Secret Evidence and the Courts in the Age of National Security

In response to the threat of international terrorism, a transformation is occurring in Article III courts, immigration proceedings, military courts and status review tribunals: the expanded use of secret evidence. This trend challenges the bedrock principles of our legal systems: access to information to conduct an investigation, the ability to contest facts and present a defense, and the right of the press and public to scrutinize legal proceedings. It is one instance of the central civil liberties issue of our time: will the government protect national security at the expense of, or while preserving, fundamental rights and liberties?

While the use of secret evidence is not new, it has assumed greater prominence in the wake of recent terrorist attacks. Since 2001, we have seen increased use of the Foreign Intelligence Surveillance Act, significant expansion of the government’s investigatory powers under the Patriot Act, and ever more assertions that national security compels the use of evidence known only to the government and the court or tribunal. It raises concerns about whether we have struck the appropriate balance between national security and liberty.

This conference will describe and evaluate the use of secret evidence throughout the legal process—in the investigative stages, in Foreign Intelligence Surveillance Act courts, in civil and criminal cases, in Article III courts, in immigration and military courts, and in Combatant Status Review Tribunals. Panelists will explore the appropriate limits on the use of secret evidence, the extent to which legitimate national security concerns can be accommodated within these tribunals, and alternative models by which the competing concerns can be accommodated. Journalists and lawyers will also explore the broad range of first amendment issues related to journalists’ access to information, privileges, and privacy. In addition, scholars and lawyers from Israel, Ireland, and the United States government will provide comparative perspectives on the use of secret evidence in the tribunals of other countries.

Papers presented at this conference, along with a summary of the proceedings of each panel, will be included in a symposium issue of the Cardozo Public Law, Policy and Ethics Journal.

Advanced registration is requested. Conference admission is free. Please RSVP by November 22.
Monday, December 5

8:30 am  Introductory Remarks  
ELLEN YAROSHEFSKY  
Professor of Law and Director, Jacob Burns Center for Ethics in the Practice of Law, Benjamin N. Cardozo School of Law

8:45 am  Courts and National Security: A Historical Perspective  
DAVID RUDENSTINE  
Dean, Benjamin N. Cardozo School of Law

Moderator  
PETER P. SWIRE  
John Glenn Scholar in Public Policy Research, Moritz College of Law, Ohio State University

Panel  
HON. RALPH GUY  
Foreign Intelligence Surveillance Court  
JAMEEL JAFFER  
Staff Attorney, American Civil Liberties Union  
REP. JERROLD NADLER  
US House of Representatives  
FRAN FRAGOS TOWNSEND  
Assistant to the President for Homeland Security and Counterterrorism

11:15 am  Break

11:30 am  Beyond Article III Courts: Military Tribunals, Status Review Tribunals, and Immigration Courts  
Moderator  
ROBERT CHESNEY  
Associate Professor of Law, Worrell Professional Center, Wake Forest University

Panel  
BRADFORD A. BERENSON  
Former Associate Counsel, The White House  
BRIAN D. BOYLE  
Former Principal Deputy Associate Attorney General, US Department of Justice  
DAVID D. COLE  
Professor of Law, Georgetown University Law Center
GITANJAI GUTIERREZ  
Attorney, Center for Constitutional Rights

CHARLES SWIFT  
Lieutenant Commander, JAG Corps, US Navy

1:30 pm  
Luncheon

3:00 pm  
Issues in Article III Courts

Moderator  
DEBRA A. LIVINGSTON  
Professor of Law, Columbia University School of Law

Panel  
JOSHUA L. DRATEL  
President, New York State Association of Criminal Defense Lawyers

NANCY HOLLANDER  
Partner, Freedman, Boyd, Daniels, Hollander & Goldberg, P.A.

ANDREW MCCARTHY  
Senior Fellow, Foundation for the Defense of Democracies

HON. GERALD E. ROSEN  
US District Court, Eastern District of Michigan

5:00 pm  
Cocktail Reception

6:30 pm  
Dinner and Keynote Speaker

HON. FRANK LAUTENBERG (Invited)  
US Senate

Tuesday, December 6

9:00 am  
Comparative Perspectives: Israel and Ireland

Moderator  
PETER RAVEN-HANSEN  
Professor of Law, George Washington University Law School

Panel  
AMI KOBO  
Deputy National Public Defender of Israel

RONALD R. ROOS  
Deputy Chief of the Counterespionage Section, US Department of Justice

GADI TASFRIR  
Senior Prosecutor, Office of the State Prosecutor of Israel

11:00 am  
Break
11:30 am  Investigative Journalism and National Security

Moderator  NICHOLAS LEMANN
Dean, Columbia School of Journalism

Panel  SCOTT ARMSTRONG
Investigative Journalist, National Security Clearinghouse

          EVE BURTON
Vice President and General Counsel, The Hearst Corporation

          STEPHEN F. HAYES
Journalist, The Weekly Standard

          DANA PRIEST
National Security Correspondent, The Washington Post

1:30 pm  Concluding Remarks and Luncheon

          BARRY C. SCHECK
Professor of Law, Benjamin N. Cardozo School of Law

Advanced registration is requested. Conference admission is free. Please RSVP by November 22.

Name/Title

Organization/Affiliation

Address  City/State

Telephone  E-mail

☐ Yes, I would like to attend lunch on December 5; enclosed is $25.
☐ Yes, I would like to attend dinner and keynote address on December 5; enclosed is $40.
☐ Yes, I would like to attend lunch on December 6; enclosed is $25.
☐ I will attend just the conference.

Return your conference registration and/or lunch/dinner reservation(s) with a check for the appropriate amount made out to Cardozo School of Law.

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