



CITIZENSHIP IN A TIME OF REPRESSION

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**Presenters
Michael Trainer & Kenneth Davis**

Fairchild Lecture Series Transcript



Dean Davis: - Law School. He's a member of the Board of Directors of the Environmental Law Institute and the Committee for Civil Rights Under Law, and is past chairman and president of the Sierra Club Legal Defense Fund, now Earth Justice.

Dean Davis: He's been an adjunct lecturer at Boalt Hall Law School at the University of California-Berkeley, where he's taught Remedies and Conflicts of Law.

Dean Davis: In 1995, Mr. Traynor was named by the American Association for the Advancement of Science as a fellow for research and publication on issues at the intersection of science and law in biotechnology, the environment, and information technology.

Dean Davis: In 2002, he was elected as a fellow of the American Academy of Arts and Sciences, and his most recent honor, which came after the publication of the program, is that he received the 9th Circuit Professionalism Award, which is very special to our law school, because it's named after one of our graduates, the late John P. Frank, class of— John Skilton and I were speculating and I looked to Ed for resolution. '39 or '40?

Dean Davis: '40.

Dean Davis: And finally, as someone—I should have introduced myself for those of you who don't know. I'm Ken Davis, I'm dean of the law school. And as someone who has probably gotten an unfair share of job opportunities based upon the mistaken assumption that I have something to do with the preeminent administrative law scholar Kenneth Culp Davis, which I don't, I should add that our speaker today is, however, the real deal.

Dean Davis: All of us, I think, as part of our legal education, read numerous opinions by the distinguished Chief Justice—Roger Traynor—of the California Supreme Court. I know I still regularly teach one, *Minton v. Cavaney*, if you remember that one, in my Corporations class.

Dean Davis: Mike Traynor is Chief Justice Traynor's son.

Dean Davis: So it's a wonderful honor to welcome to our law school Michael Traynor.

Michael Traynor: It really feels good being back in a law school classroom again. I love to teach and this atmosphere is just terrific. When we came in at the airport, Shirley and I, my wife Shirley is right here, and got into a cab, the cab driver asked us where we were from.

Michael Traynor: And Shirley said, "Well we're from Berkeley," and the cab driver said, "Madison is the one town in this country that makes Berkeley jealous."

Michael Traynor: Which I take as a compliment to both our cities, so it's a great pleasure to be here. I'm also glad to see my ALI Council colleague Diane Wood, who's on the

7th Circuit here with her husband Rob, that was a very special treat and pleasure.

Michael Traynor: And I'm delighted to be here in Madison, and to honor Judge Thomas Fairchild, a magnificent citizen of Wisconsin who has devoted his life to distinguished public and judicial service.

Michael Traynor: I'm grateful to be in your friendly company, and grateful to Dean Kenneth Davis, Jr., for his generous introduction. Thank you.

Michael Traynor: The last time I visited Madison was in 1996, to see Shirley Abrahamson, when she was sworn in as Chief Justice of Wisconsin by Chief Justice of the United States, William Rehnquist.

Michael Traynor: Her Fairchild lecture is a brilliant analysis and portrait of the American Law Institute.

Michael Traynor: It is a special pleasure to be here, at the Law School of the University of Wisconsin. UW-Madison has identified as one of its key strategic directions the strengthening of its commitment to public service, including the concept of citizenship, which emerged as critical in the university's self-study.

Michael Traynor: I salute the many contributors to the positive spirit of Wisconsin's citizenship, including United States Senator Russell Feingold, who had the courage to cast the sole dissenting vote in the Senate against the so-called Patriot Act, to which I will refer later.

Michael Traynor: I think there's a little slide here, too, from the day's newspaper.

Michael Traynor: Maybe somebody will help me put that on in a minute. Thank you. I should know how to work- oh there it is right there, thank you. See that?

Michael Traynor: It's a timely cartoon.

Michael Traynor: This remarkable group of Wisconsin citizens also includes your governor Jim Doyle, former Senator Gaylord Nelson, former governor Tommy Thompson, the late judge and state Senator Robert W. Warren, Judge Barbara Crabb, John Frank, my dear late friend and ALI colleague, and John Skilton, our prized co-chair of the Lawyers' Committee for Civil Rights Under Law.

Michael Traynor: Two years ago, here in Madison, Tony Lewis gave the Robert W. Kastenmeier lecture entitled "Civil Liberties in a Time of Terror."

Michael Traynor: My talk today is entitled "Citizenship in a Time of Repression" and it addresses the responsibilities of citizens in safeguarding civil liberties. I considered whether to select a blander, less provocative title, but decided that I could not do so, for I feel that in my heart, that our rights as citizens to the truth and basic

liberties, are being repressed by our own government, and that we have to stand up against this erosion of our liberties.

Michael Traynor: As an idealistic 10-year-old, I observed the formation of the United Nations in San Francisco. Gathered on the stage at the opera house, world leaders worked diligently for an international structure, promising a beleaguered world security and peace, as well as human rights.

Michael Traynor: As a teenager I began to develop what has become a dual and lifelong commitment to our environment and to liberty. I believe that the preservation of each is important for the other, and that governmental oppression of our environment is likely to be joined by governmental repression of human rights.

Michael Traynor: In 1950, when I was 15, I spent the entire summer hiking in the Sierras in California, and appreciating the freedom of being one with the mountains, lakes, and streams. The next year, I was fortunate to be a freshman at the University of California at Berkeley, and to begin classes with one of those remarkable teachers who influence one's entire life.

Michael Traynor: Professor Jacobus tenBroek, a constitutional lawyer and scholar, introduced us to principles of liberty and equality, to the Socratic method, and the issues of freedom of expression. We also studied the Hirabayashi case, which upheld a military curfew against persons of Japanese ancestry, and the Korematsu case, which upheld their forced relocation during World War II.

Michael Traynor: Both cases were early examples of governmental overreaction to perceived threats. Today, the word "patriot" is used in a statute that in my opinion stifles liberty. The term "collateral damage" is used to describe the death of children and other innocent bystanders. The phrases "weapons of mass destruction," "immediate threat," and "imminent threat" were used by our government to justify war. Phrases that have prompted disturbing questions and unresolved questions about the evidence upon which the government acted, as well as about knowledge and intent.

Michael Traynor: As an environmentalist, I am appalled to see a measure that would increase pollution, falsely described as a Clear Skies Initiative, and a measure that will deplete forests called the Healthy Forest Restoration Act.

Michael Traynor: Our government is blatantly misusing language. George Orwell's prescient warnings against newspeak and doublethink are as apt today as they were over 50 years ago.

Michael Traynor: Truth, liberty, and openness are related, as I will demonstrate by examining one of the most controversial provisions of the Patriot Act: Section 215. This section amends the provision of the Foreign Intelligence Surveillance Act that deals with government investigations and the power to obtain records secretly.

Michael Traynor: Because members of religious groups know the FBI can now demand their personal records, even if they have done nothing wrong, some are already declining to attend mosques, make charitable contributions, speak about controversial issues, visit websites, or engage in other activity that might become the subject of a record.

Michael Traynor: If not repealed or renewed, Section 215 will sunset, with some qualifications, on December 31, 2005. Prior to the Patriot Act, the statute was limited to business records, related only to common carriers and public accommodation, physical storage, and vehicle rental facilities.

Michael Traynor: It also required the Attorney General to certify to a court that the records sought were relevant to an investigation, and that there was reason to believe that the target was a foreign power or the agent of a foreign power.

Michael Traynor: I will examine three aspects of this issue. First, what the Department of Justice and the Attorney General of the United States say about Section 215 in public relations statements on their official website and elsewhere. Second, what the statute actually authorizes. And third, what the Attorney General has admitted in sworn testimony before the house judiciary committee.

Michael Traynor: The Department of Justice maintains a website reassuringly entitled "Preserving Life and Liberty." There it posts the Patriot Act, speeches and reports, including one called "Dispelling the Myth," describing Section 215 as addressing access to business records and other items under the Foreign Intelligence Surveillance Act. That report describes as a myth the statement that many people are unaware that their library habits could become the target of government surveillance.

Michael Traynor: It describes as "reality" that the library habits of the ordinary Americans are of no interest to those conducting terrorism investigations and that obtaining business records is a long-standing law enforcement tactic.

Michael Traynor: The Department's website asserts that, "Section 215 has a narrow scope. It can only be used to obtain foreign intelligence information not concerning a United States person, or 2) to protect against international terrorism or clandestine activities. It cannot be used to investigate ordinary citizens or even domestic terrorism."

Michael Traynor: The website emphasizes that Section 215, "preserves First Amendment rights. It expressly provides that the FBI cannot conduct investigations of a United States person solely on the basis of activities protected by the First Amendment to the Constitution of the United States."

Michael Traynor: In other public statements, the Attorney General has characterized the American Library Association's concern about Section 215 as hysteria. The Department's Director of Public Affairs describes Section 215 as having only a

narrow scope, as going to great lengths to preserve First Amendment rights, and as requiring a court order.

Michael Traynor: A trusting reader of such public statements might understandably conclude that Section 215 was aimed primarily at business records, not at library or personal records. And at foreign terrorists, not American citizens. That it affirmatively preserves First Amendment rights, and that its application will be subjected to serious judicial review.

Michael Traynor: Most readers and web surfers will likely not review the actual statutory language or the testimony of the Attorney General.

Michael Traynor: The statute, however, expands broadly the definition of accessible records. It now extends to tangible things including books, records, papers, documents, and other items. It explicitly authorizes the director of the FBI or his designee to conduct an investigation of a United States person, a term that includes United States citizen or lawful resident alien.

Michael Traynor: Although such an investigation cannot be solely on the basis of activities protected by the First Amendment, the term solely seriously limits their protection. Would you want to rely on the government's determination that you were solely engaged in protected activity and not anything else?

Michael Traynor: The statute plainly suggests that the FBI can investigate United States persons based in part on the exercise of their First Amendment rights, without any safe harbor for such exercise. Moreover, the First Amendment limitation only applies to an investigation of a U.S. person.

Michael Traynor: A visiting uncle from a foreign country, for example, could be the subject of an investigation, and while staying at his nephew's house here in the United States, the investigation could extend to the nephew's records.

Michael Traynor: Furthermore, under Section 215, the government applies in secret to a designated federal judge or magistrate for a secret order. The targets are not notified that their privacy has been compromised. The government's application need only specify that the records are sought for an authorized investigation conducted pursuant to the statute.

Michael Traynor: This standard is a most lenient one. The government need not show probable cause—or even reasonable grounds—to believe that the target of the order is a criminal suspect or foreign agent.

Michael Traynor: The statute requires that the judge shall enter an ex parte order as requested, or as modified, approving the release of records, if the judge finds that the application meets the requirements of the Section.

Michael Traynor: The statute gives the judge no authority or leeway to require evidence or to go beyond a determination that the government's application itself meets the statutory requirements.

Michael Traynor: Section 215 provides that the order shall not disclose that it is issued for purposes of an investigation. The person who is the subject of the investigation may never know about it. Section 215 further contains a non-discretionary gag order, a gag requirement that no person shall disclose to any other person that the FBI sought or obtained tangible things.

Michael Traynor: In his testimony before the House Judiciary Committee on June 5, 2003, the Attorney General, in response to questions from Representatives Tammy Baldwin of Wisconsin, acknowledged that Section 215 had expanded the records accessible.

Michael Traynor: He agreed that the standard for seeking a court order was lower than probable cause. He admitted the FBI could ask for book purchase records, a library book, or computer records, and that "there are some educational records that would be susceptible to demand."

Michael Traynor: He conceded that probably the FBI could get genetic information, such as a little DNA left on a glass of water, by someone who had committed a crime. The Department similarly downplays the intrusive effect of other provisions of the Patriot Act.

Michael Traynor: For example, the sneak and peek provision, that authorizes government agents to come to a private residence in secret to look around, take photographs, and even to seize property without the owner's knowledge. Notice may be delayed for a reasonable time, which may thereafter be extended by the court for good cause shown.

Michael Traynor: In a democracy, the government is implicitly constrained by the informed consent of its citizens. When citizens visit the website of our Department of Justice, they are entitled to an objective description of the law, not an advocate's brief or public relations statements that omit crucial points or distort the language and meaning of the statute.

Michael Traynor: We should remember the wisdom of Thucydides, who related the loss of clear meaning of words to the subsequent degradation and decline of Athens.

Michael Traynor: The truth comes first. In the last few decades, our country has experienced several deplorable sequences of governmental deception. The Johnson administration's deception of Congress and the country led to the infamous Tonkin Gulf Resolution of 1964, to expansion of the Vietnam War, and to more than one generation's distrust of government.

Michael Traynor: The debate over whether a citizen has political responsibility, however, is ancient. It is a debate between on the one hand Epicurus, who as summarized by Jefferson said, "Happiness is the aim of life, and the summum bonum is to be not pained in body nor troubled in mind."

Michael Traynor: And on the other hand, Cicero, who reminded us that we are not born simply for ourselves, but share a responsibility to others, including participation and leadership in one's political community.

Michael Traynor: The dichotomy between self-interest and altruism continues in modern terms. Our freedom allows us the choice to go bowling alone, to pursue individual pleasures without any sense of citizenship, community and responsibility, and to just take and not give.

Michael Traynor: It also allows us the choice to heed John F. Kennedy's eloquent plea in his inaugural address: "Ask not what your country can do for you, ask what you can do for your country."

Michael Traynor: Do Americans want to become informed and involved? Or do they want to be like the person who, when asked if he knew the difference between ignorance and apathy, responded, "I don't know and I don't care."

Michael Traynor: This debate reflects very important and sincerely held belief about what life should mean, and what government's role in lives of citizens should be.

Michael Traynor: This country could not even have this debate, or confront or appreciate our differences, however, if it did not have the rock of liberty upon which the freedom to differ is founded.

Michael Traynor: Is there really cause for concern? Why not just be complacent, passive, and phlegmatic? Many Americans are not likely to be taken in by government duplicity and secrecy. Many still feel relatively secure in jobs and homes and are law-abiding. Many should not yet have to worry about being packed off to a detention camp, or compelled to talk about beliefs or friends before some hostile interrogator. Or subjected to secret government surveillance of personal records and residences.

Michael Traynor: Why should Americans care if some misguided person, or minority, or radical, or alien, gets caught up in a secret investigation of clandestine activity, or detained indefinitely in some offshore prison?

Michael Traynor: To me, however, it is all the more insidious that the repression occurring now is mainly felt by aliens, those on the fringe of society, citizens with radical views, victims of invidious discrimination, and people who may not be so law-abiding.

Michael Traynor: Government will aim first at the weakest, they will target those who lack public support and against whom there may be a majority of opinion. It will not aim

Michael Traynor: Over centuries, brave men and women have courageously defended liberty, risking their lives and careers. They are celebrated in ancient legends, such as Antigone's struggle to give her dead brother a decent burial.

Michael Traynor: In the reports of battles our country has fought for right and freedom, in modern accounts of resistance fighters, combat veterans, and champions of civil rights, and in Nelson Mandela's life story, "A Long Walk to Freedom."

Michael Traynor: Tom Fairchild has shown that courage throughout his life, including his challenge to Joe McCarthy in 1952 for the Senate of the United States. His life and career are inspiring.

Michael Traynor: By comparison, it seems little to ask that citizens stand up against the repression of truth, openness and liberties today. President James Madison, for whom this city is named, understood the Constitution as the people's law, which was to be revered, and not remolded by their servants.

Michael Traynor: It seems little to ask that we the people stand up for our law, our Constitution.

Michael Traynor: The appropriate responses to terrorism do not include deceiving the American people, needlessly invading our liberty, or enlarging a government of secrecy. They do not include passivity on the part of citizens. If we as vigilant citizens so choose, the spirit of liberty that is in our hearts will become also the voice of liberty in our country.

Michael Traynor: Thank you.

Dean Davis: Stay there, I've got a gift for you.

Michael Traynor: Okay, thank you.

Dean Davis: Thank you so much, Mr. Traynor, for the very thoughtful remarks. As a token of our appreciation, this is the symbol of the law school, the gargoyle, and I guarantee you, a conversation starter I hope, on your bookshelf.

☒ Davis: Anyway, we will not force you and your delightful wife to have to schlep this back to Berkeley in your suitcases, we'll ship it to you, to avoid whatever Patriot Act detection you might go through at the airport with this guy.

Michael Traynor: I'm deeply honored. Thank you.

Dean Davis: Mr. Traynor has suggested that it's a delight to be back in a law school classroom and he would welcome any questions.

Dean Davis: I don't know if Lynn Thompson or a member of her staff is out there who can maybe refill Mr. Traynor's water, I think would be good.

Michael Traynor: Okay. Who wants to be the first penguin off the ice floe? Let's get it started if we can.

Michael Traynor: Yes?

Speaker 3: My question is [inaudible 00:53:36] of a possible solution to the Patriot Act. And when I look at terrorism and what occurred on 9/11, you used the term fanatic, which I think is appropriate if you look at people who committed suicide in an attempt to kill as many Americans as they could.

Speaker 3: And I look at the solutions that you proposed and I don't see really how to deal with preventing a situation like that. Now, in general, investigating in certain intrusive manners, the Patriot Act ... may eventually protect against one of these acts. It seems to me that those solutions that you proposed, particularly increasing criminal penalties, seems to be fully inappropriate, since this people obviously only care about dying, that wouldn't fly. And I just don't see how those solutions really would protect us against incidents like that, and that limiting the intrusive nature of the Patriot Act would protect the United States.

Speaker 3: And the second question I have is, the use of the term true emergency. It seems to me the only way to know if it's a true emergency is to have investigation beforehand to know that the fact in itself are true. I'm wondering if you can explain how we can learn something is a true emergency while still maintaining at least enough of a investigatory presence to verify.

Michael Traynor: On the first question, citizens themselves can't stop a 9/11. But we can support aggressive measures, intelligent measures, to strengthen our counterintelligence system.

Michael Traynor: For example, in the preceding administration, and I want definitely not to be political here, counterterrorism activities is a high priority of the Justice Department. The records that are available, and there are only a few on the web, but I'm sure the story is much broader than that, indicate that in 2001, the FBI was asking for some \$53 million in funds to strengthen counterterrorism activities by hiring translators, researchers, and counterterrorism specialists.

Michael Traynor: In a letter ironically dated September 10, 2001, the Attorney General deleted that from the budget and recommended that that not be funded. So I think we need, as a government and citizens, to support intelligent and good measures for effective counterterrorism and planning.

Michael Traynor: That's only a partial beginning, but you're right in stating, I think the studies of people who study terrorist acts, the one thing they're willing to do is give up their lives and they want to demonstrate their fanaticism and prowess, as I mentioned, and do it with a flair, flashing the scimitar or some modern-day equivalent of it.

Michael Traynor: Now, the second question, how do you define a true emergency? We have to rely a great deal on our elected representatives and our executive. But why can't a court be somewhat involved at least in that determination, in reviewing to make sure under the pre-Patriot Act organization of FISA, the Foreign Intelligence Surveillance Act, a careful, very careful workup had to be made by the Attorney General and he had to certify personally to the truth of whatever statements were made about the emergency that justified the surveillance order.

Michael Traynor: Why not engage either in appropriate cases the courts, or in some cases, if the legislature is better to review, to have very effective oversight by Congress, or in some cases, as in the case of the inspector generals who criticized the Attorney General for the deportations, inspector generals who are independent and well-financed within the executive department.

Michael Traynor: Yes, in the back.

Speaker 4: Well I was curious, I'm wondering if you're familiar with the work of Harvard professor Lance Carey, who points out that a single airplane on 9/11 that did not reach its intended destination was the one where a group of citizens got together and made the conscious decision to sacrifice their own lives by attacking the hijackers, and that therefore, this personal information and localized decision-making was actually the most effective technique for stopping the terrorism once the hijackings had already occurred.

Speaker 4: So I'm curious if you could speak to the point that it seems to me part of the problem of the Patriot Act is that it does exactly the opposite. That the evidence that we have now, the FBI collected information before 9/11, they just didn't use it very effectively. So it's not clear to me how to get more information is going to help, and it seems to me that in fact, redistributing a lot of power and information back to ordinary citizens would be more effective technique.

Michael Traynor: They're both wonderful points. That's a great example, and I have a lot of references to cite when the article gets published, and I will certainly use that one. And I agree with you, if we got better information—we're good people, we're American citizens that can understand these problems. We're resilient, as I said. What we don't want is some fear monger, or it could be in the form of a government official, or a TV newscaster, talking about anthrax or something, being totally uninformed and scaring people.

Michael Traynor: We need to be educated about it. And I think the more information we can be given to share in that and to build up that education, the better without compromising, as I said, military actions or necessary secret intelligence. I appreciate both of your points.

Michael Traynor: Yes?

Speaker 5: Could you spell out the difference between the rules for prisoners of war, as applied, let's say in World War II, and the rules that are applied to the Guantanamo Bay prisoners of war, or opposing variations of those?

Michael Traynor: I'll try to do the best I can on that. The Geneva Conventions, and there's four of them, I think the third applies to prisoners of war, has some conditions in it. You get treated with certain human conditions. If you have been caught and you have been fighting in uniform, you haven't been attacking civilians, you have been engaging in what are considered to be—it's hard to think of ordinary acts of war, but military combat work, people necessarily are gonna be injured and die.

Michael Traynor: I think the government's justification for not according the Geneva Convention treatment, is that their claim at least is that these people in Guantanamo Bay did not qualify in terms of being in a foreign uniform, fighting for a foreign military. The truth I think is, we don't know what the truth is, who these people are.

Michael Traynor: Some of them appeared to be turned over by war lords for ransom, and there may be a bunch of innocent people, there may be some very difficult criminals in that area. But it's not easy to distinguish.

Michael Traynor: But I think the rationale for the government denying the protections of the Geneva Convention to the people in Guantanamo Bay is that they were not within the definition of what constitutes adequate warlike combat.

Michael Traynor: Yes?

Speaker 5: It's my impression that there are demands being made for treatment of those people, it was never given to the prisoners of war in World War II, they weren't given the right to anything. They were given food and locked up, period. They had no rights and court cases.

Michael Traynor: Well, we were in a war, and then when the war ended they were returned to their homelands.

Speaker 5: Well, right.

Michael Traynor: And they were given by and large, with the exception of I think some cases, in particular including the Japanese internees, were treated not brutally, but they weren't given access to courts and so forth. But they were returned, and there was a definite period of time.

Michael Traynor: We've got these people in Guantanamo Bay, they've been down there about two years. No charges have been filed against them.

Speaker 5: There were no charges against the prisoners of war. And they were returned at the end of the war.

Michael Traynor: But do you feel that that's a precedent for Guantanamo Bay?

Speaker 5: I just wonder what the rules are that changed. I'm just trying to find out. I don't want to make a decision.

Michael Traynor: Right now, the executive is claiming the power—unheard of, really, in our country, to be able to label anybody it wishes as an enemy combatant. And that's a term of ours. That's not a prisoner of war who's entitled to the Geneva Convention. To label anybody an enemy combatant, including any United States citizen, and detain them indefinitely and not allow them to talk to a lawyer, not allow them any judicial review to determine whether even the basic reason for their being detained is adequate or not.

Michael Traynor: And if you think that's a good thing then I think we'd be in disagreement about that.

Michael Traynor: Yes?

Speaker 6: I think that the post-9/11 evaluations have not been thorough and careful and thought out in a way that I find very dismaying.

Speaker 6: For instance, as I watched the planes crashing in—the horrible sights of the 11th, I just thought how the terrorists had used our transportation system, considered as a whole, as a way of blackmailing our citizens and striking fear into them.

Speaker 6: And I was thinking of practical things. Like, what if we would do a better job of improving the rail system so that if people want to travel on interstate trips, they can do that if they want to?

Speaker 6: Same with the highways. You go out to the highway and just look, and there are huge trucks, and there's traffic that's so frightening. It's no wonder that people want to go by plane.

Speaker 6: And look at the after effects of the war, which plunged us into the worst deficit that we have ever had in our country, and none of the effects of that desperate deficit have come home. And yet I see our superintendent of schools and our members of the school board being vicious with each other, because they're discharging 20 teachers and they are stopping sports, stopping schools, this and that.

Speaker 6: And it hasn't even started yet. So I think what we need to do in our society is pull up our socks and start concentrating on some analysis, and do something about taking the terrorism by the throat and trying to keep the terrorists from

blackmailing our entire society. And that's not necessarily, although very importantly is the law, but we have to start working as a society to preserve our—I'm a conservative, about the Bill of Rights. And I thank you.

Michael Traynor: To me, two things come out of what you just said, at least in terms of my reaction personally.

Michael Traynor: One is, it's very important for citizens like yourself, and all of us, to engage in discussions like this, to see what the best answers might be, and second, to really question the priority that's being given to anti-terrorism activity.

Michael Traynor: Why should it be a priority to attack our liberty? Why shouldn't it be a priority to do what we really haven't yet, for example, and that is to assure better security at our ports and our container facilities, and our means of transportation?

Michael Traynor: Yes, right there in the middle.

Speaker 7: Yeah. How can an individual, running through public office, attack the Patriot Act and avoid being charged with being unpatriotic, without giving a classroom lecture?

Michael Traynor: I think being honest about how they feel about our country's liberty. You struck a chord, because I think politicians should be bolder than they are. I wish more of them would speak out. I think what Senator Feingold did—I mean, imagine being the only dissenting vote shortly after 9/11, when there wasn't much time for debate, and that's one of the problems.

Michael Traynor: And he cast a dissenting vote. And I think people are beginning to see now that there was an overreaction in the Patriot Act, and some people are gonna rein it in. But there's a couple of one-sentence quotes I want to just refer to, because they bear on your question.

Michael Traynor: One is by the Attorney General in December 2001, in his testimony to the Senate judiciary committee, and this reflects what you say about the fear mongering.

Michael Traynor: "To those who scare peace-loving people with phantoms of lost liberty, my message is this: your tactics only aid terrorists, for they erode national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends."

Michael Traynor: And then in the Padilla case, which is one of the cases involving an American citizen, Admiral Jacoby, who is the head of the Defense Intelligence Agency, filed an affidavit in which he says, "Anything that threatens the perceived dependency and trust between the subject and the interrogator threatens the value of interrogation. Any contact with a lawyer can undo this work. Only after

Padilla has perceived that help is not on the way, can the United States reasonably expect to obtain all possible intelligence."

Michael Traynor: So you have public officials in high places making assumptions that to attack and challenge what they are doing to our liberty, is somehow un-American.

Michael Traynor: I think we as citizens have to help our leaders, our politicians, our representatives, to have the moxie to stand up and resist that kind of statement, when the Attorney General, for example, says that to members of Congress.

Michael Traynor: There ought to be immediate opposition to that sort of thing. It's the kind of thing that happened during the McCarthy era. And I guess is it too much, really, to ask as citizens that we elect representatives that are willing to say those things and make those kind of challenges as Senator Feingold did from Wisconsin?

Michael Traynor: Yes, in the front row there.

Speaker 8: Do you think that perhaps beneath our necessary search for remedy to potential acts of terrorism that might loom in the future, that we need to be hard at work, at learning how to understand the root causes of terrorism in the world? And if you do think that, how can individual, ordinary citizens do as you suggest: Stand up and insist that part of our efforts, scholarly, government, and individual, be devoted to defining and figuring out how to work with people who might be inclined toward terrorism, to help them expand their personal horizons and find some other ways to view life?

Speaker 8: Is this an unrealistic hope?

Michael Traynor: I would hope it's not an unrealistic hope. I mentioned education. I think it's gonna be important for all of us to learn more about these enemies and supposed enemies of ours.

Michael Traynor: I don't know the Qur'an, I plan to learn more about it. Sometimes the terrorists will refer to passages in the Qur'an in justifying or explaining some dastardly thing they've done.

Michael Traynor: I think we need to understand their culture more. If there are ways to reach out to people who are Islamic but not violent, to help them and cooperate. But to arrogate to ourselves as one country the idea that our Judeo-Christian ethic is supreme one to win in some sort of crusade, the president was quoted I think by Woodward as saying, he was asked, did he talk to his father? No, he talked to a higher father.

Michael Traynor: Well, that's a connotation that this is some sort of spiritual crusade, people of the Islamic faith, Muslims are against us. I don't think that's true at all. And I

think if we learn more about them, as I believe you're suggesting—if I'm hearing you right—it's gonna take a passage of time. We're gonna have to start, with some exceptions obviously, but start from a fairly rudimentary base to learn.

Michael Traynor: Yes, in the back.

Speaker 9: I watched President Bush give a speech on the Patriot Act. His main point seemed to be, why can't judges and prosecutors have the same powers that they already have to work toward organized crime and drug wars, stuff like that. Most of the stuff is already being used against criminals, then why can't they handle the same kind of power used toward terrorists? And I think that's a very effective argument. Do you think that's a mischaracterization?

Michael Traynor: The argument is based, and you hear it in more legal context, we've always had these powers and we have them through grand jury subpoenas, and this is just another way of law enforcement.

Michael Traynor: I think there is an answer to that. I understand the political effectiveness of those remarks. But with a grand jury subpoena, a court can review it. Not a secret court in a bunker in the Department of Justice building in Washington DC, but a court in the area where the grand jury is sitting.

Michael Traynor: A grand jury subpoena can be challenged before a court as unreasonable, as calling for information that's not relevant. As calling for information that's privileged, such as privileged under the attorney-client privilege. As calling for material that's protected by the First Amendment, as in the Branzburg case in the United States Supreme Court sets forth some limits on that.

Michael Traynor: It can be done via a motion to quash or limit a grand jury subpoena that's presented to a court. You can also challenge, there are limits on what you can do by way of a gag order, with a grand jury subpoena.

Michael Traynor: Under the Patriot Act, the gag order is right in the statute, you shall not disclose this to anybody. Under the grand jury rules, and other the other rules that the president and law enforcement are referring to, basically witnesses are not precluded, there has to be a separate order from the court under Rule 6E of the federal rules of criminal procedure, witnesses are excluded from the people who are usually subject to grand jury secrecy. And there's a whole lot of uncertainty, but it's not at all clear that witnesses themselves before a grand jury are subject to an automatic gag order.

Michael Traynor: Though it's a very different situation. Now, I wouldn't be opposed to having judges involved in carefully reviewing the circumstances, but to just do it in one secret court, which has now issued over 15,000 orders and only one time that I'm aware of did it not go along with what the government said and it didn't reject the government entirely, it modified it. All seven judges of the secret

court acted in what I think was a courageous decision, saying, "Government, you've asked for too much, we're modifying your request."

Michael Traynor: And the one and only time that there was an appeal, they got reversed by the special review court.

Michael Traynor: But in the 25 year history of the Foreign Intelligence Surveillance Act, there has been over 15,000 secret surveillance orders. That's less than 1000 a year. The last number I have for 2003 is 1700 or more. In 2002 it was some 1200 or more. The government's clearly making much more use of secret orders.

Michael Traynor: And then when it comes down to our understanding, well, how many orders did you get for 215? And how many orders did you get for sneak and peek? And how many did you get for wiretapping or surveilling the internet?

Michael Traynor: All of that's classified. And that's supposed to be reported to the secret intelligence committees, and both subcommittees, and both the House and the Senate.

Michael Traynor: We don't know as Americans whether they're doing their job as reporting. I grant you the political effect, that's there. But it needs to be countered, and I'm trying to counter it here.

Dean Davis: We have time for maybe one more question and then we'll have our reception, and those of you who want to pepper Mr. Traynor some more, can do it at the time.

Speaker 10: I just have one question. You made passing reference to the press in your speech, and I wonder if you could tell us what role the press can play in a time of repression, and then what role you think the press actually is playing in a time of repression. And I guess my question gives my bias away.

Michael Traynor: What's your bias?

Speaker 10: I'm not so sure they're playing the right role. But I certainly don't want to put too much blame upon it. But I'm wondering if you could expand a little bit on the role you think they could play and that they may be playing.

Michael Traynor: I think they could be far more diligent in asking tough questions. I think when you get a press conference, you get sometimes people in the Washington press corps and they don't get a chance to follow up. They're dusted off, the media training people will say, "You don't have to answer the questions that are asked."

Michael Traynor: There ought to be some way to have questions like cross-examination, so there's a series of questions and it becomes part of our expectation as citizens

of our reporters, that they're gonna be asking one follow-up question after another until they get the answer that they're entitled to.

Michael Traynor: I don't think they're doing the job now. I think that sometimes they're also engaged in scare-mongering without the facts. I think we had some of that during the anthrax scare. If they had tried to educate us about what anthrax is, what the dangers of it are, how long it lasts, and so forth. Instead of saying, mail with anthrax, everybody should get worried about it.

Michael Traynor: So I think they need to be better prepared, certainly more vigilant, certainly tougher in their asking of questions, and not to just sit down and have an answer fobbed off on them that's a public relations statement, but to call them on it. That's what I think.

Michael Traynor: Thank you very much.

Dean Davis: And everybody is cordially invited to join us at the reception outside, which will start immediately.