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HOW FAR HAVE WE COME SINCE SEPTEMBER 11TH, 2001?

SHAWN MITCHELL[†]

Good afternoon. It is a pleasure to be with you. I have to juggle part-time service in the legislature – that is full-time during the months we are in session – with a law practice, and I spent the last few days working around the clock on a couple of briefs. I mean literally around the clock. – I slept last night from about 3:00 in the morning until about 4:30 in the morning. So if I seem a little off, I apologize in advance.

I was thinking about what I might say that would be worth the time and attention of a group of studying legal scholars and teaching attorneys, and Brent put me at ease when he said, “Don’t worry; if we wanted anything too impressive, we wouldn’t have invited a state representative.” So I appreciate that. And I am impressed at the attendance you have this afternoon, Friday afternoon, with all the precious time at Berkeley and before that at BYU, and you can imagine what the transition was like from BYU undergrads to the Berkeley law school.

As a graduate of a competitive law school, as a legislator; in other words, as someone who is not an expert on the important issues that we are considering here today, what I can offer you in this discussion, I think, is someone who cares about these issues and who thinks about them. I graduated fifteen years ago. And my exposure to criminal law or criminal procedure since then has been about as regular and extensive as maybe some of the third year students have experienced regular attendance on Friday afternoon classes.

So what I offer you today is not the perspective of an expert. But in a way I think that is fitting, because the most important discussions about liberty that we have, and perhaps some of the most important weighing, evaluating, and defending of liberty, probably should be conducted at a level that is accessible to citizens who live it. To citizens who face most of the criminal charges, who pursue opportunities in society, who look for academic and economic freedom, who live their lives. This is unlike some of the hard sciences, or even some of the social sciences, where scholarly debate and esoteric discussion accomplishes something that is intrinsically worthwhile.

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I think when it comes to deciding whether or not liberty, freedom, or our civil rights are adequately safeguarded, probably the most valuable discussions are the ones that are accessible to everyone that these issues affect. So I am proud to be able to meet that standard with you here today.

The topic that I was assigned is: How far have we come since September 11th? I can reflect, and ask you to ask yourselves the same question in a couple of different ways.

How far have we come since September 11th in terms of combating terrorism? Where are the terrorists? How successful are they in their aims? What do we know about the answers to those questions? Where is our society? Where are our standards? Where are our freedoms? Are they largely respected? Have they significantly deteriorated? I have to admit to being appalled by much of what I heard from the speaker before me. I would like to follow up and learn a little bit more about some of the stories and information and anecdotes. But there are things perhaps happening that should not be happening. And yet – and yet.

I think these issues need to be put into a context. And let me step back and try and put them into a context. I submit to you that the government's first duty is to promote the survival and safety of its citizens. I submit to you that that is kind of the organizing principle that developed early rudimentary governments, when settlers in the valley would band together against marauding wolves, or against other tribes that would come against them, or against whatever the threat was. It was largely an economic effort, but probably even more for collective physical security.

I submit to you that in our society today, the way the government protects us from harm and promotes our survival really has two different faces. One is domestic. It is our civil and criminal justice system, the issues it addresses, the threats it responds to, the penalties and sanctions it imposes, and the activities it carries out. I would suggest that another face of our government's effort to protect our survival and safety is the national security, or the foreign threats. And I would submit to you they present two – or at least historically we believe they present two – substantially different kinds of analysis and sets of issues to think about.

When you think about our civil justice system, and street crime, and threats to civil order in that way, you might think of assault and battery. You might think of robbery. You might think of corporate crime. You might think of looted pension funds. You might think about the consequences and the harm that those kinds of actions impose on society, and the way we respond to them with a very painstakingly constructed civil justice system, with presumptions of innocence, and with procedural safeguards at many junctures along the way, which many people do not even become aware of.

Everyone knows what the *Miranda* rights are, but few people know that there are equivalent principles to *Miranda* rights at several steps along the way, any one of which can void an arrest, or conviction, or the reliability of evidence admitted at trial. That is our criminal justice system. The police that carry out its efforts at the ground level, that respond to calls, that look for criminal suspects, that arrest people, that take them in. It is all to respond to us and protect us, and in some measure track down, and bring justice to [criminals], and in that sense we hope in furtherance of deterrents [that] protect us from current crime and from future crime.

Now consider the threat coming from the other face of our government's effort to promote our survival – national security. Foreign military threats. We live in a large and powerful nation. We are not really accustomed to thinking of an imminent military threat. However, considering the battlefield circumstances that our nation has found itself in, and that fighting young men and woman have found themselves in, also consider the mores, the standards, the safeguards, the values, and the assumptions that make up the criminal and civil justice system. Then contrast that with life on the battlefield.

On the battlefield, it is not about due process, it is not about identifying someone who did something wrong and bringing justice to them. In general, it is about protecting against the threat. It should be about protecting against the threat.

The theory is, in many cases, not in all, but in many cases, that our military is engaged because we believe the side that is coming, the side that our military is engaging and is responding to, presents some threat to us, or to our vital national interests. And when a soldier is on the battlefield and bullets fly, he does not consider whether or not he has Fourth Amendment probable cause to shoot back. He does not worry about whether or not he has a warrant to go into the cave, or into the foxhole, or around the corner. He responds to the threat, protects himself or herself; and, we hope, if leaders are choosing reasonable policies, through accomplishing the objective, protects all of us, protects our vital interests, and protects against the threat.

Now, I am sure many of you would like to disagree with very much of what I just said, but the time will come. However, I think you will probably give me the distinction between how we respond to civil street crime and how we respond to a military threat. Now, September 11th challenged those assumptions, of that clean dichotomy, in many of our minds. We were exposed to a catastrophic event that killed not tens, not hundreds, but thousands of people.

It was not about crime, in the sense of someone trying to steal money. It was not about some kind of manageable rebellion, or antisocial behavior from a subculture in our society. Terrorism was a direct chal-

lenge, a very effectively carried out challenge. Carried out by a line of thought, by a line of thinking and strain of thought, which has adherence in many places around the globe. And what September 11th made some Americans come face to face with, and start thinking about, was the kind of threat that they used to associate with the military – jeopardy might now be among us on our streets. How many of you, in the early hours of September 11th, would have bet five dollars that two days would go by without there being another attack somewhere? How long did we wait and hold our breath and wonder when it would hit?

The nature of the threat is changing, the nature of the threat that we live with day to day on our streets may be changing. With the determination of whoever the bad actors are, with the skill and sophistication of whoever the bad actors are, with the technology or ingenious strategy they are willing to use making weapons of mass destruction.

Even though we did not find them in Iraq, does anyone doubt that there are financed terrorist networks all over the globe, just desperately trying to find chemical weapons, access to the right kind of plutonium, or biological weapons? Does anyone take comfort in thinking that is not happening right now? That there are arms bazaars and markets all over the world? There probably are.

So, if the nature of the threat has changed, what should we think about the nature of our response? Is the way that we traditionally respond to “cop and robber” kinds of violations adequate to our protection if someone is trying to do something diabolical? Trying to do something that will kill hundreds, thousands, or even tens of thousands of people? Do we need to take any different steps to identify, to respond, to contain, and to apprehend the people that present those threats to us? And if so, how much different should those steps be from police department, FBI, and other traditional law enforcement investigation methods?

I would like to point out one more difference between traditional police work and military work. I want to make one point – to illustrate that one difference between what the military does and what the police, prosecutors, and civil justice system do, is that the military is supposed to be about protection, unless we are aggressing. It is supposed to be about diffusing a threat.

It is much, much less interested in identifying specific culpable bad actors, and imposing some kind of justice that is carefully calibrated and measured out. It is about protecting us or our vital interests from threat, and that protection function usually, or often, involves a lot less due process than even in our local police force.

It is one thing for the police to be investigating a crime, because then, of course, all civil liberties and protections apply. It is quite another thing if there is a shootout on the street, you walk out your door, and you are about to walk into the line of fire. I hope that cop hits me with a body

blow that puts me down on the floor immediately. And that is not cruelty or unjustified violence. That is taking whatever steps, appropriate to the circumstances, to protect a citizen from the threat.

So now the question is, and I pose it to you again, do the threats that we believe may be among us have any relevance, or have any decisive effect, on the kinds of steps that we take to respond to them? Let's discuss it. I suggest that the answer is obviously yes. And the question then becomes: What should those steps be? How do we identify our vital and cherished liberties, and make sure that they are protected? How do we ensure that we are responding appropriately and with adequate seriousness to threats that are different from a bank robber, or likewise, to depict something heinous, a child molester? Let's talk about some of what we have done. First of all, a lot of what Dahlia talked about had nothing to do with the Patriot Act, or a formal legislative response. The arrests that started immediately were not authorized by any new legislation. They were executive branch policy to act under existing law. And you can almost debate whether they acted faithfully to that law or not. But they were not, and in large degree, still are not "shored up" or motivated by the Patriot Act.

They were the executive branch's efforts to act with dispatch to protect our society, to protect against the threat. So when we got around to passing legislation, it passed 98-0 and very quickly in the United States Senate, and I do not recall what the vote in the United States House of Representatives was, but it was almost as lopsided.

But what did we do? Most of your elected representatives did not know what they were voting on.

What did we include in the anti-terror legislation? It is roundly condemned by national commentators, by radio personalities, and by people at cocktail parties, who speak as if it was accepted that it was a vile intrusion into our civil liberties. If there are vigorous opponents to the Patriot Act here today, I would like someone to tell me specifically, someone tell me, particularly a student, what is wrong about the Patriot Act?

I bet you there are people here today that saw Federalist Society advertised and think I am a thug, and buy into the kind of "accepted wisdom" that the Patriot Act is just a wholesale abridgment of our civil liberties. But I would like to hear someone to tell me anything that it does.

Q. (symposium attendee) If I understand correctly, if the government is coming in to ask a judge for a warrant, they simply make the claim that they are investigating a terrorist, and that judge has the discretion in granting that warrant.

A. (Rep. Mitchell) That is not how I understand it. What I understand is that whereas formerly if their concern was for terrorism, you would have to meet a probable cause standard. Now it meets the FISA,

or Foreign Intelligence Service Act standard, which is “reason to believe” or “reason to suspect.” That is the lower end of the bar for government surveillance.

However, if that information is used for a protective function, rather than for the prosecutorial function, then I feel better, I feel freer, I feel more protected, knowing that someone does not have to go prove, to the level of a civil case, that someone might be involved in dangerous activity before they can even take a peek and find out. I do not know about you, but knowing the threats that are out there, I want the bar lowered if the information is channeled into the protective function, and the response, but not transferred to criminal prosecution.

Let us mention a couple of things the Patriot Act did do. In communication technology, it updated standard wiretap authority, and search warrant authority. It used to be that when you got a warrant to track someone, you had to get it to the particular communication device the person used. Well, under the Patriot Act, you can get a warrant that follows the person from device to device.

Which, if you think about it, makes a lot more sense. Sophisticated terrorist groups can dispose of three cellular phones a day, and just keep cycling through new cellular phones. As a response, let us get a warrant on a person, and try to follow those communications.

Another thing that the Patriot Act did was to update a search warrant that used to apply to telephones, and I think was called a pin trap warrant, that would not let you monitor the content of conversations, but would allow you to see phone numbers that were going in and out of the phone. Well, we extended that concept to include many electronic devices. Now, you can monitor the e-mail addresses going into and out of a computer. If there is justification for a warrant that allows you to check numbers going into and out of a phone, is there not equal justification for a warrant that allows you to monitor e-mail addresses going into and out of a computer?

One of the major differences that the anti-terrorist legislation made was to increase communication between that security and protection side of the government and domestic law enforcement. We have all heard the anecdote about one of the September 11th hijackers that wanted to learn how to fly airplanes, but did not care to learn to land an airplane. That information did find its way into the government’s hands. But it never crossed the gulf that it needed to cross, to be reasonably processed and acted on. That is because of the restrictions we had in place before the anti-terrorist legislation – restrictions that kept security and protection personnel from talking to the law enforcement personnel.

I guess the topic that Professor Chemerinsky’s discussion is going to focus on is the loose definition of association, or support of terrorism found in the Patriot Act. The point I want to make to you is that there are

not very many broad, sweeping things that the Patriot Act does. There are a lot of targeted, specific tools it provides to law enforcement.

There is another controversial provision within the Patriot Act – Section 215, or the so-called “Library Amendment.” Everyone hears about the government snooping about what you are reading. Well, number one, as of whenever I last did research on that issue, there is no known instance, not a single reported instance, of law enforcement using Section 215. Is that changed?

(Prof. Chemerinsky) The University of Illinois, on their website, has a survey showing that over one hundred fifty libraries had their records subpoenaed under Section 215 of the Patriot Act.

(Rep. Mitchell) Thank you. Last time I looked there were none.

This ties pretty tightly to the Tattered Cover book store case that was litigated here in Colorado about a year ago. And I just have to tell you, as someone that is as jazzed about the First Amendment as the next guy, I just do not think that the government’s ability to look at a book, to see if it provides evidence tying me to an illegal activity, has anything to do with it chilling my speech.

First I am going to give you the argument that it does, then I am going to give you my argument that it does not. The argument that Section 215 has a chilling effect: If you look at a book that you know might be subject to government surveillance or a subpoena, it would have a chilling effect on what you read, so when you go to the library, or go to the book store, you are going to feel the shadow of Big Brother looking over your shoulder. And you might thus be chilled in the materials you read.

Fair enough, except the First Amendment is not just about books and print, it is about speech, too. Our human medium of communication is by and large speech. Government agents regularly try to find out about the things you have said, to see if those things tie you specifically to a crime. For example, when a government agent says, “Did you see the defendant, ma’am?” And the woman replies, “Yes, I saw the defendant.” And the agent then asks, “What did he say?” Does anyone think that the defendant’s lawyer should jump up at trial and say, “Objection, Your Honor – he is inquiring into my client’s speech. If my client knew that the things that came out of his mouth were subject to government surveillance, that would chill his speech. And our Constitution, by gosh, protects the principle of free and open expression. And you cannot impose that chilling effect, so you cannot inquire into what my client said.”

I think that is a pretty tight analogy. It makes no sense to me at all to think that if the information in a book, or the information that came out of your mouth were somehow relevant to tying you to criminal activity, then the fact that relevance was sought out to be introduced as a chill on

your freedom of expression by book or reading or speech in the first place.

Because remember, when everyone says that it chills what you are reading, what they are really talking about is the specter of government censorship, and government somehow punishing you for what you are reading, or government making your reading material illegal. That is the farthest thing from a prosecutor's mind – he just wants to find out if you have borrowed a book on methamphetamine labs at the Tattered Cover book store.

Section 215 of the Patriot Act allows federal officers and law enforcement officials to subpoena records held by third parties, to see what books or magazines they have read. And if anyone believes that is because they are putting together a censorship law, then we cannot have a discussion. Rather, it is because they want to find out, from your reading activities, if they can possibly tie you to a crime, and I do not see any difference between that and inquiring into the words that come out of your mouth, or the words that your ears catch coming out of someone else's mouth. It is all speech. It is all human diction.

The point that I mean to make to you is that no matter how easy it is to criticize massive sweeps and detentions, or join with everybody in criticizing the Patriot Act, first, let us be specific and make sure that we are really confident there are things that we think are worth criticizing. Secondly, let us judge them in context. Do we face a different kind of threat? Are we more aware of a different kind of threat than we were before September 11th? I submit that we are. I submit that what we have done has been a measured, and by and large reasonably successful, effort to respond to the threat, while at the same time protecting liberties, freedoms, and traditional openness in society.

Are there abuses? Sure, there probably are some. I want to hear more about some of the stories that Dahlia told. I disagree with some of conclusions and broad assertions that she made. Let us talk about a couple of those. The response of our society to focus on Islamic extremism is, to some extent, racial profiling – it is about the color of skin. The next threat is not going to come from the Norwegian fishing team. We know where the line of thinking comes from that wants to kill many Americans, and I am sorry, but it is not coming from very many Nordic Europeans. It is, by and large, young, angry men, from a handful of countries in the Middle East. Also add in the Philippines and disaffected American youth that are tapping into the terrorist network, and joining it. We know that. It would be insane to ignore that fact.

Will that lead to some injustice? Will that lead to some people being scrutinized when, number one, they are innocent, and number two, there might not even be very good reason to scrutinize them? Probably so. Do I feel bad about that? Yes, I do. Do I think there should be some civil

remedies if someone can prove that they were harmfully impacted by unreasonable government action? Yes, there should be.

But what would you do? You are George Bush, you have an Attorney General, you have the FBI, you have the CIA, and one morning, ten thousand Americans die. Dahlia wants you to keep doing traditional criminal investigation, and wait until you see that someone has done something that looks illegal. I just do not think that view is connected with rationality.

When I say we know where the threat comes from, there is a history. Starting with the Marine barracks in Beirut, Lebanon in 1983, followed by the bombing of the American embassies in Kenya and Tanzania, followed by the Khobar Towers bombing in Saudi Arabia, and followed by the USS Cole bombing in the Persian Gulf. On American soil, before the USS Cole bombing, there was the World Trade Center bombing in 1993. After the USS Cole bombing, there was the devastating mother of all attacks – on the World Trade Centers, the Pentagon, and the plane in Pennsylvania on September 11th of 2001.

It was not a broad, diverse coalition of people that put forth those attacks. It was a very focused attack as far as nationality, ethnicity, and religious motivation. That was where the threat came from. To pretend otherwise is to read the Bill of Rights with a suicide bent.

The argument that a little bit, or even a lot, of increased scrutiny is the same thing as internment – I just do not know what to say that. If you are a person of Middle Eastern descent, you can go out and walk out on the street today. If someone approaches you and is unkind or unfriendly to you, I am sorry, they should not be.

If you get pulled over by a cop, or if there are some other kinds of civil unpleasantness, it is still obscene to compare that to what happened to Japanese Americans who were citizens for generations. Not just the individuals were citizens, but their parents were citizens, and in some cases, their grandparents were citizens. They owned land and property that was confiscated. They were herded into camps, and everyone knew it, and they were held there for years.

What is happening today is much, much, different. It is not the same thing. Were there some people that were rounded up and swept into detention for some time? Maybe for too long? Yes. Again, does that prick our civic conscience? Yes. Should some of them be compensated? Yes. Is it quite possible and reasonable to believe that those actions were carried out in good faith by officials who were thinking of nothing more than your safety and my safety? I argue yes.

Thank you for letting me be here with you today.

