our habits.

19 |           And I just learned about this, this morning -  
20 | - this is where I'll end. The Magic Lantern was on the  
21 | NPR Morning Edition. The Magic Lantern is a little  
22 | program that arrives by email from your friendly local

1 | law enforcement agent and sits on your computer, and it  
2 | records all of your computer activity, all of your  
3 | keystrokes and who you're sending these. And then at  
4 | some preordained or triggered point in time, it sends  
5 | an email to the law enforcement office with all of that  
6 | information in it.

7 |           So, these are some of the good things you  
8 | have to look forward to. And perhaps, our solace is  
9 | that we're all innocent, and so we have nothing to  
10 | fear. Thank you.

11 |           MR. DRUYAN: Let me ask Professor Pushaw.  
12 | You said that the Bush Administration is not targeting  
13 | all Muslims. They are not closing down mosques. I  
14 | certainly would agree with you. But in fact, they have  
15 | issued orders to interview thousands of individuals of  
16 | Middle-Eastern descent. The Immigration and  
17 | Naturalization Service has decided to focus on 6,000  
18 | individuals of Middle-Eastern descent for deportation;  
19 | I've seen somewhere upwards of 30,000 illegals in the  
20 | United States. Their first focus is the 6,000 from  
21 | Middle-Eastern countries. Isn't that, in fact,  
22 | targeting individuals of Middle-Eastern or Muslim

1 | descent, and isn't that selective enforcement of both  
2 | the immigration laws and perhaps criminal laws as well.

3 |           PROFESSOR PUSHAW: You could certainly argue  
4 | that.

5 |           HON. SOFAER: I'm not arguing. I'm asking.

6 |           PROFESSOR PUSHAW: Well, again I would draw  
7 | the contrast of what happened in World War II. They  
8 | are not targeting every person of Middle-Eastern  
9 | descent in the country. They are, I think, certainly  
10 | going after groups. If you look at who the terrorists  
11 | were, the fact is that they all are from one ethnic  
12 | group, and therefore I think it is rational, if you are  
13 | looking for al Qaeda members or supporters, to focus on  
14 | that group.

15 |           MR. DRUYAN: But Professor Manheim says that  
16 | is looking at last year's terrorist group, and that  
17 | doesn't work.

18 |           PROFESSOR PUSHAW: Well, I'm not sure about  
19 | that. That may be true in the future, but if what  
20 | you're doing right now as the government is to say, who  
21 | was linked to al Qaeda in America before September 11,  
22 | and therefore who probably has continuing links, I

1 think that it does work and it is reasonable.

2           Now, he makes a good point. In the future,  
3 when you're doing surveillance, say, at airport, well,  
4 then, that is more of a problem. You have to start  
5 somewhere. There are 250 million people in the country  
6 and you have to begin by weeding out at least likely  
7 people and have it more narrowly targeted as you go  
8 down the list. I concede that it is unfortunate that  
9 perfectly innocent and patriotic people might be swept  
10 up in this.

11           HON. SOFAER: But what's innocent and  
12 patriotic about 6,000 Saudis that are illegally in the  
13 United States? Forgive me; I don't understand.

14           PROFESSOR PUSHAW: Yes, right.

15           HON. SOFAER: Is it appropriate for people to  
16 stop and question and be put in prison? If you take  
17 them first, it would seem to me to be a perfectly  
18 proper expenditure of limited resources, and then you  
19 proceed to the other 34,000.

20           MR. DRUYAN: Let me ask Professor Manheim.  
21 What's wrong with starting with the 6,000 illegal  
22 immigrants from Middle-Eastern countries? Or, maybe

1 | there isn't anything wrong.

2 |           PROFESSOR MANHEIM: As Judge Sofaer  
3 | indicates, there are thousands of people who are in  
4 | violation of the immigration laws. I've heard  
5 | estimates that as high as a quarter of the 30 million  
6 | aliens in the U.S. are in violation of the immigration  
7 | laws at one point or another.

8 |           HON. SOFAER: Sure. Most of them are  
9 | Mexicans, and you'd want us to spend the limited  
10 | resources we have picking up mostly Mexicans who  
11 | haven't been responsible for a single terrorist act in  
12 | -- what? -- 120 years?

13 |           PROFESSOR MANHEIM: Most of them are in  
14 | violation of the immigration laws in the following  
15 | manner: they have overstayed their visas. That's a  
16 | pretty serious crime, isn't it?

17 |           HON. SOFAER: Sure. But there's a thing  
18 | called prosecutorial discretion.

19 |           MR. DRUYAN: Wait -- we've got to let --

20 |           PROFESSOR MANHEIM: Except the members of al  
21 | Qaeda, if there are any sleeper cells left in the  
22 | United States, they are not going to be in violation of

1 | the immigration laws. They will not have overstayed  
2 | their visas.

3 |           HON. SOFAER: How do you know that, Mr.  
4 | Manheim?

5 |           PROFESSOR MANHEIM: Every single one of them  
6 | that was here --

7 |           HON. SOFAER: Are you the Attorney General of  
8 | the United States to make that judgment?

9 |           PROFESSOR MANHEIM: Every single one of those  
10 | 19 was lawfully here. None of them would have been  
11 | picked up for immigration crimes.

12 |           So, the point is --

13 |           HON. SOFAER: That isn't so. Four of them  
14 | were illegally here.

15 |           PROFESSOR MANHEIM: -- you know, we're  
16 | expending our energies and our resources looking for  
17 | the wrong folks. We've got hundreds -- 1,200, perhaps  
18 | -- people in detention because they've overstayed their  
19 | visa. These are not the folks that are members of al  
20 | Qaeda. So it's ineffective to say, "Well, look, we  
21 | have tens of thousands of people who have overstayed  
22 | their visas. Let's just deport the Arabs."

1           I have to confess that Congress has special  
2 authority when it comes to immigration matters. It's  
3 known as Plenary Power, so in fact it might be  
4 constitutional. But I don't think it's right.

5           MR. DRUYAN: You say that it is not likely  
6 that the people of Middle-Eastern descent who are here  
7 illegally are tied to al Qaeda cells or terrorist  
8 cells. Isn't it more likely that they have been  
9 willing to commit a crime to get into the United States  
10 in the first place, and doesn't that make it more  
11 likely that they may be engaged in illegal activity.  
12 That isn't whether 15 or 19 of the terrorists were here  
13 legally or not.

14           The fact that somebody would surreptitiously  
15 or by fraud enter the United States from a country in  
16 the Middle East that everybody in this room knows is  
17 tied to terrorist activity, doesn't it make it more  
18 likely that that person's going to commit a crime, and  
19 isn't that reasonable allocation of government  
20 resources to focus on those people first?

21           PROFESSOR MANHEIM: I think that ethnicity  
22 and country of origin are relevant factors, and I think

1 | you have to look at those. But there are a lot of  
2 | other relevant factors, and if you focus on race  
3 | without looking at the others, then you're missing  
4 | opportunities and wasting resources.

5 |           If someone has been in an area, has entered  
6 | the United States from an area known to have al Qaeda  
7 | cells, I would say yes, absolutely; that person ought  
8 | to be a focus of activity. But I do not think we are  
9 | going about it in an efficient manner. Not only is it  
10 | inefficient and a waste of resources, but I think it  
11 | raises the very specter of racial profiling. It  
12 | legitimizes it for the rest of society. And those are  
13 | huge social costs.

14 |           I am not in law enforcement, and I'm not  
15 | privy to the intelligence information. All I know is  
16 | what I've heard on the radio and read in the newspaper  
17 | -- that of these 1,200 people who have been detained,  
18 | only one of them has been charged with a serious crime,  
19 | and it had nothing to do with al Qaeda.

20 |           MR. DRUYAN: May I ask Judge Sofaer if he  
21 | agrees with his colleague that more than mere ethnicity  
22 | is necessary, and that in his examples he used a

1 | variety of other characteristics, such as tall, white,  
2 | "resembles" someone. Isn't it constitutionally  
3 | required that you need racial profiling plus you need  
4 | other factors in order to identify a suspect?

5 |           HON. SOFAER: To identify a suspect, sure.  
6 | But there's a difference between identifying a suspect  
7 | and determining the allocation of limited resources  
8 | with regard to 50,000 people who are known to have  
9 | violated a crime.

10 |           So, you have 50,000 people who are known to  
11 | be illegally in the United States, and the question is  
12 | how do we proceed to look up to see which of these  
13 | might be engaged, or are planning to be engaged, in  
14 | terrorism. And for that purpose, I would agree very  
15 | readily that any Saudi Arabian who's working in the  
16 | vineyards in Napa Valley should be treated just the  
17 | same way as the Mexican who's working in the vineyards  
18 | in Napa Valley. But there aren't too many of them.

19 |           The Mexicans who come over are basically here  
20 | to earn a living. We know that from common experience  
21 | and sensible judgment, and they have not committed any  
22 | crimes of that sort. And to say that every time we

1 | want to search, every time we want to question a Saudi,  
2 | we have to arrest three Mexicans because there are  
3 | three times as many Mexicans in the country as Saudis  
4 | is bonkers. Forgive me.

5 |           PROFESSOR MANHEIM: Well, no one's suggesting  
6 | that.

7 |           HON. SOFAER: Well, of course you're  
8 | suggesting that.

9 |           MR. DRUYAN: Time out for a second. Let's  
10 | do this. What I want to do is make sure we get to the  
11 | other two panel members. A lot of the questions that I  
12 | have here also relate to the next topic. So, what I  
13 | think we'll do is move quickly, so we can have our  
14 | other two members of the panel talk.

15 |           MR. ROHDE: It is a pleasure to be with  
16 | everyone. I thank Pepperdine and the Federalist  
17 | Society for convening this forum, and I thank Dean  
18 | Lindt for his kindnesses at all times.

19 |           I am, in Professor Pushaw's terms, a pre-  
20 | September 11, 1960s alarmist, and a stickler for  
21 | constitutional niceties. And those descriptions will  
22 | inform what I have to say tonight.

1           In his speech to a joint session of Congress  
2 on September 20, nine days after the savage attacks on  
3 America, President Bush called on all of us to uphold  
4 the values of America. He said that we are in a fight  
5 for our principles and our first responsibility is to  
6 live by them. He described those principles as "our  
7 freedom of religion, our freedom of speech, our freedom  
8 to vote and assemble and disagree with each other."

9           Last month in his State of the Union address,  
10 President Bush insisted that we would never compromise  
11 our devotion to human dignity, which he defined as "the  
12 rule of law, limits on the power of the state, respect  
13 for women, private property, free speech, equal justice  
14 and religious tolerance."

15           Regrettably, in a series of unprecedented  
16 actions taken by the President, Attorney General John  
17 Ashcroft, Secretary of Defense Donald Rumsfeld, and  
18 others -- this Administration has deliberately violated  
19 the very principles that the President insisted it was  
20 our first responsibility to live by. Instead of  
21 respecting freedom of speech and the right to disagree  
22 with each other, Press Secretary Ari Fleischer has

1 | warned us to "watch what we say." And Attorney General  
2 | Ashcroft has accused his critics of "aiding the  
3 | terrorists and giving ammunition to America's enemies."

4 |           Instead of respecting the rule of law, limits  
5 | on the power of the state, and equal justice, the  
6 | government has incarcerated over 1,200 persons --  
7 | Muslims from Middle-Eastern countries -- without  
8 | promptly charging them with any crime, without promptly  
9 | giving them access to lawyers and to their families.  
10 | And instead of respecting the rule of law and our right  
11 | to vote, which implicates the separation of powers and  
12 | the checks and balances established by our  
13 | Constitution, the President issued a military order  
14 | creating secret military courts without any  
15 | consultation with, let alone authorization from,  
16 | Congress, a co-equal branch of our government.

17 |           The list of other violations is much longer  
18 | than the framework of tonight's event work affords us  
19 | time to examine. But let me, in my limited time,  
20 | discuss three areas: the mass detentions; the military  
21 | commissions; and Guantanamo Bay.

22 |           About 1,200 individuals -- Muslims, Middle-

1 Eastern, central Asian men, have been swept up in the  
2 dragnet. We know from media reports that approximately  
3 ten have been identified with close ties, the way it's  
4 put, to the al Qaeda. Eighteen more have distant  
5 connections to hijackers or the other ten. Many of the  
6 rest of them had expired visas. But contrary to  
7 Professor Pushaw's suggestion that "all of them have  
8 likely violated the law or immigration regulations," it  
9 is now reported that many of them were absolutely  
10 innocent.

11           The media reports have described Dr. Albadar  
12 al Hasmi, held incommunicado, denied access to a lawyer  
13 or his family for seven days, held for nearly two  
14 weeks, released; innocent; no immigration violations.

15           I made the effort to contact a man we will  
16 call Bassam from Syria, here on a valid extended  
17 visitor's visa. You can talk about 1,200 people, but  
18 talking about one person specifically may tell us  
19 volumes. Bassam was taken from his home late at night,  
20 with no time to get his passport. He was shackled and  
21 moved from Anaheim to Lancaster. He was held  
22 incommunicado. But surely he knew, because he believed

1 | as a visitor to America in the American system, that as  
2 | soon as his wife brought his valid passport to the  
3 | authorities, he would be released the next day. She  
4 | brought that passport to the authorities, and they took  
5 | the passport away from her. And so, he was then held  
6 | for ten more days. He was subjected to four body-  
7 | cavity searches. Now, one body cavity search may be  
8 | necessary. But when a man is in custody, what are the  
9 | three extra body cavity searches for? He was held,  
10 | shackled and humiliated for 28 days, until his lawyer  
11 | could get him in front of an immigration judge, who  
12 | apologized to him by looking at a page in his passport  
13 | to identify his extended visa beyond that appearance,  
14 | and he was released.

15 |           We don't know all of the persons who are in  
16 | detention. I am proud to say that the American Civil  
17 | Liberties Union has asked for that information. Along  
18 | with 19 other groups, we filed Freedom of Information  
19 | Act requests. And those requests have been denied. We  
20 | have filed litigation under the Freedom of Information  
21 | Act to find out who is in detention, whether they are  
22 | innocent, whether they have lawyers, and the reasons

1 | they are being held.

2 |           The problem is that we are receiving protests  
3 | from diplomats and consulates who have been refused  
4 | access to their citizens being held in custody.  
5 | According to the *New York Times*, some of the diplomats  
6 | say that the failure to abide by international norms in  
7 | handling detentions has undermined assertions by the  
8 | Bush Administration that the United States is fighting  
9 | to preserve freedom.

10 |           There is a little known convention, the  
11 | Vienna Convention of Consular Relations, which  
12 | guarantees access for foreign detainees to their  
13 | consulates, that they must be notified of that right,  
14 | that the consulate must be notified of the foreign  
15 | detainees. That Vienna Convention is being  
16 | systematically violated.

17 |           Let me turn to military commissions. On  
18 | November 13, President Bush unilaterally created  
19 | military commissions without any review or  
20 | authorization from Congress. Not only does the Order  
21 | exceed presidential constitutional authority,  
22 | remarkably, it deliberately circumvents the USA PATRIOT

1 Act, which provides that non-citizens suspected of  
2 terrorism must be charged with a crime or immigration  
3 violation within seven days of being taken into  
4 custody, and that such detainees have full access to  
5 federal court.

6           The Administration had sought indefinite  
7 detention without recourse to the courts, but Congress,  
8 in one small act of courageous independence, refused  
9 that power to the Administration. So, as soon as the  
10 ink was dry on the USA PATRIOT Act, the President did  
11 unilaterally what he could not do constitutionally.

12           Under the military order, President Bush  
13 alone could charge non-citizens with acts of  
14 international terrorism, a term that is not defined in  
15 the military order. They could be tried in secret  
16 military commissions under rules established by the  
17 Department of Defense. The commissions would not, by  
18 the terms of the order -- and you have it in your  
19 materials -- be bound by principles of law and the  
20 rules of evidence generally recognized in the trial of  
21 criminal cases in the United States district courts.

22           Conviction and sentencing, including the

1 | death penalty, would only require the concurrence --  
2 | and listen carefully -- of two-thirds of the members of  
3 | the commission present at the time of the vote, a  
4 | majority being present. This has been misreported in  
5 | the news as only requiring a two-thirds vote of the  
6 | commission. It's worse. Assume a five-member  
7 | commission; assume three commissioners are present at  
8 | the time of the sentencing or conviction. Two of the  
9 | three, two-thirds of them, then present, could convict  
10 | and issue the death penalty. Two out of five.

11 |           And if all of that were not bad enough, the  
12 | military order purports to deny any relief or appeal in  
13 | any court of the United States, any foreign nation or  
14 | any international tribunal, and lodges exclusive power  
15 | of appeal to the President of the United States  
16 | himself, or at his election, to the Secretary of  
17 | Defense. Conveniently, free of any judicial,  
18 | congressional or international oversight, the President  
19 | indicts, the President's men sit in judgment, and the  
20 | President presides over any appeal. This would be the  
21 | ending of any totalitarian rule, unencumbered by the  
22 | nuisance of a Constitution or a Bill of Rights.

1           I will defer comment on some of the more  
2 arcane legal issues of the World War II decision on  
3 previous military courts and issues of that kind. I  
4 want to tell you, though, that the law says that unless  
5 civilian courts are closed, the President does not have  
6 the power to establish military tribunals.

7           It may have escaped attention that the  
8 President and his defenders attempted to get limits on  
9 detention without charge. They failed in that. And  
10 yet, the President has done exactly that without  
11 Congressional authority.

12           There has been no showing that our existing  
13 judicial system is inadequate to try suspected  
14 terrorists. We have tried the bombing conspirators in  
15 the original World Trade Center, the foiled plot to  
16 bomb New York City tunnels, the suspects in the bombing  
17 of U.S. embassies in Africa. We have done all that in  
18 our U.S. district courts. Many al Qaeda leaders are  
19 currently under indictment in U.S. district courts.

20           Our system is well equipped to deal with  
21 high-security trials. Under the Classified Information  
22 Procedures Act, CIPA, classified information can be

1 | summarized for disclosure to the defense under  
2 | supervision with a federal judge to ensure compliance  
3 | with due process. We have the means to try suspected  
4 | terrorists without sacrificing the Constitution. And  
5 | the President's military commissions are self-  
6 | defeating, since our allies have announced that they  
7 | will not extradite suspects if they face prosecution  
8 | and the possibility of the death penalty at the hands  
9 | of a tribunal, which so utterly fails to comply with  
10 | international standards of human rights, including the  
11 | international covenant on civil and political rights.  
12 | These are the very rights and standards which the  
13 | United States invokes, rightfully, when condemning  
14 | military tribunals in Peru and Nigeria and Egypt and  
15 | Russia.

16 |           So far, the Administration has blinked twice  
17 | in cases that appear to fall within the scope of the  
18 | military order. Zechariahs Mousaoui, the suspected  
19 | twentieth suicide bomber, and Richard Reed, the  
20 | suspected al Qaeda shoe bomber, are both being tried in  
21 | federal courts, which is exactly where they should be  
22 | tried. Perhaps the criticism from across the political

1 | spectrum and from around the world has lessened the  
2 | President's zeal for secret military commissions.

3 |           Let me conclude by talking briefly about the  
4 | Guantanamo Bay situation. The United States of America  
5 | has already violated the Geneva Convention in  
6 | connection with the detention of approximately 158  
7 | captives who are alleged to be Taliban or al Qaeda  
8 | soldiers from 25 different countries, including  
9 | Britain, Australia, France, Belgium, Sweden, Algeria,  
10 | Yemen, Afghanistan and Pakistan.

11 |           The President and the Secretary of Defense  
12 | have labeled these prisoners illegal combatants and  
13 | have exceeded the limits of the Geneva Convention by  
14 | subjecting them to interrogation when the Convention  
15 | expressly provides that they need only disclose their  
16 | name, rank, serial number and date of birth. Despite  
17 | the President's reassurance that the U.S. is adhering  
18 | to the spirit of the Geneva Convention, let's be very  
19 | clear on this. The Convention provides that all  
20 | persons detained in hostilities are deemed prisoners of  
21 | war, unless a court of competent jurisdiction finds  
22 | them to be illegal combatants. Such a proceeding has

1 | never been invoked, yet their interrogation, in  
2 | violation of the Geneva Convention, goes on.

3 |           It is clear that the Administration is  
4 | violating the Geneva Convention, and the cause of  
5 | international law is suffering, not to mention the  
6 | support of our allies, many of whom have condemned our  
7 | blatant disregard of international law. It's reported  
8 | that military officials and Secretary of State Colin  
9 | Powell, who understands the importance of reciprocity  
10 | under the Geneva Convention, have expressed concern  
11 | that by denying the captives the protection of the  
12 | Geneva Convention, the United States is setting a  
13 | precedent that could put future American battlefield  
14 | captives at risk.

15 |           Let me conclude by saying, and reminding us  
16 | of some prescient words of Supreme Court Justice Murphy  
17 | in *Duncan v. Kahanamoka*, decided in 1946, which was  
18 | addressing the constitutionality of martial law in  
19 | Hawaii during World War II, after the immediate threat  
20 | of invasion had passed. The government insisted at  
21 | that time that the invention of nuclear weapons  
22 | required new thinking for a new kind of war that would

1 | not permit the luxury of the rights enshrined in that  
2 | 18th century Constitution. The Court rejected that  
3 | argument.

4 |           Justice Murphy wrote, "That excuse is no less  
5 | unworthy of our traditions when used in this day of  
6 | atomic warfare or at a future time, when some other  
7 | type of warfare may be devised." Over a half-century  
8 | later, the wisdom of Justice Murphy endures. The new  
9 | warfare of terrorism does not excuse us from remaining  
10 | true to our traditions.

11 |           President Bush was right on September 20 to  
12 | call upon us to uphold the values of America and to  
13 | live by our principles. We can only hope and pray he  
14 | will practice what he preaches.

15 |           MR. DRUYAN: And last but not least, Justice  
16 | Sofaer.

17 |           HON. SOFAER: Okay. That was stirring. And  
18 | I feel all stirred up over that one. But let me just  
19 | say before I start, this is going to be very difficult  
20 | in 15 minutes to lay out a response to the excessive  
21 | anxiety that appears to exist on the other side of the  
22 | table here. But I'm going to try.

1           I want to start, though, with talking about  
2 what our tradition is. And I think Mr. Rohde and I are  
3 very, very close. Our tradition is not very good when  
4 it comes to emergencies in this country, as my  
5 colleague pointed out -- Professor Pushaw. We didn't  
6 do exactly well in the Second World War, putting  
7 Japanese Americans in those camps. We didn't do well  
8 with the Alien Sedition Act under John Adams. And we  
9 didn't do well with Lincoln in the Civil War.

10           We didn't do well after the First World War,  
11 with the Sedition Acts that put so many people in jail  
12 for nothing more than stating their points of view.  
13 There were people who were imprisoned for opposing the  
14 war -- literally getting up and saying, "I don't know  
15 that you should serve in the army because we're doing  
16 something evil." That person went to jail. The *Shank*  
17 case is also garbage. There are plenty of cases by the  
18 Supreme Court that are properly thrown in the garbage  
19 can, and most of them written in times of emergency.

20           So, our tradition as a nation in times of  
21 emergency is not that great. That's why Professor  
22 Pushaw is right. I love him; I don't know him very

1 well, but he is very right when he says, compared to  
2 what we've done in the past, we are doing pretty well.  
3 I think that's right. I think that compared to what  
4 we've done in the past, we're doing pretty well. And  
5 there are still some things we're doing wrong. But  
6 it's very important to go through things one at a time  
7 and to see what is it that we're doing wrong, and why  
8 is it wrong, and what is it that we're doing right?  
9 And also, it's important to ask ourselves, what are we  
10 trying to do? What is going on here? What is behind  
11 all these efforts? So we can show a little bit of  
12 empathy for John Ashcroft and George Bush and all the  
13 other people there who are trying to protect us. That  
14 is what I'm going to try to do very quickly.

15           Now, we are having a big debate. There are  
16 three things we're going to talk about. I really  
17 thought I was going to talk about tribunals, but I  
18 don't mind talking about detention, even though I don't  
19 like what we're doing with detention at all. It's a  
20 lot easier to talk about tribunals than it is to talk  
21 about detention. Also, I'll talk about Guantanamo.  
22 That's fine. But from my point of view, let's start

1 | with tribunals because it's quite clear what we're  
2 | trying to do with tribunals, and I completely support,  
3 | ultimately, what we're going to do with tribunals, not  
4 | what was done in the initial Order.

5 |           For years, this country has talked about  
6 | bringing terrorists to justice. This started with  
7 | George Bush, Senior. It was a big mistake -- instead  
8 | of bombing Libya over the Pan Am 103 and bombing Iran,  
9 | what he did was, he said, "We'll send the FBI to  
10 | Scotland and they spent several years looking around  
11 | the ground and found a little triggering device, and  
12 | managed to indict two secret agents of the Libyan  
13 | Secret Service -- could you imagine? And then they  
14 | tried them in the Hague. After months and months of  
15 | trial, they finally convicted one of them. He's on  
16 | appeal; he may get let off.

17 |           And after this is all over, what's going to  
18 | happen? We've already lifted our sanctions on Libya,  
19 | and nothing else is going to be done to Libya, even  
20 | though they killed hundreds of Americans, destroyed  
21 | this plane. And Iran, we got wiretaps, intercepts,  
22 | connecting Iran and the PFLP to the bombing. Nothing

1 | is going to happen with them because we know that you  
2 | can't use intercepts in a courtroom.

3 |           So, we have no evidence that is usable  
4 | against the PFLP and Iran, even though we know who is  
5 | calling who and what they said to each other. That was  
6 | just the beginning.

7 |           Then we had Clinton and all the "bring them  
8 | to justice" stuff. And he was sending the FBI all over  
9 | the world, people they didn't even want the FBI -- you  
10 | know, this country, they didn't want them in. 'Get out  
11 | of here, FBI. We're in charge here. Go away.' But  
12 | no, the FBI was very persistent. They stayed around.  
13 | And eventually, they even made some indictments.

14 |           Well, wow. They indicted people who were  
15 | willing to blow themselves up. They assumed they were  
16 | going to be so terrified by Mary Jo White in the  
17 | Southern District of New York, the U.S. Attorney, that  
18 | they were going to immediately stop all the terrorist  
19 | acts they were engaged in because they might end up in  
20 | a federal penitentiary in the northeast of the United  
21 | States. Well, that didn't work. And we learned that  
22 | it didn't work.

1                   We had a guy, Osama bin Laden, sitting in  
2 Afghanistan, saying he wanted to kill Americans. He  
3 issued a faqua\*. You know, he's a lunatic. He's not  
4 an Islamic scholar. I mean, the guy had no authority  
5 to issue a faqua under Islamic law. He wasn't even  
6 trained to be a Mula\*. But, he issued a faqua and he  
7 said, "Let's kill Americans." And he did. He went  
8 about killing Americans. He killed Americans at the  
9 World Trade Center; he killed Americans on the U.S.S.  
10 Cole; he may have killed the Americans in Kobar. We  
11 believe that. He helped people in Somalia kill  
12 Americans. He killed Americans in Africa, at two of  
13 our embassies. And we started indicting them all over  
14 the place; we indicted them over here; indicted them  
15 over there. We had a secret indictment. Oh, we really  
16 terrified the guy. He was scared. He was really  
17 scared.

18                   And our head of terrorism was now the  
19 terrorism. We really have accountability in our federal  
20 government. He said at one time in a public speech,  
21 "Oh, Osama bin Laden is sitting out there over a  
22 campfire in Afghanistan, and he's scared. He's on the

1 | run. Oh, yeah. He was on the run." He was on the run  
2 | planning the most brutal and vicious murder of  
3 | Americans yet in the World Trade Center bombings. And  
4 | that's where it came to an end.

5 |           George Bush, the present President, said no  
6 | more criminal law. This is not criminal stuff. It's  
7 | not the kind of stuff the ACLU should just reach into  
8 | their usual grab bag of tricks and start talking about,  
9 | who did we notify? What does the Fourth Amendment say?  
10 | How can we do this and how can we do that? This is  
11 | war.

12 |           Now, he was using a word that technically he  
13 | shouldn't have used. I'm an international lawyer; he's  
14 | not. He's just President. You know. And we  
15 | international lawyers -- we know there's no such thing  
16 | as war. Presidents don't know that. We have to teach  
17 | them. Now, what we have is self-defense. We're  
18 | engaged in actions of self-defense. We're in a state  
19 | of military conflict. The Geneva Conventions apply.  
20 | All those things apply. But it's not a war in the old  
21 | sense.

22 |           There's no right to make war anymore in the

1 | world. You're not allowed to go off and just take  
2 | somebody's territory away from him the way you used to  
3 | be able to. After the U.N. Charter, it is illegal to  
4 | do that. We know that. But that's not what we're  
5 | doing.

6 |           Now, what he meant by saying we're at war is  
7 | that we're not going to look at these bombings anymore  
8 | as crimes. We are going to look at them as acts of  
9 | war. We are going to treat them as national security  
10 | emergencies. And so, that is what he said to his  
11 | cabinet. He said, "Ashcroft, I'm tired of sending the  
12 | FBI to Scotland and all over the world collecting  
13 | little gizmos that they find in the fields after a few  
14 | months of investigation. I don't want Americans to be  
15 | killed anymore. You go out there and tell the FBI to  
16 | get on these things before they happen, to find out  
17 | who's coming into the country, who's in the country now  
18 | that could be a threat, and put an end to it before it  
19 | happens." So, Ashcroft did that.

20 |           He issued a number of orders, put into effect  
21 | a number of ideas that were designed to do that.  
22 | Mueller did it -- the head of the FBI. And even the

1 CIA, God bless them, George Tenent, who defended us so  
2 well prior to last year, he has instructed his agency  
3 to please give some concern to events that might occur,  
4 and not to just what's already happened. So, we're  
5 really rolling now. We're on the way. And you're also  
6 on the way now to understanding what happened.

7           These tribunals are appropriate because we  
8 are in a war. This is not like ordinary crime. That  
9 is what he was saying. Ashcroft was saying, "We've got  
10 an army out there in Afghanistan of about 40,000  
11 people." Five hundred of them have already been  
12 arrested. We're already proceeding against them.  
13 Another 1,500 are in custody in Afghanistan. We might  
14 want to screen them as well.

15           We do not want secret information revealed in  
16 public trials like it was in the World Trade Center  
17 trial, where, as a result of revealing the fact that we  
18 were using a certain method to listen in on al Qaeda  
19 conversations, those conversations came to an end. We  
20 don't want that anymore. We do want tribunals where  
21 you can hold things in secret. We want simplified  
22 tribunals where we can try a thousand people quickly,

1 | one after the other. That's what we want. And that is  
2 | what was set up.

3 |           Now, I can't go into all the details. In  
4 | *Policy Review*, which is coming out this month, I have  
5 | an article with Paul Williams, where we go through  
6 | every one of these rights. The fact of the matter is  
7 | that Mr. Rohde is completely correct. The initial  
8 | order that was issued by the President was drafted in  
9 | an unfortunate way. It was drafted by young lawyers in  
10 | the Department of Justice who don't know anything about  
11 | military law. The problem with that order was not that  
12 | it wasn't screened and cleared with Congress because I  
13 | don't think Congress, unlike the ACLU, has any  
14 | difficulty with military tribunals at all.

15 |           The problem with that order was that it  
16 | wasn't screened with the Department of Defense lawyers,  
17 | who know about military law. That's the problem with  
18 | it. It didn't go to the Department of State lawyers --  
19 | my old law firm, you know. It didn't go there. We  
20 | know about those military tribunals. We know how to  
21 | construct them properly. We wrote the rules for the  
22 | tribunal in Yugoslavia, which doesn't follow our

1 federal rules, but it's a lot more flexible. So,  
2 that's what's wrong with the order, and the order is  
3 being re-written, as Mr. Rohde knows.

4           You know the order's being rewritten by the  
5 Department of Defense lawyers.

6           MR. ROHDE: I haven't seen it.

7           HON. SOFAER: Nah -- but you know it's being  
8 done.

9           MR. ROHDE: We'll have another conference  
10 when it's rewritten.

11           HON. SOFAER: But I don't want to fault him.  
12 Everything he says about the existing order is true.  
13 The existing order is inadequate and it's wrong in many  
14 respects. But we know that the existing order is being  
15 written by the Department of Defense lawyers. It is  
16 going to require a unanimous vote for the death  
17 penalty. And I'm sure that's going to make the ACLU  
18 very happy about the death penalty being imposed in  
19 that way.

20           Now, I can assure you that that order is  
21 going to be rewritten in many different ways, and it's  
22 going to comply with the international rules of the

1 ICTY, the Yugoslavia tribunal. I would like to just  
2 say a couple of words --

3 MR. DRUYAN: Okay. Do it quickly because I  
4 think you're going to have plenty of opportunity in the  
5 next half-hour to make some additional points.

6 HON. SOFAER: Okay. Well, don't  
7 underestimate my reticence. Really, I can be very  
8 quiet.

9 Now, the detentions. The people being held  
10 are either being held for legal violations -- that is,  
11 they're being charged -- or they're being held as  
12 material witnesses. The people being held are all  
13 being legally held. However, I completely agree with  
14 Mr. Rohde that there is no reason these people should  
15 not be given access to their lawyers. I think this was  
16 well motivated.

17 Once again, the effort by Ashcroft was to  
18 grab these people before any of them committed another  
19 horrendous crime, another horrendous attack -- not just  
20 a crime; an attack -- on the United States. And that  
21 was his motivation. I don't fault him for the  
22 motivation. I think he did the right thing. But he

1 | should have given those people access to counsel, and  
2 | he should have revealed who they were. I just don't  
3 | see why the government resorted to these excessive  
4 | things, but I'm not surprised. Given the history of  
5 | our excessive actions -- I don't think it's anywhere  
6 | near as serious as what was done in the second world  
7 | war or any previous emergencies.

8 |           With Guantanamo, I just think that once  
9 | again, the Attorney General wrote an order for the  
10 | President. I do not fault him for the order. Most of  
11 | the people in Guantanamo are going to be considered  
12 | illegal combatants. But the order, once again, was not  
13 | screened with the Department of Defense lawyers. It  
14 | was also not screened with the Department of State  
15 | lawyers.

16 |           I mean, Department of Justice lawyers are  
17 | good lawyers. They just don't know non-criminal law.  
18 | They should stick to criminal law. This is military  
19 | law, and they don't know anything about military law,  
20 | and the guys in the Department of Defense pointed out  
21 | to them the Geneva Conventions provides not that  
22 | everyone should have access to a court -- that's

1 | completely wrong -- but that if there's any doubt about  
2 | the status of someone you hold, he has to be given  
3 | prisoner of war status until his case is heard by an  
4 | appropriate tribunal, a military tribunal. Not a  
5 | court. And that's what should have happened. That's  
6 | what should happen. And that's what the Department of  
7 | Defense is going to insist will happen.

8 |           So, I think we've made some mistakes. Our  
9 | lawyers in the Department of Defense and the Department  
10 | of State are correcting those mistakes and the  
11 | President is going to go along with those corrections.  
12 | I think they're going to find that some of those people  
13 | being held in Guantanamo are prisoners of war. I  
14 | really do. But I think most of them will be found to  
15 | be illegal combatants, and they should and will be  
16 | tried before military tribunals. Thank you.

17 |           MR. DRUYAN: Mr. Rohde, does the President  
18 | have the power to set up military tribunals to try  
19 | those al Qaeda or Taliban members who were captured by  
20 | our military?

21 |           MR. ROHDE: The best law on that is that the  
22 | President only has such powers after a declaration of

1 | war and congressional authority.

2 |           MR. DRUYAN:    Judge Sofaer?

3 |           JUDGE SOFAER:   Well, this idea of a  
4 | declaration of war -- there are even some so-called  
5 | conservative lawyers who have said that.  I think the  
6 | reason they say that is because they really want a  
7 | declaration of war.  I think they're crazy people.

8 |           There shouldn't be a declaration of war.  
9 | There is no such need.  The Congress has passed a  
10 | resolution.  It says that the President can do all  
11 | necessary and appropriate things to deal with nations,  
12 | groups and individuals responsible for September 11.  
13 | Now, that is not a declaration of war but it is as  
14 | sweeping a grant of authority related to the use of  
15 | force as a declaration of war can be.  So, I just don't  
16 | see how that doesn't give the President the power -- if  
17 | a declaration of war did -- to institute military  
18 | tribunals.

19 |           MR. DRUYAN:    Mr. Rohde, is it your view that  
20 | the al Qaeda members have a right to be tried in U.S.  
21 | courts and afforded all of the rights under the  
22 | Constitution that are afforded to U.S. citizens and

1 non-resident aliens?

2 MR. ROHDE: If you're asking for my advice,  
3 they should be tried in the court that Judge Sofaer  
4 applauds, or a model for it, which is an international  
5 tribunal, such as the one that tried war crimes and  
6 crimes against humanity for Rwanda or the former  
7 Yugoslavia.

8 We lecture countries all around the world to  
9 respect international law, to submit their detainees  
10 and those who have committed war crimes to  
11 international tribunals, and that's exactly what we  
12 should be doing.

13 MR. DRUYAN: Under the Geneva Convention,  
14 once a war is over, are the combatants to be returned  
15 to their native countries, and is it your view that at  
16 some point, the members of al Qaeda who are being held  
17 by the U.S. in Guantanamo Bay should be repatriated to  
18 Saudi Arabia or Afghanistan?

19 MR. ROHDE: The Geneva Conventions say that  
20 prisoners of war must be "released and repatriated  
21 without delay after the secession of hostilities." The  
22 question that we all have to face is, what is the end

1 | of this enduring war? Are the end of hostilities to be  
2 | defined by a country? Have the hostilities in  
3 | Afghanistan come to an end, or will they shortly? Or  
4 | are we to tack on hostilities as we spread through the  
5 | axis of evil across the world. I think it should be  
6 | defined by the hostilities that the individuals were  
7 | involved in, and if they are determined to be prisoners  
8 | of war, we should follow exactly the rules of the  
9 | Geneva Convention, if for no other reason than we want  
10 | those rules applied to American servicemen, God forbid,  
11 | if they're ever taken into custody.

12 |           Let's assume that somebody from a Middle-  
13 | Eastern country comes into the United States illegally,  
14 | rather than coming in illegally in an airplane crashing  
15 | into the World Trade Center killing himself -- comes  
16 | into the United States illegal prior to al Qaeda and  
17 | sets off a car bomb in Manhattan and blows up the  
18 | Empire State Building. Should that person be subject  
19 | to a military tribunal, in your judgment? First of  
20 | all, is it constitutional? Is it proper? And as a  
21 | matter of policy, should that person be tried by a  
22 | military tribunal?

1                   HON. SOFAER: As long as the courts are  
2 available in the United States, they must be used to  
3 try Americans. That is not a rule that applies to  
4 aliens, and it's not a rule that applies to aliens who  
5 are here to commit acts of war. I would think it would  
6 be up to the President as to whether he would want to  
7 use a military tribunal for a case like that. My  
8 preference would be that he would use a court for that  
9 case. But I think it's a good line to draw between the  
10 U.S. territorially and actions, activities, that occur  
11 on the battlefield.

12                   But if you want to say the U.S. has been made  
13 into a battlefield by such an individual, you could. I  
14 think the President could do that if that is what he  
15 wanted to do.

16                   MR. ROHDE: I disagree with that. We have ex  
17 *parte Milligan*, the Civil War case. And in really  
18 extraordinary terms, the United States Supreme Court  
19 said then, and has been reinforced, that the  
20 Constitution is the law for rulers and people, equally  
21 in war and peace, and covers with the shield of its  
22 protections all classes of men at all time and under

1 | all circumstances. You wouldn't know it from the  
2 | drumbeat of war on television and CNN and from the  
3 | Administration. But the Constitution protects persons;  
4 | it does not only protect citizens.

5 |           And I want to say before I lose my chance --

6 |           HON. SOFAER: But he was a citizen, Milligan  
7 | was a citizen and he was not a soldier. And what they  
8 | tried to do was to take an American citizen who wasn't  
9 | a soldier and put him before a military court. And the  
10 | Supreme Court quite properly said, "You can't do that."

11 |           So, the drumbeat here is coming from you, Mr.  
12 | Rohde.

13 |           MR. ROHDE: Well, I don't think so, Judge.  
14 | You've agreed with me on about ninety percent of my  
15 | criticisms of what's been done. And the point I wanted  
16 | to make before you interrupted was that the road to  
17 | hell is paved with good intentions. All you can say is  
18 | that these are good people who are trying hard. But if  
19 | we held this panel in 1942, I am worried that you would  
20 | have been citing the good intentions of those who  
21 | interned the Japanese. And we have to be very careful.

22 |           Are we writing a chapter of American history

1 | which will be a courageous chapter, in which we fought  
2 | terrorism and reestablished our economy, and remained  
3 | true to the Constitution and the Bill of Rights, or are  
4 | we simply writing another shameful chapter that we're  
5 | going to look back on, and a panel when the young  
6 | students here are as gray as I and come here and look  
7 | back on 2001 and 2002 and say that was another shameful  
8 | chapter, and more shameful because we did it in  
9 | conscious knowledge and historical recognition of what  
10 | had gone on.

11 |           MR. DRUYAN: Let me ask you, doesn't ex  
12 | *parte Quirin* clearly set a precedent for military  
13 | tribunals? I mean, isn't it constitutional -- in the  
14 | hypothetical that I gave to Professor Sofaer, for a  
15 | military tribunal to try that terrorist who came  
16 | illegally to the United States and tried to blow up the  
17 | Empire State Building, correct?

18 |           MR. ROHDE: *Quirin*?

19 |           MR. DRUYAN: Yes.

20 |           MR. ROHDE: *In re Quirin* was the World War II  
21 | case when President Roosevelt immediately empanelled a  
22 | military tribunal to try eight Nazi saboteurs. The

1 Supreme Court upheld in a *per curiam* opinion so that  
2 six could be executed, and then months later issued its  
3 opinion in which it said that because of the  
4 authorization of Congress, the act of the President  
5 with a declaration of war was legal. We don't have  
6 that.

7 That case is more of a case against the  
8 President today because of the difference between the  
9 circumstances in World War II and the circumstances  
10 today. And it was done in violation of congressional  
11 law because of the USA PATRIOT Act.

12 MR. DRUYAN: Okay. Judge Sofaer -- a  
13 question from the audience. PROFESSOR PUSHAW:  
14 Let me take some of the arrows here.

15 MR. DRUYAN: All right. Let me ask you a  
16 question. You said at the outset that no right is  
17 absolute. Are you suggesting that an American citizen  
18 who's engaged in terrorist activities on U.S. soil,  
19 committing a crime like Timothy McVeigh, doesn't have  
20 an absolute right to trial by jury?

21 PROFESSOR PUSHAW: Well, to answer that  
22 question, I would say yes, Timothy McVeigh, as an

1 American citizen in a criminal case has a right to a  
2 trial by jury. But we're not here talking about  
3 American citizens and military tribunals, which as I  
4 understand it are chiefly directed at non-American  
5 citizens engaged at war. Therefore, I personally don't  
6 think that the right to a trial by jury is necessarily  
7 going to attach.

8 I think that military tribunals have had a  
9 long history. Again, they go back to the Civil War.  
10 The Civil War obviously was a domestic war. We can  
11 have military tribunals against Confederate spies. So,  
12 I guess Lincoln violated the absolute right to a trial  
13 by jury in a criminal case. Therefore, we should all  
14 be vilifying Abraham Lincoln.

15 So, instinctively I would say, if there is  
16 any right that's absolute, it is that the American  
17 citizen has a right to trial by jury in a criminal  
18 case.

19 MR. DRUYAN: Would John Walker Lindh have an  
20 absolute right to trial by jury, given his activities?  
21 I hate to prejudge him, but --

22 PROFESSOR PUSHAW: Well -- I mean, that's a

1 | difficult question just because in a case that's so  
2 | unusual, he's an American citizen but what he's being  
3 | charged with are acts of war and treason on foreign  
4 | soil. I mean, could he be subject to a military  
5 | tribunal? I would leave that call to the President  
6 | myself.

7 |           HON. SOFAER: Well, the call's been made and  
8 | rather than make a big issue out of it, he's being  
9 | tried in court.

10 |           MR. DRUYAN: Well, he's being tried for  
11 | violating U.S. criminal law. Could he be tried for  
12 | acts of terrorism, in the way I think acts of war  
13 | against the United States would not violate the  
14 | criminal law?

15 |           MR. ROHDE: I believe in equal justice, and I  
16 | believe that he's being tried in a U.S. district court.  
17 | But in my approach, he could also be tried in an  
18 | international court for crimes against humanity, if the  
19 | evidence and charges justify that. We're assuming a  
20 | lot here. The Professor says military tribunals have a  
21 | long history. That history ended with World War II.  
22 | We have not had military tribunals for all of the

1 | conflicts since World War II, including the Vietnam War  
2 | and all other military conflicts, which by the way we  
3 | have no declaration of war since that time either. So  
4 | I think that's important to recognize.

5 | I think military tribunals should be  
6 | seriously limited in the way we've talked about.

7 | HON. SOFAER: Well, we've had courts martial.

8 | PROFESSOR MANHEIM: But these aren't courts  
9 | martial.

10 | HON. SOFAER: Yeah, I know, but you don't  
11 | have a jury in the courts martial.

12 | PROFESSOR MANHEIM: But we do have the  
13 | Uniform Code of Military Justice, which doesn't  
14 | necessarily apply in these tribunals.

15 | HON. SOFAER: Yes, military inquiries and so  
16 | forth.

17 | MR. DRUYAN: Yes, Professor Manheim. Given  
18 | technology today and the ability of criminals,  
19 | terrorists, to move from cell phone to cell phone, to  
20 | use computers, to use the Internet, doesn't law  
21 | enforcement need expanded powers, and what's wrong with  
22 | roaming wiretaps that allow a law enforcement official

1 | to tap any phone being used by the suspected criminal  
2 | or suspected terrorist, or that allow the federal  
3 | prosecutor to go to one judge anywhere in the United  
4 | States to get a trap and trace or pen register on any  
5 | phone in the United States? What's wrong with those  
6 | provisions, and do you think that those expanded powers  
7 | violate the Constitution?

8 |           PROFESSOR MANHEIM: I do think they violate  
9 | the Constitution. It should be remembered that many of  
10 | the provisions in the USA PATRIOT Act have been  
11 | circulating for years. Law enforcement has tried to  
12 | get such things as Carnivore and all these expanded  
13 | powers authorized. And then along comes September 11,  
14 | and we now have a golden opportunity to do that.

15 |           I think a lot of things have to be said about  
16 | the technology. One is that if you have sophisticated  
17 | terrorists out there, they are not going to be deterred  
18 | or caught by the use of all these enhanced surveillance  
19 | techniques. It will be ordinary folks who will wind up  
20 | being the targets and the subjects of surveillance.

21 |           You know, if you want to get technical, folks  
22 | with al Qaeda are beginning to experiment with such

1 | things as steganography, which is to embed their  
2 | encrypted messages in pictures, so there's no known  
3 | device that could actually intercept and decode that.  
4 | So, one of the things, of course, that the FBI has been  
5 | trying to do is to prohibit encryption so as to make  
6 | interception more feasible.

7 |           My point on this is that most of these  
8 | expanded surveillance authorizations, first of all,  
9 | violate the Fourth Amendment. I don't think they're  
10 | reasonable under the circumstances, and they're just  
11 | too much. They're too much in this one principle  
12 | sense. That is, there's reduced judicial oversight.  
13 | It's one thing for a court to authorize and maintain,  
14 | monitor, the use of wiretapping technologies.

15 |           The USA PATRIOT, in the name of prosecuting a  
16 | war, which -- I do want to leave the military  
17 | activities quite apart from everything else we've been  
18 | talking about tonight. We can all agree that the  
19 | military campaign has been waged very successfully, and  
20 | it's accomplished many of its goals. But now when we  
21 | are talking about what do we do at home? How do we  
22 | prosecute peace? I think we have to be very careful

1 | not to fall victim to an expanded sense of danger and  
2 | the need to suppress civil liberties in the name of law  
3 | enforcement.

4 |           MR. DRUYAN:    Let's talk about roaming  
5 | wiretaps.  There's a requirement that law enforcement  
6 | report the results of those wiretaps back to the judge,  
7 | right?

8 |           PROFESSOR MANHEIM:  I think the reporting is  
9 | periodic, episodic.

10 |           MR. DRUYAN:    But that's what it is in  
11 | connection with any wiretap.  I mean, you don't report  
12 | every day.  You make 30-day reports with respect to a  
13 | specific phone.  So there is a judicial oversight,  
14 | except through the initial wiretap and then through the  
15 | reporting.  So a roaming wiretap just says you can go  
16 | from this phone to this phone because we're going to  
17 | focus on you, the criminal, rather than you, the phone.

18 |           PROFESSOR MANHEIM:  From this library to that  
19 | library, and all communications coming from a targeted  
20 | communications device can be monitored without any  
21 | specific showing that an individual is going to be  
22 | present.  Normally, when a judge issues a warrant, it

1 | describes with specificity the person, place and thing  
2 | that a monitor receives. These authorizations do not.  
3 | They're general. They're blank.

4 |           PROFESSOR MANHEIM: And they focus on an  
5 | individual, but not the place --

6 |           MR. DRUYAN: -- right. But isn't it  
7 | realistic to assume in this day and age that I, the  
8 | criminal, am going to be on the plane tomorrow, and I'm  
9 | going to be in New York the next day and then  
10 | Washington, and I'm going to be using a cell phone and  
11 | I'm going to be using a beeper, and I'm going to be  
12 | using all these things.

13 |           How in the heck can law enforcement  
14 | successfully get wiretapping of criminal communications  
15 | by that individual unless they have roaming wiretap?

16 |           PROFESSOR MANHEIM: Well, I think you've  
17 | given us a good justification for tapping everybody  
18 | because we don't know when a particular individual --

19 |           MR. DRUYAN: Oh, no. I've got probable  
20 | cause. I've got --

21 |           PROFESSOR MANHEIM: You don't need probable  
22 | cause. That's the point. You don't need probable

1 | cause for these.

2 |           MR. DRUYAN: I've got probable cause and I've  
3 | got necessity. I've got the requirements for a Title 3  
4 | wiretap. I can meet those. What I can't do is I can't  
5 | show that this terrorist or this criminal is going to  
6 | be using the same phone every day for the next 30 days.  
7 | All I can show is, he's going to be engaged in criminal  
8 | activity throughout the United States.

9 |           PROFESSOR MANHEIM: I think if you do have  
10 | probable cause in Title 3 and meet Title 3  
11 | requirements, you can get a very broad warrant. But  
12 | what we're talking about here are very low thresholds  
13 | of indication or evidence that an individual either may  
14 | be involved with an entity that has links to foreign  
15 | intelligence. It's a very, very low threshold. It  
16 | does not meet our standard wiretap requirements. So,  
17 | you can couple the reduced threshold of showing that  
18 | law enforcement needs to make with the expanded  
19 | breadth, scope and duration of the wiretap with the  
20 | reduced judicial oversight, including, as I indicated  
21 | earlier, that the courts must issue these warrants.  
22 | When you couple these things together, what you wind up

1 | --

2 |           HON. SOFAER:  -- warrants, you're talking  
3 | about two different --

4 |           PROFESSOR MANHEIM:  Well, that's a --

5 |           HON. SOFAER:  -- one is the pen register  
6 | thing, where you don't have to have probable cause, but  
7 | the other one that we're talking about, the roaming  
8 | wiretap, is a probable cause requirement.

9 |           Let's be realistic about this.  You're  
10 | sitting in your cave in Afghanistan and you're  
11 | preparing to attack America.  You tell your "Listen,  
12 | when you get on the phone and you're going to talk  
13 | business, don't talk in the apartment.  Go down and use  
14 | the public phone down the block because those idiots in  
15 | America are really well intentioned but they're stupid.  
16 | They are not going to let the government of the United  
17 | States wiretap you when you walk out of that apartment  
18 | and go use another phone.  Is that stupid or what?"

19 |           To stop the American government, with  
20 | probable cause, tracking a person that they reasonably  
21 | believe and have gone to a judge and identified as a  
22 | person about to engage in a crime using his cell phone,

1 | because you don't know the number? You know the number  
2 | in his apartment but you can't tell on a cell phone. A  
3 | guy would trade his cell phone every day. There are  
4 | people who use their cell phone and throw it in the  
5 | garbage and get another cell phone because they know  
6 | that they're going to have a new phone that you can't  
7 | get a warrant on.

8 |           Well, now they don't. Now you can get a  
9 | warrant that covers all those phones, and thank  
10 | goodness for it.

11 |           MR. DRUYAN: A FISA wiretap has to involve a  
12 | foreign agent, right? You can't just get a FISA  
13 | wiretap --

14 |           PROFESSOR MANHEIM: You can on U.S. citizens,  
15 | as long as they are --

16 |           MR. DRUYAN: But they've got to be an agent  
17 | of a foreign government, right?

18 |           PROFESSOR MANHEIM: Well, they have to be  
19 | suspected of being an agent of a foreign government.

20 |           MR. DRUYAN: So we're talking about a very  
21 | limited type of warrant involving foreign terrorist  
22 | types of activity, where the government has evidence

1 | showing they have to make a special court that connects  
2 | the individuals to foreign terrorist activities.

3 |           PROFESSOR MANHEIM: Again, the threshold has  
4 | been reduced by the USA PATRIOT Act. It used to be  
5 | that foreign intelligence had to be the subject of the  
6 | wiretap communication under FISA. Now, it doesn't have  
7 | to be the subject. It can be an element of it. FISA  
8 | can --

9 |           MR. DRUYAN: A significant element.

10 |           PROFESSOR MANHEIM: -- a significant element.  
11 | FISA can now be used for ordinary criminal activity.  
12 | So in other words, what we set up was a special  
13 | procedure with reduced Fourth Amendment oversight, and  
14 | now we're expanding its use in many different ways with  
15 | reduced judicial oversight, and the problem isn't the  
16 | al Qaeda terrorists. The problem is everybody else is  
17 | going to be caught up in these expanded surveillance  
18 | procedures and mechanisms.

19 |           So, when the FBI puts Carnivore on the  
20 | library's Internet terminal, then everybody using that  
21 | library computer is being surveilled. Everybody.

22 |           MR. DRUYAN: Professor Pushaw, you said

1 | earlier when we were talking about this requirement  
2 | that the PATRIOT Act says as long as it's not being  
3 | done for First Amendment purposes -- I think that's one  
4 | of the requirements, that you can't target somebody  
5 | solely --

6 |           PROFESSOR PUSHAW:  Solely because of the  
7 | activities --

8 |           MR. DRUYAN:  That's a meaningless limitation  
9 | under the PATRIOT Act, isn't it?  I mean, law  
10 | enforcement's never going to go in there and say, we're  
11 | targeting this group because they're exercising the  
12 | First Amendment.  I mean, they're always going to have  
13 | some other reason.

14 |           PROFESSOR PUSHAW:  That's true.  But  
15 | presumably, the federal court, if somebody claimed that  
16 | was the reason for it, could look beyond that assertion  
17 | by the government, the substance of it.  If that reason  
18 | was simply that there were people exercising their free  
19 | speech rights, and that's the sole reason they were  
20 | targeted, they can find that that provision had been  
21 | violated.  I don't know if it's absolutely meaningless.

22 |           I agree with you.  The government will always

1 | have a positive justification for anything it does.  
2 | They rarely will concede, "We are affirmatively  
3 | violating constitutional rights and we're damn proud of  
4 | it." They're never going to say that. Yet, I think  
5 | the courts going to give deference, as they should, to  
6 | federal law enforcement officials, but I don't think if  
7 | it's transparent that somebody was targeted solely  
8 | because of engaging in protected First Amendment  
9 | activities that a court is just going to say, "Look,  
10 | government, all you've got to do is assert that that  
11 | wasn't the purpose, and we'll defer to you." I just  
12 | don't think that.

13 |               MR. ROHDE: Let me ask a question because I  
14 | don't know any statistics on this. But are you aware  
15 | of any situation where a FISA judge has denied a  
16 | warrant?

17 |               PROFESSOR PUSHAW: I'm not aware of any.

18 |               PROFESSOR MANHEIM: These are pretty  
19 | automatic, aren't they?

20 |               HON. SOFAER: Well, I'm not sure that the  
21 | records are readily available that would tell us how  
22 | often --

1                   PROFESSOR MANHEIM:  And that's really an  
2 important point.  One of the reasons we have this  
3 special FISA court for these warrants is so that they  
4 are secret, they're not available and people don't have  
5 an opportunity to challenge them.

6                   People who are caught up in these warrants,  
7 especially with the delayed notification, will never  
8 know that their communications are being intercepted  
9 and tapped.  And even if they do learn about it,  
10 there's no mechanism for them to contest the validity  
11 of the interception of the wiretap.

12                  MR. DRUYAN:  I think you're opposed to FISA  
13 courts entirely.

14                  PROFESSOR MANHEIM:  No, no.  I think they're  
15 absolutely necessary in the circumstances in which they  
16 were originally conceived.

17                  MR. DRUYAN:  So it's really a question as to  
18 where you draw the line, and you think that they've now  
19 drawn the line too far on the side of the war on  
20 terrorism as opposed to the protection of civil  
21 liberties, is that right?

22                  MR. DRUYAN:  Isn't that just a judgment call

1 | that the Congress and the President can make as opposed  
2 | to a constitutional issue?

3 |           PROFESSOR MANHEIM: Right. So let me respond  
4 | this way. We've all observed that the protection of  
5 | civil liberties in this war really is greater than it  
6 | has been in the past. I mean, we're not interning  
7 | people right and left. We have a few, obviously. But  
8 | there's still greater sensitivity to the constitutional  
9 | issues. To do that, of course, you have to have people  
10 | who are vigilant, who vigilantly protect those rights.  
11 | That's what the ACLU is doing, trying to provide the  
12 | counter-point, to raise the civil liberties flag and  
13 | say, "Watch what you're doing; don't go overboard."

14 |           The problem with these surveillance  
15 | techniques and authorizations is there's really no one  
16 | there to do that, and there's no one there to provide  
17 | the check against abuses. And so, without that check  
18 | against abuses, as good as these things sound in the  
19 | abstract and as necessary as they sound, we are bound  
20 | to go overboard, inevitably bound to go overboard. And  
21 | that is where my concern was.

22 |           MR. DRUYAN: Is it your view that the

1 | expansion of government powers under FISA is  
2 | unconstitutional, or is it a judgment call that you  
3 | just simply disagree with?

4 |           PROFESSOR MANHEIM: No, I think that FISA  
5 | itself it constitutionally questionable, quite frankly.  
6 | I agree on policy grounds. I'm not sure of its  
7 | constitutionality. But as you move further away from  
8 | the very limited nature of targeted foreign  
9 | intelligence activities, then I think it becomes more  
10 | constitutionally suspect. And let me just add, there  
11 | are so many different variants of this.

12 |           One of the things that USA PATRIOT does is  
13 | that it encourages and allows for greater cooperation  
14 | among the different law enforcement and intelligence  
15 | agencies in the United States. But under the National  
16 | Security Act of 1947, the CIA is forbidden from  
17 | engaging in domestic security, forbidden from spying on  
18 | American citizens. Now, with all this cooperation and  
19 | the ability to share grand jury information and other  
20 | intercept information among the FBI and CIA, etc.,  
21 | we're getting perilously close to the situation where  
22 | we have the secret police monitoring the activities of

1 | the United States citizens. It hasn't happened yet, as  
2 | far as I know, and I don't believe it will happen, but  
3 | we have to be ever vigilant to make sure that it  
4 | doesn't.

5 |           MR. ROHDE: Can I underscore that by saying  
6 | that the USA PATRIOT Act is reducing the wall that used  
7 | to exist between the intelligence gathering.  
8 | Intelligence gathering was used to protect national  
9 | security. It was not the anticipation that the  
10 | information gathered through intelligence means would  
11 | ever be introduced in a court of law. It was used to  
12 | spy on people and to protect the country. As we  
13 | reduced those walls, the information obtained through  
14 | intelligence gathering, which does not meet Fourth  
15 | Amendment and other constitutional standards, bleeds  
16 | over into the criminal area, providing either the  
17 | fruits for further information or the information  
18 | itself that can then be used not only against  
19 | foreigners but against U.S. citizens. And so, I won't  
20 | take a breath because I have the last word.

21 |           MR. ROHDE: I want to say that I'm proud of  
22 | the grab-bag of tricks that the ACLU has, like the

1 | First Amendment, the Fourth Amendment and the Sixth  
2 | Amendment. Thank you.

3 |           HON. SOFAER: Now, my last word, though, is -  
4 | - I think I want to give you a little bit of history on  
5 | this. There was a case Mitchell decided that he was  
6 | going to create something called the Intelligence  
7 | Wiretap. And you remember Attorney General Mitchell;  
8 | he went to prison. He was not -- well, he should have  
9 | gone to prison for that, as well. He said that he  
10 | could be trusted to come up with a way to basically,  
11 | without a warrant, tap people for intelligence reasons  
12 | and then use the evidence in criminal cases that had  
13 | nothing to do with the intelligence. And that's what's  
14 | behind FISA. And Mr. Rohde's completely right on this.

15 |           What they're doing with FISA and the  
16 | amendment of FISA is they're trying to go back to those  
17 | national security wiretaps, which would give them  
18 | evidence that they could use to keep people from  
19 | killing Americans, which is good. They should do  
20 | national security wiretaps. And that's what I hear  
21 | people saying on the other side of this table. And  
22 | they should in order to protect Americans; not in order

1 | to prosecute people.

2 |           Once again, the lawyers in the Department of  
3 | Justice can't help themselves. They just have to make  
4 | cases. You've just got to get them off this issue  
5 | because they don't know how to win wars. Those powers  
6 | should not be abused for the purpose of making cases.  
7 | And I completely support the notion that FISA should  
8 | not be expanded, and we should not be attempting to  
9 | overrule the eight-to-nothing decision in the Supreme  
10 | Court of the United States striking down Attorney  
11 | General Mitchell's attempt in *United States v. United*  
12 | *States District Court*.

13 |           MR. ROHDE: Judge, come sit over on our side.

14 |           (Applause.)

15 |           MR. DRUYAN: Thanks to our panel, and thanks  
16 | to the audience.

17 |           MR. ROSEN: Let's get another round of  
18 | applause for our panelists and moderator. On behalf of  
19 | Pepperdine, thank you all for coming.

20 |           (Whereupon, the panel concluded.)