



## TRANSCRIPT

### Civil Liberties in an Age of Terror

**Discussants:** Dr. Viet Dinh, Professor Georgetown University Law Center  
 The Hon. Stephen Gerald Breyer, Associate Justice, U.S. Supreme Court  
 The Hon. Dr. Wolfgang Schäuble, Minister of the Interior, Germany

**Moderator:** Nik Gowing, Lead Anchor, BBC World

FIRST 10-15 MINUTES ARE MISSING....

**SUPREME COURT JUSTICE STEPHEN BREYER:** The document itself, which I think is important to understand. I think it's important to understand in reference, your questions, one substantive matter and one procedural matter.

The substantive matter, which I say often when I'm talking to students, particularly, I say, 'What is this document about?' And a lot of them will say human rights. And I say, 'Human rights is there, but that isn't what it's about.'

What it's about is a document in the first seven articles creates Democratic forms of government.' So at the heart of the constitution, as I see Senator Bennett, it's his institution that's created the Senate, the House, and the Presidency.

All of whom are elected, and we are not. And so the primary thing is to create a Democratic system so that people can decide for themselves what kind of government they want. Whether they want their cities, towns, states, nation to be, that's their decision.

But it's a certain kind of democracy. It's the kind that does protect human liberty, that's primarily in the first ten amendments. It divides power, state, federal, and three branches. It assures a degree of equality and insists on a rule of law.

Now in a sense those and other things are boundaries. And we are, and the metaphor I use, it seems to get across, is the boundary patrol. And I think life at the frontier is sometimes tough, and we sometimes get very hard questions, but people forget that because it's the boundary patrol trying to see in cases a few of them, is this on the inside or the outside, what a difficult case.

They jump from the fact that we're patrolling the boundary, which is true, to the conclusion that we're telling people what to do, which is false. And that brings me to the procedural point. The procedural point is our institution works best, now you can't always have this, but I think it works best when we are really last.



Toqueville saw this at 1840. He comes to the United States and he says, “The last five years, what have I been seeing here? I’ve been seeing chaos.” He called it a clamor of everybody shouting at each other and talking about politics. And what he meant was the debate which is heightened with the Patriot Act where people shout at each other nonstop.

In all kinds of groups, law and order groups, civil liberties groups, every group under the sun and as a result of their shouting you’ll do some drafting. Maybe you’ll go to far, maybe you won’t. But then Senator Bennett’s organization may try a few things, or maybe an administrative agency will.

And maybe we’ll learn from experience and maybe we’ll have revision, but at the end of the day, not at the beginning, we sometimes can serve a purpose after others have educated themselves and are then able to educate us in deciding that frontier question.

So what’s happening now? Well, what’s happening now is we’ve had a considerable amount of experience with the Patriot Act, with Guantanamo, with other questions involving civil liberties, and after others have worked it out, if there is still contention, and it takes the form of a legal issue, then it reaches us and then we can apply the boundary conditions.

That’s a long, general answer to your general question.

UNIDENTIFIED PARTICIPANT: But you talk about the boundary patrol. Can you give us a view of whether the principles have now crossed the frontier of human rights and liberty Justice Breyer?

BREYER: I can say this. I can say I know a few principles. Principle one which is always there as the boundary patrol operates. Now that was once debatable, cause I know there’s an old Latin saying with (INAUDIBLE), he’s saying (speaking in Latin) which I never got my Latin course right but I think I said once it was supposed to mean “when the cannons roar, the laws fall silent.”

Then someone told me, you idiot. The Romans didn’t have cannons. But regardless, it meant in time of war, no law. That’s wrong. We apply the law. What law? Where that’s where you were talking about balancing. Is it a special law? In a sense it is not a special law.

Much of this document, if I look at the fourth amendment, what it talks about, the right of the people to be secure in their persons, etcetera, etcetera, they are protected against unreasonable searches and seizures. What’s unreasonable?

I guess you need a warrant. Do you? If you see somebody grabbed off the street, pushed with a gun into somebody’s private apartment house. It’ll take the policeman two minutes to



get in there if he sees it. He's not going to go downtown and get a warrant and he shouldn't and that's (INAUDIBLE).

So there is flexibility there to adjust to the circumstance and the same is true in time of war or it's true in time of terror. But the trick is the difficulty is, the hard issue is, well, what counts as too much one way or the other and there we have, I'll stop here and if you want to continue because I don't want to go into too long a lecture.

UNIDENTIFIED SPEAKER: You're not lecturing, we're understanding what is, what the principles are.

UNIDENTIFIED SPEAKER: OK, I'll say one other thing then. Look, we have some weapons in trying to find out whether this is too much or too little reasonable or unreasonable and a lot of people do not like to admit these weapons are good ones, but I do. They are called lawyers and what the -- they are -- and what the lawyers do is that they ask to questions, particularly if they are on the defendant side.

They are the defendant side and the government's prosecuting this person who has been imprisoned for a certain amount of time or special prison or who knows what and the government says, but don't you see. Security needs, special, terrorism, and the lawyer will say, oh, why? Let's--I can't tell you, it's a secret, oh tell the Judge.

There are many ways to skin this cat, but the lawyer will persevere until some good and proper reasons and not theoretical reasons, but a few facts are out there that allow people to determine whether the why has an answer. But even if it has an answer they'll go to question two and question two is a great one.

Question two is, why not and what they mean by why not, why not do it this way, which gets you your objective of security, but at less of a civil liberties cost. You say that you cannot give the personal lawyer, why not, because he'll tell the lawyer a code and they'll say don't blow up the bridge, that means blow it up.

All right, or say hello to my mother, that means set off the bomb, all right, you see the problem, there is a problem there, could be a problem there, all right, no, I say -- but, show me that's true. Fine, is it still true tomorrow, is still true the next day, I mean in some countries the Judge will visit the person confined.

If he's convinced that's right on day one he comes back next week or in two weeks from now. And the longer he's there, the better the justification. Now I'm using that as an example and I don't say it's a perfect example or even relevant to many questions.

What I'm trying to show you is, that the answers to these questions are often context specific and that they often require the government to justify both why and why not do it a less



restrictive way. That's ordinary work of courts. Ordinary work of courts at this frontier and the frontier is a frontier or security needs and civil liberties tradition, can clash.

UNIDENTIFIED SPEAKER: Minister Schauble you have recently signaled a greater robustness on these issues, using the word (INAUDIBLE) which is prevention of danger or risk management. You've created a significant number of waves with this clear intention, which you stated. Now, how should we read the German approach to this now, given the increased federal powers that there now are on security and with the concerns you have.

You haven't in Germany had a major terror incident, it could have happened with the trains last year, there could have been others with the aircraft as well, but how important do you believe it is to do this to prevent and preempt as opposed to react?

DR. WOLFGANG SCHAUBLE, MINISTER OF INTERIOR, GERMANY: First, I have to say to American auditors that in German constitution, prevention, police, is in the responsibility of the (INAUDIBLE), until our last amendment for constitution, federal government didn't have any responsibility in police.

It was only to the (INAUDIBLE). Now we have made an amendment in our constitution that (INAUDIBLE) the responsibility for the government and to the federal and to the federal (INAUDIBLE).

In against the dangers of the threat of international terrorism, only the threats of international terrorism; having got this confidence now we have to make a legislation for the (INAUDIBLE) because it can only act on the basis of legislation, because our understanding is on the basis of Constitution. We have to define, by law what they may do and what they must not do. And now are in the (INAUDIBLE) and we have a debate, what instruments do you need for (INAUDIBLE) and security (INAUDIBLE).

Actually we had the debate on the investigation online. Until now, German authorities acted on the basis, on our understanding of Constitution and of on law. That it was allowed like on the legislation how to condone telephone communication.

Now, federal the (INAUDIBLE) decided, if you want to control online you have to make a special legislation. You cannot take the legislation for controlling telephone communication. You have to make a special legislation.

Until now, we have acted on this basis, now I have to say that we are making a new legislation because we need to instrument understand, recondition, renew. We need it as we always used. Former governments used it. I decided until we have a clear Constitution on a legal basis, we will not use the instrument.



But I will. I will need an (INAUDIBLE) That was the debate. Most people in Germany even our coalition (INAUDIBLE) take me on saying, we need such an instrument, that we used to have it, but what we need is a basis for it, a legal basis (INAUDIBLE). That our German, method to act only on clear constitutional basic and to define by law what can be done and what we mustn't.

We need the instrument, of course, we need information if you have to prevent if you have to, if you are responsible for security (ph), you have to got informations. You have to. You need cooperation with intelligence services from other countries.

We have a debate for example, of course, we are totally clear, torture is not allowed. Under no circumstances, there must no be any debate of it. But if our intelligence services get information, for another intelligence service; what we are not totally sure whether this other intelligence service (INAUDIBLE) is using torture or not, can I say if – until I a sure that there was no torture, I will not use the information. I can't.

Of course, if I get the information on an act on an immediate threat, I must not make a Parliamentary inquiry. Was it in this African country, really on the basis of German law or not? I have to do what I can to avoid the (INAUDIBLE) threat. That this responsibility doesn't do anything (ph) ...

UNIDENTIFIED PARTICIPANT: Minister, how do you find define that word balance at the moment, given what you went through and what Europe went through last August with the likely aircraft plots, 10 to 12 planes likely to downed over the Atlantic?

The balance that you and other interior Ministers and others in European governments had to define when it came to security, liberty, freedom to travel, but also maintaining and guaranteeing some kind of security in future. In likeness, on that critical problem of balance...

SCHAUBLE: Yes. First of all I am in my understanding there is not a rivalry between liberty rights and security, freedom and security or not opposites. Security is a precondition of freedom. And freedom is a precondition on security. Of course, to be concrete you have to look for balance and here the 10<sup>th</sup> of August was the date when the British authorities find out the preparations on the Texan plans U.K. and U.S.. And we had a meeting on the 11th or 12th in August in London, the British and some other colleagues, John Reed and others and myself.

And the balance we found was we control weekly in traveling. Last week your European Parliament said that it is nonsense to grow leopard (ph). I'll expect that, the plans the British authorities discovered were wouldn't have been successful.



This 200 million of special liquids you can destroy a plane. Therefore if I don't have another instrument, I have to tell people who want to fly by a plane you have to choose. If you want to bring liquids in the plane you have to suffer the risks that the plane will be destroyed.

If not, you have to accept that we will forbid get liquids in the head lockers. 99 percent of people decide to prefer not to bring liquids in plane but to be a little bit more secure. Not to fly on plane which will be destroyed that the balance.

NIK GOWING, LEAD ANCHOR, BBC WORLD: Let me ask you for your judgment about public acceptance of everything we're talking about here. Viet Dinh what's your feeling about public acceptance of the Patriot Act now and also other measures particularly as there is much greater broadening. Not just in America and Europe but also right across the world at the moment.

VIET DINH, DR., PROFESSOR, GEORGETOWN UNIVERSITY LAW SCHOOL: It's not static Nik, its dynamic process. After 9/11 for about two to three years, the Patriot Act and a whole bunch of other measure were perceived correctly by the public as the means through which we protect liberty by making America secure because you don't have any freedom where you did.

As the threat dissipates in the public imagination and importance in the public debate, obviously the public acceptance of measures and restrictions wane and that's when we start thinking about the rules of the road for the long haul.

I saw the reauthorization debate last year after the sunset of the Patriot Act as a way for us to transition from the sprint stage of the immediate fight against terror after 9/11 into the marathon phase of how we go about defining the rules of the road for the new normalcy that I think unfortunately we as Americans and the Western World have to accept as a reality.

On one thing, when we established these rules of the road, certain things are just common sense. Allowing law enforcement officials to collect information, whatever the means of transmission is with the proper judicial authorization and legal approvals is a no-brainer.

Because if we do not allow law enforcement officials to collect information, transmit via the Internet then the terrorists will use the Internet, if we do not allow law enforcement officials to shoot down carrier pigeons to get coded messages then they will use carrier pigeons, because communications are the keystone of conspiracies. And without these kinds of ability to introduce these communications we won't have a chance to prevent these (INAUDIBLE)

UNIDENTIFIED PARTICIPANT: But we've had concerns here about assembly, about information, about foreign citizens versus domestic citizens. How do you see the public mood moving on that which can then define maybe or modify the kind of laws that you have been involved in drafting?



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DINH: I think you start from the beginning which is what is the right thing to do, and then you try educate and convince the public about it. I completely, the Minister that the right thing to do is not to look liberty as something to be traded off for in terms of security, it's very easy to engage in that type of rhetoric.

But it's much harder to the hard work of law enforcement on counter terrorism which is let's find the tools that will give us the information that we need and target those tools at the criminals and terrorists while at the same time by doing so we liberate and make free all the law abiding citizens who are being threatened by the criminals and terrorist not vice versa.

GOWING: Justice Breyer, before I invite others to join us, you use that word – you picked it out of the Constitution, unreasonable. How much does your definition in the Supreme Court of unreasonable get amended and modified by your sense of the public mood after incidence.

BREYER: It's easy to say the answer to that. The answer is zero. That's the correct answer.

GOWING: But...

BREYER: Well, because of a few mistakes that have been made in the past history of the Supreme Court, the most notable, I think, in this area, and I can remember this. I'm old enough. I'm six-years old and we're up in San Francisco. And I can remember my mother driving me down just after World War II, and it was Tanforan Race Track. And she said that's where they held the Japanese.

And the Japanese were 100,000, almost all American citizens, lived in California, and they were taken in the 1942, and they were sent to work camps in Utah and throughout the Middle West. And you'd be surprised. Earl Warren, the greatest, he said that was the greatest mistake he ever made. But he was the champion of civil liberties later, and he wanted that to happen. And the person who didn't was J. Edgar Hoover, and not the known champion of civil liberties.

But he said no, we can handle it with the FBI, went to the Supreme Court. And six to three, in 1944, the Supreme Court upheld it. Now that was not a happy day in the history of the court, three dissents, which are certainly well remembered, more so than the majority.

One and I think they pose a very interesting question, Justice Jackson, he said I understand how General DeWitt, the head of the sixth army, would have taken these people whether anybody legally approved or not because we were afraid of an invasion from Japan, and that's what Californians thought would happen. That's what the army thought might happen, and it didn't matter what the judges said. All right?



But that's no reason to approve it now. We should have a tough law protecting civil liberties. And if the President thinks that it has to be broken, save the country, he'll break it. I used to rather sympathize with that point of view, but I don't anymore.

I've sort of leaned in the direction of Justice Murphy, who is not known for anything but this opinion. And Murphy said "I've looked into this, and I've seen what the FBI says. And there's not one piece of evidence that any of these Japanese citizens was disloyal or even contemplated disloyalty. And on that basis, there is no basis to hold them."

And when I say that point of view is that he hopes, Murphy, philosophically speaking, and I hope, that the law should work out. That is the law should be such that if there is a terrible threat to the United States or any country, the President and the authorities can deal with it.

Now if you want both for the law to do that and protect civil liberties and really give protection, which must be, we're back trying to define that term, unreasonable, or similar terms. What about this term? He asked about the foreign people in the United States. This part of the Constitution, amendment 14, says, nor shall any state, including the feds, deprive any person of life, liberty or property. Person. It doesn't say Citizen, Person, it says.

And what's a deprivation? You see how these words invite this kind of not exactly balancing, but what I call a search for information. The same kind that you are conducting, the same kind the Minister is conducting every time he tries to write some words on a statute that won't go too far, but just far enough. That will control the bureaucracy, but not prevent them from doing what has to be done.

And what is that? OK. I'm ending up on chaos, except that I do have faith, though it's almost Pollyannaish to say that the exchange of information at technical as well as policy-making efforts by all countries who have the same values and the same problems will produce better definitions of what's reasonable. That's why I like the meeting. That's why I think this is a good thing. There we are.

GOWING: Minister Schauble, you were Interior Minister 17-years ago. What about your definition and your perception of that say, the word, "Unreasonable," and what the public would accept now, but perhaps wouldn't have accepted 16 or 17 years ago, when you were last in the job you have now.

We try to gage how much the mood and the public acceptance of this has changed under the principles of balancing.

WOLFGANG SCHAUBLE, MD, MINISTER OF INTERIOR, GERMANY: Seventeen years ago we lived in the time of Cold War and therefore some people have forgotten that until '89 we had a wall in Berlin and we had an iron curtain in Europe and we had total





different understanding in – what is intelligence services and the threat was not by international terrorism, but it was (INAUDIBLE) by the Cold War.

Therefore, things have changed because we don't really feel a threat by – in time of war and International policies and we hate to alarm until, since September 11th, that there is a threat, a new threat, totally different and, therefore, the problem, in my view is, that of course we are always under the rule of law, but the rule of law in terms of war and in times of peace is a little bit different.

And now we are in the new situation that we all look for new answers. We don't really – what is the problem, not only in Germany, but the Germans hope until now that we are not really – we had, we are lucky, that if you are saying as Minister of Interior we are all on the same threat.

People think you have – but if we are cautious we will not be (INAUDIBLE). I don't think it's the right answer, but what we need are common answers. We can't act and that is the difference, in my understanding, compared to the times 70 years ago.

We need much more comprehensive understanding, not only in Europe, but also in the Atlantic community and the world community. When I was asked what has been changed, having been Minister of Interior 17 years ago and now until the end of 2005, once again, my answer is I have to spend about one-third of my time in European and International affairs.

1989/1990 I did (INAUDIBLE) spent maybe two percent, five percent, but not a third or more because security is not only a national issue and what is, and what I would like to use the opportunity in this discussion is to make – to – say my clear position.

We need common answers. Acting unilaterally in any regard is a mistake in itself because you can't. We ask a question whether we can, whether we have to decide people of citizenship and not (INAUDIBLE) discussion what German going to do and all this.

I know it, but in reality, sometimes we discuss yes we cannot (INAUDIBLE) because under the rule of law there is no reason for to prosecute. If they are not citizenships and if we think there could be danger, we tend to expel them.

Is that reasonable? I doubt. I doubt.

UNIDENTIFIED PARTICIPANT: And can I ask for one clarification. You used the word war there, earlier in that answer. Do you still use that word war, because in Britain we've withdrawn from that – the British Government's withdrawn from that and there's a great urging that that word should not now be used.



SCHAUBLE: We don't use the word war, therefore, we don't like the word, the American word, War on Terrorism and I always try to explain American colleagues that the word war, in the ears of European, doesn't mean 3,000 victims.

It means millions of victims and, therefore, the word war has a total different sentimentality in Europe but, of course, International law, we have for, I don't know, maybe we find a new, maybe we will find a third way, but we don't have, actually we don't have, but what we need (INAUDIBLE), is to be clear that we can't decide unilaterally.

That we can't say we don't need international law, we have our constitution. And that is a problem, even in our transatlantic discussions. Because if you respect different constitutions, and even if he understands that the protection of civil rights is in United States even higher than in Europe, and Europe learned from United States, the best teachers for civil rights in history last century.

(INAUDIBLE) But even if you know that, I think we must find the reasons which make clear. It's not only, it's not a unilateral entity. The discussions inside Europe, we are in Bruselwitz (ph). It's boring for a Minister of national government to discuss a European, 27 (INAUDIBLE) and European (INAUDIBLE), it's not, that's boring.

But it's useful, it's useful because it gives us, for everyone, hopefully even for U.K., it gives us limits, and it give us the need and necessity to learn from (INAUDIBLE). Not to be too sure that we have right, and only to listen to us and to think, oh maybe? It could have been, it could have arguments, and in that regard we find in a very (INAUDIBLE) matter sometimes.

(INAUDIBLE) which give us, at the end of the day, more soft power and we can't, we will not succeed in fighting terrorism only by heart power, I tell you. I only concentrate on the control of internet and all, I have to do it. I started in (INAUDIBLE) conference in Germany to make (INAUDIBLE) community feel confident.

To convince the not Muslim part of our population, to look (INAUDIBLE), to improve communication, integration. (INAUDIBLE), we need both. And we try to have both in Europe and I know American has all in its own country, but American is not successful in convincing (INAUDIBLE), and we have to improve American leadership.

UNIDENTIFIED PARTICIPANT: Can I jump in here?

GOWING: Yes, please.

UNIDENTIFIED PARTICIPANT: Because I think there is a very important point here the Minister has made that I completely agree with. In the old days of the cold war, we were facing a completely different threat as nation states.



We were facing threats from other nation states. It was a Westphalian (ph) problem. In the current armed conflict if you will, if you don't want to use the word war, it is an armed conflict that, it seems to me that all 193 nations of the world are should be in a collective defense agreement toward, because it is armed conflict against non-state actors who would ferment terror in order to disrupt the system of international order, and it's much harder because they don't have a population to protect and a territory to defend, and so we can't retaliate in the normal Westphalian (ph) sense of using force.

What does that mean? It means that of course, there has to be cooperation. I think the one observation I would make of the public sentiment and the media in particular in the last five years is that the (INAUDIBLE) issues that divides us, be it extraordinary renditions one time or the war in Iraq is only a very small subset of the policies that define the war on terror, except it sucks up about 99 percent of the oxygen in the public debate. The other 99 percent of cooperation is essential and effective in curbing this global and common threat.

GOWING: All right, well let's hear a little bit more of that oxygen. Who else would like to join the discussion? A lot of you I suspect, right? Let's have the microphones here first and here, and one over there. Please microphone here first. Yes, thank you, and here.

POVICH (ph): Thank you very much. Vesna Pusic of Croatia. A few things, this is very exciting. First of all, I want to sort of follow the Professor Viet Dinh example of if you don't shoot down the pigeons they will, the terrorists will use the pigeons.

I think it extends further. If you don't use information extracted under torture they might not use torture. So you can use this same example or analogy for something that reduces the threat to civil liberties, rather than only increases the threat to civil liberties.

Also, in many ways the threat to civil liberties are not seen as threats to security and for the sake of the argument here, I would say that there is, that actually there is a conflict between freedom and security, regardless of that Minister Schauble has said. In many ways, there is always a cost benefit analysis at work whether you want to sacrifice some civil liberties in order to increase security and the threats to civil liberties.

The threats to security is always seen as threats, but the threats to civil liberties are never seen as threats and maybe if we look at that as threats to civil liberties is also security we would sort of be better positioned to decide in this cost benefits analysis. What do you want to risk? Do you want to risk that somebody might sort of pass or smuggle through our security barriers or you want to risk long-term reduction of civil liberties.

GOWING: Right, could I ask if they could respond to that. There are a lot of people who want to intervene, so I could I urge short interventions and shorter replies if possible, who would like to come back on that, Minister.



SCHAUBLE: I gave the concrete example after the (INAUDIBLE) we decided to limit the civil liberty like to take (INAUDIBLE) in the hand like (INAUDIBLE). Of course, it's a decision and I think it was the right balance. You can disapprove, then if we have different opinions we have to get a majority rule, but it's not a fundamental problem.

GOWING: Justice Breyer.

BREYER: You want me to respond to the, I do in concrete cases for example. We've had, I guess, three decisions out of Guantanamo. I'll just show you how it comes up. There are prisoners in Guantanamo, they brought a case a few years ago. The question in that case is due the laws of the United States that protect civil liberties extend to them and what we said was they can come in to a regular court, file a Writ of Habeas Corpus like anybody else and determine whether they are being held in violation of the law.

Now arguably Congress has changed that recently, there are two sides as to whether they have or haven't. That's the first decision. The second decision was what happens if a person is being held in Guantanamo and he says I am not an enemy combatant. I was not, I was picked up on the battlefield in Afghanistan, but I'm just a shepherd and happened to be there by accident and they picked me up because they wanted to (INAUDIBLE).

Well, who is to decide that? Well our court said there had to be a fair tribunal with a neutral decision maker in an effort to provide both sides with arguments in proof, all right that's traditional.

Third case, Bin Laden's driver, not the most popular person in the United States sued the case against the President of the United States and he is one of the most powerful people around, I guess in the world. And I think it (INAUDIBLE), who won, Bin Laden's driver.

Bin Laden's driver said that the President does not have the power under the law to try me with special military tribunals and we looked at the law and the court decided, no he didn't. All right, now you see, those are the kinds of questions. It's for the legislature that is going to make this balancing engross.

What we're going to do as a court is there is going to be a particular person and that particular person is going to say, I'm here, I'm being held, I don't want to be held, and the question does the law permit it and it's not just the statute they passed.

The first question will be, does that statute that they passed permit his being held and the second will be, if I does, does it violate basic liberties that are protected by the Constitution? And I'm trying to give you a general answer which really explains how our institution works and doesn't get at what you're trying to get at which is how to make the balance.

UNIDENTIFIED PARTICIPANT: Right. (INAUDIBLE)



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UNIDENTIFIED PARTICIPANT: (INAUDIBLE) I'd like to push the panel a little bit on your 17 years question.

UNIDENTIFIED PARTICIPANT: Go ahead.

UNIDENTIFIED PARTICIPANT: What has changed is the fabrics of our societies are becoming increasingly difficult and we are far more vulnerable now than we were 17 years ago and that translates into our concept of civil liberties. Look at privacy as a key issue there. But we are putting digital footprints everywhere we're going.

So, we've become very vulnerable even as individuals. To (INAUDIBLE) what does it mean in terms of the state trying to rebalance liberties and security when the whole framework in which we are acting is changing?

Does the concept of privacy, as we knew it, as it developed in liberal society, still apply in the kind of society that we are moving into?

UNIDENTIFIED PARTICIPANT: I don't know, I want to say one thing about it because I so much agree with that, that is the law. I think every time you get a specific thing, though, you say, my goodness this is awful, there is a company over there that can find out my entire medical history and they'll put it online and anyone can get my medical history that sounds bad, right?

But I'll tell you, the company is there in case you get carried into the emergency room unconscious and you'll be dead without it, now how do you feel about it? There's a company over there that is getting all my preferences as to what I want to buy, what I don't buy, my God they'll find out everything about me.

Sounds terrible. Oh, but wait, what they're trying to do and what they'll use that for is make you offers of those books that you actually want to read instead of your having to look through 4,000 Amazon things that don't interest you.

See, every time we find a good use of this, we find a bad one and a bad one, a good one. All I'm saying is, I sympathize with the question we're going to have to change the law, but we have new wine in old bottles et cetera, not easy to do.

NIK GOWING, LEADANCHOR, BBC WORLD: Yes Jim.

UNIDENTIFIED PARTICIPANT: I think I would answer this the first part of the question whether our privacy is being assaulted everywhere by with the second part of the question which is the everywhere we have diminished expectation of privacy, because our definition of what is private has changed because of the footprints that we leave everywhere.



My approach to the problem initially, and I admit it is an imperfect approach at a time necessary at the time, is that whatever Johnson and Johnson can use in order to sell soap, I should, the government should be able to use to deter terrorism.

It's a good analogy, it's imperfect because then the second question comes in is that do we have the right the civil system in order to control what Johnson and Johnson can do as well as what the government can do, obviously the European Union has the (INAUDIBLE) protection directive, we take a completely different approach and our Privacy Act we just passed in the 1970s limits governmental access of information and by and large leaves private access and gathering information empty.

GOWING: Right. (INAUDIBLE). All right, we've got about 20 minutes, no more to run so please be economic with your interventions and I can get to as many people as possible.

UNIDENTIFIED PARTICIPANT: (INAUDIBLE). I just want to point to the international consequences of the counter terrorism efforts as they are taking place today. European leaders have been proud of numerous statements where they say that any counterterrorism efforts will have to take place in full accordance with international human rights and refugee (INAUDIBLE).

At the same time the European Union almost remains silent and not in anyway in form specific in taking on its key ally the United States when it is violating some of the core principles exactly of that international law. Torture, non-fair trials, kidnappings, we're talking about undisclosed detention places, ghost detainees and forced disappearances and so on. This is having consequences world wide on how regimes are getting away with crimes they did not get away with before. I'm saying this also in the context of the summit that is just coming up on Monday between the EU and the U.S.

Unless Europe faces up to this challenge and becomes more specific about what it means when it talks about counter terrorism efforts in full accordance with international law, it does that publicly also confronting the United States we will see an ongoing undermining of exactly that law and we will see regimes world wide engaging ...

UNIDENTIFIED PARTICIPANT: And we will see regimes world wide engaging with impunity in the very same practices against their dissenters, either terrorists or not.

UNIDENTIFIED PARTICIPANT: (INAUDIBLE) you and your other 26 colleagues should be far more assertive with America.

UNIDENTIFIED PARTICIPANT: Europe is not an authority to control United States. If and we are not the teachers of United States. If I am going in favor of unilateral acting, the



precondition has no one is arrogant and that everyone has to understand that we have to act together.

We discuss different opinions but we are not the judges, Europe is not the judge for the United States.

UNIDENTIFIED PARTICIPANT: But is it arrogant to promote a principle?

UNIDENTIFIED PARTICIPANT: No. We promote principles, have ever I said we have to find common denominators and begin discussing about what we can do together. But it's important not to take a position. Europe depends on cooperation with United States even more than United States depends on cooperation Europe.

For example, in intelligence, without close cooperation with U.S. Services, European Services are not very useful. We need cooperation and therefore we have to discuss all the issues. And I do it, and we all do it but it's sometimes it looks a little bit like the Europeans would like to decide what the Americans have to do.

And that's not fair. Then we have to act together. We have to act together. And we have to take common responsibilities.

UNIDENTIFIED PARTICIPANT: And so are these supposed to be happening, I mean, when I hear this kind of discussion, I'm tempted to say there are very strict laws against torture in the United States.

UNIDENTIFIED PARTICIPANT: Yes, here to.

UNIDENTIFIED PARTICIPANT: And I'd be surprised, I wouldn't understand why if somebody is inside the United States and they've been tortured why they wouldn't bring some kind of an action and get some recovery.

Now there may be answers to that, maybe they are hidden, maybe they're outside the United States, maybe it's during war time, but it's complicated. So I would just say I do know that there are very strict laws against that in the United States.

And I have a fairly strong instinct about how the judiciary would react in an instance where there was an individual before the court who had suffered injury in violation of those laws, but that doesn't mean I know what's going everywhere in the world. I live in a little office and people don't tell me everything.

GOWING: And Viet Dinh, this principle that America should listen, there should be pressure from Europe, what would be the response where you work and when you're drafting a law. How much would you be willing to embrace that or how much would you resent it?



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VIET DINH, DR., PROFESSOR, GEORGETOWN UNIVERSITY LAW SCHOOL: No we would listen first to our constitution and make sure that everything we do is consistent with our constitution, our tradition. To the extent that the experience of other nations inform how we do our work, I think that is critical that we listen to that.

But one thing I do want to object is the fact that as much as Europeans often complain the United States has asserted itself, the power to be the world's policemen, it's equally arrogant as the Minister has said, but much more diplomatically for Europeans, some Europeans to arrogate to themselves the authority to be the world's conscience.

You know we as the Justice says, we have systems, we have laws, we have constitutions to protect the rights of persons within our jurisdiction. And yes we will listen to constructive criticism, we should listen to such constructive criticism. But to first assume that we are not fulfilling international morale and constitutional obligations I think is letting the United States off too easily.

GOWING: Right there, there are still a lot of people who want to intervene, but please be economic again. You have a microphone along side you.

UNIDENTIFIED PARTICIPANT: (INAUDIBLE) I am member of the European Parliament; yes indeed we don't use the word war on terrorism because first of all we in Europe have been living with terrorism for a long time. And we know how to deal with it and we're not breaking basic civil liberties in our laws to try these people while this is not happening in the U.S.

And indeed you're right, Europe is very much in disgracefully in same boat with U.S. in indeed outsourcing torture in this program, through this program of extraordinary conditions and actually conspiring to apprise people of the right to trial -- persons have the right to trial.

We have to get our act together in cleaning up that because exactly what differentiates us from the terrorists, is that we fight for the rule of law for a democratic and free society and that's exactly the reason why this is not a war.

This is a fight, a political fight and we cannot fight it and we cannot even fight with using the weapons we need like intelligence service -- Military and so on. If we taint them in practice, which is absolutely prohibited by our basic laws and actually in this way we're not only undermining our capacity to fight terrorists, we are discrediting our role in pushing for democracy and human rights in the world.

This time whenever you talk to the Chinese or whoever on human rights and laugh in your face, so we really have -- this -- we need a joint EU/U.S. Cleaning Act (ph) to, indeed, fight terrorism properly and in Europe, in a way, we are doing that.



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Our people are being tried the way we don't see them being tried in the U.S.

UNIDENTIFIED PARTICIPANT: Right. A joint U.S./EU Cleaning Act (ph) quickly. All right, think about it for the end. Right.

**Stefan Kornelius**, *Süddeutsche Zeitung*: **Stefan Kornelius**, from *Süddeutsche Zeitung* (INAUDIBLE). I want to add on this issue -- since you both recognize that those self-contested (ph) issues are sucking up 99 percent of the air, why is it such a difficulty to bring up a political effort to clean it up -- to bring that out and probably one quick question to Justice Breyer.

Since we all know that terrorism is about -- not about killing 2,000 or 3,000 people or not about bringing down actually an entire state, but mainly about limiting liberties and bringing in that creeping, wonderful German word angst (ph).

Would the American system -- the legal system, wouldn't it have been a stronger sign if it would have fended off terrorism with existing means without implementing all laws we have seen since 2001?

So it's a basic question, is the American system strong enough to withstand terrorism even without the Patriot Act?

STEPHEN GERALD BREYER, ASSOCIATE JUSTICE, U.S. SUPREME COURT: Oh, I see. Well one, so far the cases that we've dealt with have been cases under ordinary law. I think that's so, isn't it?

KORNELIUS: Yes.

BREYER: And so the Patriot Act hasn't yet had bite in the sense that people have been injured because of the Act, throughout the cases that have come to us. I think that's true.

UNIDENTIFIED PARTICIPANT: That's because it's all constitutional.

BREYER: Oh, fine is that the reason? OK. The -- now there is an ...

UNIDENTIFIED PARTICIPANT: Take my word for it.

BREYER: ... there is an exception here. There -- oh, thank you. There is an exception here and I decided not to take all your advice since you said that Johnson & Johnson has the right to find out about my use of soap and so you should have the same right and the thought that crossed my mind is, I don't care if Johnson & Johnson knows how many -- how much time I spend in the bathtub, but I don't want you to know.



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So -- but -- (INAUDIBLE) I want to make the -- what I was going to say on the Patriot Act (INAUDIBLE) ...

UNIDENTIFIED PARTICIPANT: Can we leave the civil liberty of the bathtub, please?

BREYER: But the point I wanted to make on the Patriot Act -- this is important. It is coming up again in this sense, that Congress amended the Act in a way that, at least arguably, says that those in Guantanamo don't have the power to use the Federal Courts that some people think we said they did have and so the question will be whether Congress constitutionally could take that right of review away from the people in Guantanamo.

Now we were asked to consider that case out of order in a sense, quickly -- especially quickly. Two of us -- see, I only remember really well the things that I wrote or write. So I, myself, and another wanted to hear it immediately -- Justice Souter -- Justice Ginsburg also wanted to hear it, but perhaps not until the Fall, but we needed four votes and we had at three, but two others said -- that Stevens & Kennedy said that the fact that we don't want to hear it out of order doesn't mean we don't want to hear it.

And so that is the state of the Supreme Court law -- if you want to call it that, at this moment on the question that's of most interest to you, which is what about the special laws? Because this is indeed a special law, is it not of yet?

BREYER: The jurisdiction?

UNIDENTIFIED PARTICIPANT: Yes.

BREYER: Yes, definitely.

GOWING: Thank you very much, please. Quickly. Oh, you've lost the microphone, and the microphone is in front of you sitting on the desk.

**Radmila Sekerinska:** Thank you. We are talking today -- my name is **Radmila Sekerinska** from Macedonia. We are talking today about United States, European Union countries with a good democratic record. But how does newly-started debate influence the situation with regards to civil liberties in countries that have a weaker democratic record?

Some of it was raised before by one of the members of European parliament, but I really think that some of these arguments have been used and misused elsewhere, and we seem to be neglecting this effect. Thank you.

GOWING: Which comes down to that question about the U.S. EU cleaning act.



UNIDENTIFIED PARTICIPANT: We try to improve our common discussions. I will join the committee on European parliament, together with my American colleague, in two weeks to discuss this. We are working on this. We will have meeting in Venice two, three weeks ago – in two weeks or three weeks, to go on with that.

We will not find – will not come to a common act in some months, but we are working this very, very stressfully, because we know, that's right, if we don't succeed in the Atlantic community, U.S., Europe, we will not have a chance to convince other one in all of the world.

I am convinced if we act closely together, U.S. and Europe, we have a very convincing position even in United Nations, even in Security Council. It's difficult, but it's not impossible. And therefore we have to improve it.

But to have a chance to improve it we have to act on a common basic of understanding that we have common threats, and that we have not a labor shift between responsibility for security, and the others for civil rights.

I know this is custom from – when I come to Europe in parliament, to be very frank, I have been told your national stupid Ministers of Home Affairs, you are responsible for security. We are responsible on civil rights, the (INAUDIBLE) of civil rights.

And it is a (INAUDIBLE) that is able to destroy the support for European (INAUDIBLE) in all populations in member states. And therefore, we have find a common understanding that we are responsible in security as well as in civil rights. And if we do that in Europe, US framework and we understand the Americans have civil rights longer than a lot of Europeans.

And we if, on this basically we come to common (INAUDIBLE), because we had problems. And I think the real reason for getting problems in the past was acting unilaterally, not to be able to act unilaterally, and that we can change.

GOWING: And this consciousness about the message that has been sent out, the negative message that often is being sent out. From that question, human rights (INAUDIBLE), the impunity, this issue of what else is happening in the world, the fact that bad messages are being sent as opposed to the principal messages which you believe you are upholding in Washington at the moment.

UNIDENTIFIED PARTICIPANT: So I started out by supplicating just, and you wanted to end by beating my breast in earnest. I don't think that the -- my rather Pollyannaish appeal to focus on the 90 percent to 99 percent, when we are working together very effectively at the, is gong to change the public date.



But I only bring that up as a matter of perspective. I do think that there are common ground. There are many areas where, at least in concept the United States government has announced a shift in position to be more confident with European sentiments.

As a practical matter, for example, even if Guantanamo was ordered to be closed tomorrow, it would be a very, very hard task to find the appropriate countries in order to place all those persons around the world outside of Guantanamo.

So there are practical consequences that restrict actions. But in an event, I completely agree that we can all work in common together more in order to affect the common image and I think Ambassador Gray had a great quote today in the International Herald Tribune. That instead of beating each other up, the U.S. and the EU should be working in (INAUDIBLE) especially in areas of common interest like fighting terror and protecting civil liberties.

GOWING: Just before I hand it to Craig Kennedy (ph) to wind up the session. Justice Breyer, how much when you're sitting, do you consider the messages that are being sent to other nations. We've had several questions about this, real concern internationally.

BREYER: Not the messages, Judges don't form international clean up committees, but we do read and we do listen to lawyers. And so if the lawyers discover that a group of experts or others, whatever committee, internationally has looked into this and said let's do it this way, let's do it that way, strong beliefs they then -- that gets back in the form of briefs to the judges who read them. And that's why I say our role in this area often we're applying American law, but American law in respect to these protections of basic human liberty is not different from anyone else's to my knowledge.

We are applying American law and we can be informed by though not bound by what goes on elsewhere, by way of investigating how to make these balances properly and adequately to protect the civil liberty. So my answer is it's relevant. That isn't to give an answer.

If there was one thing that I'm going to remember that the Minister said, I thought it was good in this. He said at one point, and I certainly think reflects more feelings of more people than they admit. He said, we're not certain, he said, we're not quite certain we're going to look, we're going to ask, it's a spirit of uncertainty. And the reason that resonated in my mind, who was a great judge, learned in hand, said that spirit of not being too sure of ones self, that, he said, is the spirit of liberty.

GOWING: Justice Breyer, Minister Schauble and Viet Dinh, thank you very much indeed. I'm sorry, I apologize to those who also wanted to intervene, you can see the time pressures we're under, Craig.

CRAIG KENNEDY: OK, thank you so much for a terrific session. Now we're off to lunch. Take your tags out. There should be number some place. That's the lunch you're going to.



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If you head out to the lobby there is going to be signs up that have the number. You'll go off to some very nice restaurant here in the neighborhood and enjoy yourself and have another good discussion. Be back at four when Dick Holbrooke and Bob Zoellick are going to talk about the U.S. Presidential. And then tonight we're starting the night owls at 9:00 instead of 9:30 so we can go even later. We'll see you back here at 4:00, thank you.

END