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MR. SCHARF: David Cole, you did you not disappoint. We have ten minutes for questions. I am sure they are going to be plenty after those two thought-provoking presentations.

MS. JANSSEN: I guess the good news is that in Canada, we do not discriminate against foreign nationals, yet, probably because the Immigration Act has a provision saying specifically that the Charter applies, and the Charter is not distinct in all clauses between nationals and non-nationals. But, having said that, there is a real issue, and the PR card is interesting for the information of the audience. The PR or permanent residence card, has been in the works for years and years and did not come out because they could not find a way to make it secure enough. After September 11th, it was finally announced. As of June of last year, every new foreign national that becomes a permanent resident in Canada must have a PR card. Anyone who is a permanent resident and not a citizen, who does not have a PR card at the end of this year, will not be allowed back in the country until he can get one. It will be very tough to get one outside of the country. It is a way for us to eliminate people who are not there all the time.

On the privacy issue, in Canada when you phone in you can do so as an immigrant or wanting to be an immigrant. As long as you have your name, address, postal code, phone number, and file number you can actually see not only where you are in immigration and what you have written and whose written for you, but you can also see every time you have had a traffic ticket or been stopped for a speeding ticket. Our police reports are already integrated with our immigration information. Beyond that our immigration information is integrated with our citizenship application information, which is integrated with health information. Legal or not, you can already get our computer systems under FAUS and under CAPES is the International system. Since you can already get all that all information, what are the legalities of this mixed information?

MR. POWER: My short answer is that every rule has an exception. When people think about the Privacy Act in the Canadian context, you think this is going to keep my personal information private. When you look at section 82 of the Privacy Act, you look at exceptions associated with it. If there is lawful authority under another act, it can be disclosed. You can therefore have a legal basis under the authority that I suspect, certainly, under the Departmental legislation, perhaps under IRPA, you probably have authority in there for the linking of all this information. If you have that authority, then there is nothing under the Privacy Act that would prevent you

from having that linking. When you tell me about somebody calling up and providing certain basic information, I think you might have an issue with respect to a possible violation of the Privacy Act in the sense that the mechanisms that you use to authenticate somebody could probably be strengthened, because a lot of information that you ask for falls within a family context. I call it the jealous spouse syndrome. If my wife wants to get information about me and call somebody up and get that information, she already knows all the shared secrets. She could probably get it. I would probably be saying that you probably run the risk of violating the Privacy Act if you do not strengthen your shared secrets. That would be the only comment I have on the system that you have in place. There you have an unauthorized disclosure.

MR. SCHARF: Let us try to keep our questions down to about 30 seconds.

MR. HIGGINS: Mark Higgins, United States Coast Guard. As a sitting military Judge, you three times referred to the military Justice System and equated it to the military tribunals and the military commissions. The military justice system routinely tries Americans and affords them a vast aray of rights. Could you distinguish for our Canadian friends the difference between military tribunals, which are applied to foreign nationals and the military justice system, which routinely tries American and affords them their rights?

MR. COLE: I am sorry. That is a good point. I was trying to speak fast and I did not make all the fine distinctions that I probably should have. You are absolutely right and it is consistent with my theme.

We have a military justice system for us and a military justice system for them. Actually, the military justice system for us is actually quite close to the criminal process. It includes, ultimately, an appeal to a civilian Court of Appeals and to the Supreme Court. The military tribunal proposal would not allow any appeal to a civilian court whatsoever and would permit defendants to be convicted on the basis of confidential classified information, which neither they or their elected counsel would have access to. Those are the two most significant distinctions between the military systems. We have not yet put a military tribunal into place. In part because the government has found it easier to hold people without giving them any trial whatsoever. That is what they have done with the 650 people on Guantanamo Bay and two American citizens.

MR. DELAY: My name is Brendan Delay. I am a practicing attorney in the Cleveland area. When litigation starts and the other side wants to get information, we have to call our clients into the office and say, "Here is the information the other side wants." They often protest and say, "I am a private citizen. Why should I give over this information? The shy people say, "I am a very private person, why should I give over that information?" You

have to explain why they have to do that in our system. I think my answer in the future is going to be that Howard Hughes was the last private citizen. There are no private citizens anymore. Now give over the information. My question is in time will both countries have legislation, maybe called the Private Citizen Act, detailing exactly how a person can be private? How can a government not intrude upon that person's privacy?

MR. COLE: That is a good question. We have statutes like that. First of all, we have a Constitution. The Fourth Amendment protects privacy. The most significant instance is probably where the Court said the Fourth Amendment is irrelevant. Whenever you share information with a third party, by definition, you no longer have any privacy interest in it. Therefore, the government need not have probable cause or reasonable suspicion to get it. That includes the information you share with the bank, information you throw out when your garbage is collected, you pay with your credit card, when you make a phone call, all of that.

In response to those decisions of the Supreme Court saying there is no privacy protection, there were statutes enacted that said notwithstanding that there is no Constitutional privacy protection, we want statutory protection. We want to stop the government from getting access to this information, even if the bank has it, even if the credit company has it, unless the government has a good reason to get it.

Unfortunately, much of what the Patriot Act was about is eliminating those protections. Any protections remaining after the Patriot Act will be limited by the Patriot Act II. We are addressing it legislatively, but we are essentially doing away with the statutory protections that were in place.

Michael, do you want to add to that?

MR. POWER: I am going to tell you a little story. I was in California last weekend. I was sitting in the Century Plaza Hotel having a drink with a fellow who was there visiting a friend who lived in Beverly Hills. There was a movie being shot on her street. He told me that police went door to door to ask people whether they could please move their cars off the street because they were shooting a movie. I was struck by that because in Canada we would just pass a law and then the police would come along and move your car.

You have rights in this country. In Canada, we do not take that view. We might think we have rights, but we really do not. As I said earlier, there is always an exception to the rule, even with our Charter. Every right is subject to an exception and if it is acceptable in the context, then you can have that right. If it does not work out that way, then you do not get that right. So, your suggestion about having a law that says what is private and what is not is an American answer. In Canada, our laws are much more general and that approach just would not fly in Canada because there would be an exception to that law. Yeah, you can have certain privacy rights, but in certain

circumstances they have to go for the general good. Then it becomes a question of do you trust the system to manage those exceptions appropriately?

A CONFERENCE PARTICIPANT: My observation is that in respect to privacy, information about my life is out there. As you observed a moment ago, it is in private hands. It is in government hands. I only worry about the use that is made of that information. Quite frankly, I cannot hide anything. It is what they do with the information that I give the government or the private sector that is my concern.

When I take my boat or my airplane into the United States and I get in trouble, I am not sure that I am going to enjoy some of the privileges that the United States citizens enjoy. I am not sure that I do not have a concern about the way I am going to be treated. My question is, why has there not been in the United States more complaints, more observations, more yelling and screaming about the issues that David Cole has raised? I have always considered the United States as the repository of freedom andcivil rights and when I look at what has gone on in the last couple of years, I am very concerned. I am very worried that there has not been a greater outcry. I would like to know why?

MR. COLE: I am sure Michael has the answer to that. I have been doing my best. I think the biggest reason is that Americans do not consider it to be their problem. They feel like they are not going to be targeted. They are not the ones who are at the short end of the stick. In some respects, this is to their benefit. Right?

If you can strike the balance in a way that makes me safer without requiring me to pay any liberty costs, I am all for it. Whether people will be for it explicitly or not, it is in their interest, therefore they are not likely to be very outspoken about opposing it. That said, I do think there is a positive difference between reactions this time to reactions in prior periods. For example, World War I, when we locked people up for speaking out. World War II, when we locked people up for their race. World War III, the Cold War, when we locked people up and targeted them for their associations. In those periods, there was very little criticism in the media. There were very few groups that were outspoken. During the Cold War, the ACLU, the American Civil Liberty Union, was purging itself of Communists. The only legal organization that really defended communists was the National Lawyers Guild and it got labeled a Communist Front Organization for doing so.

When you compare that to today, you now have Amnesty International, Lawyer's Committee for Human Rights, Human Rights Watch, and even the ACLU is doing a very good job. The Center for Constitutional Rights, the Arab-American Institute, the American-Arab Anti-discrimination Group, and the Japanese Immigrant Groups have been very active. A whole range of essentially civil society independent institutions are giving voice to

the concerns I am raising. In turn, that has made space for the media. Again, if you compare the media this time to the media during the beginning of any of those prior crises, it has been much more critical. Mostly, the print media. I do not watch television. I do not have a good sense of television.

I do think it is too much to say no one is speaking out. I do think people are speaking out. I think ultimately if you look at history, until these measures apply to and affect enough U.S. citizens, they are not objected to in any serious way.

MR. POWER: I would add a small footnote to that. I agree with what David said, but to the extent that people may consider such measures applying to themselves, I also believe that in times of war, people will agree to a temporary suspension of civil liberties for the greater good. One thing I took away from the presentation last evening about the polling that was done was our views on terrorism. The most important statistic that came out of that presentation from my perspective was that terrorism as an issue was declining as an issue. I think it was down to 22 percent from what it had been previously. That tells me that if terrorism is becoming less of an issue for people "the war" is sort of over in their minds or ending in their minds, in which there may come a greater concern with civil liberties as that temporary suspension is coming to an end.

MR. ROBINSON: I find it interesting to note that Michael did not mention in presenting the Canadian position that there is a statute, which I think is still on the books, which we used to called the War Measures Act. A certain Prime Minister that was spoken of today, sometimes lovingly sometimes not, invoked that act to put people in jail on the basis that there was a presumed Civil War in Canada which, of course, there was not and never had been. Michael, why did you not mention that? Is it still around?

MR. POWER: I had Donovan sitting here enforcing the 20 minute rule. Quite frankly, the answer to that was yes. The War Measures Act is on the books.

A CONFERENCE PARTICIPANT: It was replaced.

MR. POWERS: It strikes me that, obviously, the government decided that they required other authority that they did not have under the War Measures Act. Arguably, they could have enacted legislation to enact the War Measures Act or its successor's legislation, but they chose to essentially enter the Anti-Terrorism Act in the criminal code. They looked at it as criminal matter and a criminal procedural matter. Under the Public Safety Act, it is an act to authorize access to information.

Why in the presence post September 11th in Canada the War Measures Act was not on the radar? They choose other mechanisms to achieve the policy objectives that they wanted to and that is what we talked about.

MR. SCHARF: Two more questions and that will be it because people had a big dinner. I am sure they are going to want to have to a break after a long exciting session.

MR. SCHAEFER: A couple quick questions. First, the government may be a little bit inconsistent treating Hamdi, Pedia and John Walker Lynn. I am going to play devil's advocate here. The Cuban Rights Community was inconsistent in their arguments as well in saying that Walker Lynn should be entitled to combatant immunity, should not be charged, and that Pedia and Hamdi should be charged. I think the real difference is they had evidence on John Walker Lynn via his CNN confession and may not have evidence against Pedia and Hamdi. I think there is been some inconsistencies on both sides in terms of what types of treatment they are asking for. It is not clear in advance what is going to be better for the particular individual. It is not clear what is going to be better for the government.

On the Guantanamo Bay detainees, have some started to be released and even if they were classified as POWs, would they be entitled to be released under the Geneva Conventions, under the standards of that convention now?

Finally, just more generally, international human rights law, constitutional law protections, there is a lot of balancing and derogations if we include in the Charter and the words in various Constitutional amendments of who is actually protected. The Court seems to place some emphasis on persons versus people versus all criminal accused. I am wondering if you could elaborate sort of the derogations of balancing question more generally?

MR. COLE: The first question, I do not know of any human rights group that said John Walker Lynn should not be tried. I think most human rights groups said the right thing to do was to put him into a criminal process and not some sort of other process. People made the point there was a double standard. People on Guantanamo were charged with exactly the same and were not given a lawyer. He ultimately pled to very minor charges, during a very serious time, but very minor charges.

On Guantanamo Bay, about 20 people have been released by the military. It is interesting when they were first brought over in January of 2002 they were described by various military, high-level officials all the way up to President, as the worst of the worst; the kind of people who would chew the cables on a transport carrier to bring it down. Since then, there have been a number of stories quoting high-level military people, including people on Guantanamo Bay who now say there are no big fish there. In fact, many of the people there are mistakes. What happened in Afghanistan was totally confusing. There were bounty hunters out there bringing people in saying this guy is Al Queda, give me my reward and so there is a real serious chance that people are mistakes. The real concern is that the United States has not provided any of these individuals any kind of a competent forum, tribunal, of any kind to determine whether they are, in fact, enemy combatants or

whether they are innocent people who got picked up by a bounty hunter. They refuse to do that.

The POW issue is little bit different. If they are POWs, there are limits on how they can be treated. They get certain rights, but they can be held until combat is over, until the war is over, whether they are illegal or legal combatants. When Donald Rumsfield was asked how long these people could be held, he said till the war is over. Someone said when is the war going to be over. That is in response to Michael's point about how this is temporary. He said when there are no longer any terrorist organizations of potentially global reach left in the world. That is when the war will be over. We are going to cure cancer, the common cold, and SARS before we extricate political violence from the face of earth it. So, it is permanent from their perspective.

The last question on rights of immigrants versus citizens. It is a more complicated issue. On the one hand there are a number of Supreme Court decisions that say very clearly, going back to the 1800's, that the Equal Protection Clause applies to foreign nationals. It applies even to illegal immigrants in a case *called Pilar vs. Stow* that was struck down in Texas barring public education to children of illegal immigrants. It said the First and Fifth Amendment acknowledge no distinctions between citizens and aliens living in the United States. It draws a distinction between people in the United States and foreign nationals outside the United States to who it virtually extends no protection, but inside, it says the same rules apply.

That said, if you look at the decisions, it is hard to square the decisions with those statements, because people have been deported for engaging in conduct that was totally lawful to engage in at the time they engaged in it. The Court upheld the exclusion of people solely for their race. It upheld a statute that required Chinese immigrants to prove they had been here for a certain period of time with the testimony of one credible white witness. None of those things have been overturned. There is a kind of double standard that goes on underneath the sort of glorious phrases that are set forth.

With respect to due process and equal protection, equal protection is a little tougher case. There is no reason why the balance ought to be struck differently for a foreign national then a U.S. citizen with respect to those rights when you get into the doctrine. No right, with the exception of maybe torture, and maybe not even that one anymore is an absolute right. I do not see why a foreign national should have his right to speak freely denied in any different situation than a U.S. citizen.

MR. SCHARF: Last question of the evening. I think Matt is an experienced conference participant. He figured out how to get three questions into one at the end there.

MR. UJCZO: I am Dan Ujczo from the United States District Court for the Northern District of Ohio. Obviously, there are some things I am not

going to say for obvious reasons, but I am going to ignore the racial profiling question. I think that would be a softball for you, David.

But one point Ellen Yost brought up yesterday as she was going through the immigration laws, is that there is no review of agents to deport people. All they have is habeas review. As an individual who looks at habeas petitions on a daily basis, if not twice daily, I think that does constitute review. Then we had Mr. Delay this morning talk about the invasion of privacy for people that raise the right to privacy for a conspiracy among a bunch of employees who were conspiring against their employer on their company's e-mail and that right away raised questions of the right to privacy.

My question is how many of these individuals are being denied fundamental rights? How many of these hearings are being held without the right to counsel? How many of these individuals are not getting the right before any forum? I think that is the fundamental question. How many people are not getting hearings at all? Like Matt said, I think there is a spectrum of rights. How many are being denied complete rights and in particular, how many are denied the right to counsel to advocate their rights?

MR. COLE: Good question. The people who are being denied any hearing and any right to counsel are the enemy combatants, the people on Guantanamo, Mr. Hamdi and Mr. Pedia. In these cases the government argues they cannot have access to an attorney, because if they got access to an attorney, it would undermine the nine-month incommunicado going on. This process precedes by developing a relationship of trust and dependency, so that the person will feel he has no hope. If you put a lawyer in there, it might actually give him hope.

As to the people I have identified, the 4,000 or so that been detained, they have hearings. How many of them have counsel? It is unclear. Generally 80 percent of detained aliens have no counsel. That is not because we affirmatively deny them counsel, it is because they cannot afford counsel. We do not provide counsel for the indigent in immigration settings. So, 80 percent do not generally have lawyers. You can presume a significant portion of these did not have lawyers.

I think it is wrong to suggest that due process is satisfied if they get a hearing. It matters what the nature of that hearing is and whether they have a meaningful opportunity to respond. Is it due process for the government to institute a rule, which they did, saying if an immigration judge in a hearing hears all the evidence and decides the person before him does not need to be detained and should be released on bond while his hearing goes forward, the INS prosecutor, the District Director can automatically override by filing of a notice of appeal? Those appeals last months often over a year, without any showing that he has likelihood of success on appeal. The person stays in, notwithstanding the fact the only Judge who has heard all the evidence says there is no basis to keep this person locked up. To me that is a violation of

due process. To me holding hearings entirely in secret without any individual showing there is any need for secrecy, is a violation of due process and the sixth circuit agreed with us on that. The third circuit has disagreed. We will see what the Supreme Court says. I think due process has been denied to a significant portion of these individuals.

MR. SCHARF: Thank you for the terrific panel, Michael and David.