
THE ASSOCIATION OF FEDERAL BAR - MARCH 20, 2002

TWENTY-SIXTH ANNUAL JUDICIAL CONFERENCE

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CONDENSED TRANSCRIPT AND CONCORDANCE
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(3) THE ASSOCIATION OF THE FEDERAL BAR
OF THE STATE OF NEW JERSEY
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TWENTY-SIXTH ANNUAL JUDICIAL CONFERENCE
(7) FOR THE DISTRICT OF NEW JERSEY
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(11) Legal Issues Arising From
Acts of Terrorism
(12) and Anti-Terrorism Efforts
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(19) Mayfair Farms
(20) West Orange, New Jersey
March 20, 2002
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(23)
(24)
(25) Reported by: Stanley B. Rizman, C.S.R.

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(1) MR. SHAPIRO: Okay. We're going to
(2) start, even with those who are standing up.
(3) Good morning, everyone. My name is Dick
(4) Shapiro. On behalf of the officers and trustees of
(5) the Association of the Federal Bar, I want to welcome
(6) you all to the 26th Annual Conference. We hope you
(7) all enjoy it. And my role here is limited. I will be
(8) brief. But I do want to extend my thanks to a great
(9) many people.
(10) First of all, I want to acknowledge all
(11) of the judges who are here, both from the Circuit and
(12) District Court, the Bankruptcy Court and the
(13) Magistrates and, in particular, those judges and
(14) magistrates who have graciously helped us in the
(15) program that is going to be presented this morning.
(16) I also want to especially acknowledge
(17) Judge Monden Tomomasa, who is a judge visiting with us
(18) from the Tokyo District Court, and hope that he enjoys
(19) the program and his experience with the American
(20) judicial system.
(21) As I think all of you know who come to
(22) these annual programs, it just doesn't happen by
(23) itself. There are a lot of people who participate in
(24) the planning and in the making of it work. And I want
(25) to really single out Dennis Drasco and Mark Olinsky

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(1) who are the co-chairs of this year's program. They've
(2) done an incredible job of assembling a spectacular
(3) panel of speakers on very important subject matters.
(4) Obviously, once again, we want to thank
(5) Stanley Rizman and Howard Rappaport for agreeing to
(6) record these proceedings as they do every year.
(7) And last, but certainly not least, this
(8) program could not run -- it could not run without the
(9) help and persistence of Ginny Whipple. And on behalf
(10) of the -- I think the whole Association, I'd like to
(11) give her a big round of applause. She does a
(12) wonderful job.
(13) (Applause.)
(14) MR. SHAPIRO: And, finally, the Mayfair.
(15) For those of you who are below the Mason-Dixon Line,
(16) yes, this is Mayfair.
(17) As you know, the topic of the conference
(18) this year addresses issues that will forever be
(19) emblazoned on all of our lives in various and sundry
(20) ways. From the very personal to the very
(21) professional, they all arise from the horrific events
(22) of September 11th. In an instant our lives were
(23) changed. Our democracy was threatened and attacked
(24) and we are all here today to say democracy lives and
(25) will continue and this program will, hopefully,

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(1) address some of the long-term impacts of that horrific
(2) event and will signal to all of those on the outside
(3) who seek to test us that we can meet the test.
(4) In that spirit and before I introduce
(5) Judge Bissell, I would like to share with you just a
(6) few brief remarks that Chief Justice Rehnquist made at
(7) the opening session of the Supreme Court of the United
(8) States.
(9) He said on that day, "I know our hearts
(10) go out to the families of those killed and injured in
(11) the aftermath of the attacks. We have witnessed
(12) extraordinary bravery and compassion from Americans
(13) from all walks of life."
(14) Well, today, ladies and gentlemen, those
(15) who are on the panel and those who are listening to
(16) the panel, we are seeing the best of our profession
(17) getting ready and in the midst of gearing up to ensure
(18) that our democracy lives forever. And I want to thank
(19) the panel members, both those who will talk about the
(20) civil implications and those who will talk about the
(21) criminal implications who are sharing with the
(22) Association of the Federal Bar their insight as to
(23) what has happened up to this moment and what the
(24) future portends because we all need that guidance as
(25) we move forward both personally and professionally.

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(1) Judge Brotman, I think, continues to be
(2) the honorary Chief Judge of the Virgin Islands even
(3) though that formal title now falls to his successor.
(4) He continues to go back there. He continues to go
(5) down to help direct cases. He continues to go down to
(6) serve as an arbitrator and mediator.
(7) I'm pretty sure he's one of the
(8) front-line conflicts judges for their cases. He loves
(9) doing it and he is vigorously and continually pursuing
(10) that. Judge Thompson is just back from a special
(11) sitting in Tampa. She went down there, I think, for a
(12) couple of months to help them out with an excess
(13) caseload there.
(14) I've already mentioned Judge Wolin's
(15) efforts on behalf of the District of Delaware.
(16) Efforts that are continuing and will continue to
(17) enhance the administration of that calendar. Judge
(18) Becker could have picked any judge in the entire Third
(19) Circuit, any District Judge in the entire Third
(20) Circuit -- to take that on. He picked Judge Wolin.
(21) That speaks well of him. I think it also speaks well
(22) of us. He honors our court with that selection.
(23) Al, I might add, is not here today
(24) because he's in Delaware. What more need be said?
(25) Let's talk a little bit about the future

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(1) as we look down the road to 2002. We will
(2) increasingly feel the impact of our vacancies,
(3) particularly with Judge Politan's recent retirement as
(4) of January 3.
(5) As you can imagine, now that we're only
(6) three months into the year, that impact in terms of
(7) the need to assign cases that would have otherwise
(8) gone to him to other jurists is perhaps not yet
(9) measurable. However, with these vacancies each month
(10) we rack up four vacancy months.
(11) Although I believe through the hard work
(12) of all of us, we're keeping our performance levels
(13) acceptable. On the other hand, with fewer judges,
(14) necessarily, we cannot devote as much individual time
(15) as we would like to the decision-making process in a
(16) given case. It is just a matter of time times
(17) workload.
(18) I want to talk, briefly, about the
(19) prospects of the filling of these vacancies. Like
(20) yourselves, I know what I read in the papers and
(21) that's about it. Our third branch is not involved in
(22) that process. As you know, it is an Executive and a
(23) Legislative function at this time. I think we are
(24) keeping our distance as we should. Of course, those
(25) vacancies are well known. But I'm an optimist. I

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(1) remain hopeful that all involved in the selection,
(2) nomination and confirmation of new judges for this
(3) district fully appreciate our needs and will move
(4) forward in good faith so that these vacancies do not
(5) remain with us too much longer.
(6) We also ask for your support in whatever
(7) way you believe you can provide it to help us get
(8) these vacancies filled and continue to carry on with
(9) the work of this Court.
(10) If I sound like a bit of a cheerleader
(11) for my colleagues, I do not apologize for that. I'm
(12) also here to serve as a lightening rod in terms of any
(13) concerns or inquiries that you may have. You know
(14) where to find me.
(15) Thank you very much.
(16) (Applause.)
(17) MR. SHAPIRO: While I'm doing the
(18) introductions, if I could ask the first panel to
(19) meander up to the dais. I'd appreciate it.
(20) As you know, the first panel is going to
(21) deal with certain civil implications arising from 9/11
(22) and in that respect I'd like to introduce Dennis
(23) Drasco to introduce the panel members and to lead into
(24) the panel discussion. Thanks.
(25) Oh, one other thing. We are leaving

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(1) three-by-five index cards and pencils on the table.
(2) We're hopeful, even with the late start,
(3) that there will be an opportunity at the end of each
(4) of the panel sessions for there to be questions. So
(5) what we would ask is that during the presentation by
(6) each of the panels, if you do have questions, if you
(7) could write them out and just pass them up, we believe
(8) that will be the most efficient way to deal with it.
(9) Thank you.
(10) MR. DRASCO: I am privileged to have the
(11) opportunity to introduce this very distinguished panel
(12) on these important issues. Let me start with the far
(13) right.
(14) We have today John Hall, who is the New
(15) Jersey Assistant Attorney General. He has been
(16) directing the Attorney General's efforts on behalf of
(17) victims of the September 11 attacks since that time.
(18) Previously, he served as Chief of Staff in the
(19) Division of Criminal Justice. He has been Acting
(20) Bergen County Prosecutor and he's also served as the
(21) Director of the Division of Alcohol and Beverage
(22) Control.
(23) The next two panelists to John's left
(24) really need no introduction. We are very privileged
(25) to have our very distinguished Magistrate Judge, Freda

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(1) whether we want to change it the way Congress did this
(2) time around.

(3) We'll have a chance to explore some of
(4) those issues this morning. I want to change one
(5) thing. I know I'm supposed to follow the rules, but
(6) I've never been good at that. Let me just say one
(7) thing. If you have a question and you want to write
(8) it out and hand it to Dennis, that is fine. Before we
(9) get to the end, if you have a question and it relates
(10) to what somebody said and you think it is pertinent
(11) and we ought to take it up and you're willing to raise
(12) your hand, I'll recognize you. If you get too long
(13) winded, I'll cut you off. If it is question that
(14) doesn't seem to fit, I'll exercise a little judgment.
(15) We'll all work this out together.

(16) But if we wait until you hand these
(17) things up, you won't get to participate. If you
(18) participate, we'll be able to answer the questions you
(19) have which will make us a much more useful group.

(20) In your materials -- I just want to point
(21) out to you it was not required that you read these
(22) during the preliminary session. But you do have the
(23) legislation, the Patriot Act, which we'll deal with
(24) later. You do have the latest March 7, sort of,
(25) statement by the Special Master, Ken Feinberg.

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(1) Changes that he's made in the way in which the
(2) Compensation Fund is going to work both in terms of
(3) who is eligible and in terms of how the compensation
(4) is going to be arranged.

(5) The thing that might get your
(6) attention -- I don't mean this to be provocative
(7) necessarily but just to introduce the issue. There
(8) are several tables in Tab 1 that you may find
(9) interesting to look at because they give you
(10) presumptive payments. What somebody, if you didn't
(11) know anything else, would get under the Fund before
(12) collateral sources result in a reduction.

(13) Just to give you an example. Just to
(14) give you a sense and set this up for the panel. A
(15) married decedent with no dependent children -- that
(16) is, one spouse has died in the events of 9/11 leaving
(17) a spouse behind and no kids. If the deceased earned
(18) \$10,000 a year -- that is sort of the low end of the
(19) chart the Special Master has prepared -- and was 35
(20) years old at the time of death, the presumed payment
(21) before deduction for any collateral sources would be
(22) \$573,000, approximately. That is the low end. A
(23) 35-year-old at the high end would get \$4,179,000.

(24) Now, four million is a considerable
(25) recovery. But when you look at it, if you do the math

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(1) and you say somebody earned \$225,000, it would have
(2) been 20 times the earning of a \$10,000 earner, you get
(3) a sense that there is an issue here about how you
(4) calculate numbers.

(5) Similarly, if someone died and was single
(6) and left behind one dependent child. A 35-year-old
(7) presumed payment would be almost half a million
(8) dollars if they earned \$10,000 a year. If they earned
(9) the high end of the chart, 225,000, they'd earn
(10) slightly more than \$3 million -- they'd be paid
(11) slightly more than \$3 million. That is the range of
(12) payments.

(13) And you can take a look at the chart
(14) yourself and sort of take a look at the comparison. I
(15) do want emphasize one thing the Special Master has
(16) said repeatedly as recently as March 7th, that there
(17) is no fixed upper limit; that these are presumptive
(18) payments. The opportunity will be there for a case to
(19) be made that the payments ought to be higher.
(20) Although he said it is doubtful too many claimants
(21) will exceed certain financial figures. This is just a
(22) little bit of background.

(23) Now, we're going to go through -- my hope
(24) is I'm going on call upon each of the panel members to
(25) address separate issues. Then I hope we can get into

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(1) a discussion so we just don't have a room of talking
(2) heads, you know, talking to you.

(3) I asked Bob Clifford to start and to
(4) describe for us what happened after 9/11 and how the
(5) process worked when Congress enacted this legislation
(6) and the ABA ended up getting involved. I think he can
(7) tell you how the Special Master came to be.

(8) MR. CLIFFORD: It might be easier if I
(9) stand because of the folks over there on the left.

(10) After September 11th Robert Hershon, the
(11) current President of the ABA, decided that with the
(12) advice a lot of us gave him that the ABA needed to be
(13) out front and center in attempting to give its
(14) expertise to whether it be Congress, the
(15) administration or the various departments, Defense and
(16) Justice, about some of the legal changes that we all
(17) knew were in the works.

(18) I'm the current Chair of the Section on
(19) Litigation. I'm very active in Democratic politics
(20) with the result being that Capitol Hill is a place
(21) that I'm very familiar with and not uncomfortable
(22) being at. So I was asked to do this job. And shortly
(23) after the 1st of October the Task Force on Terrorism
(24) and the Law was formed. And the Mission Statement, if
(25) you will, of the task force is to bring ABA expertise,

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(1) the get-go you could tell were very difficult to work
(2) with. And in the -- before the regulations were
(3) passed, one of the things they I tried to do is to see
(4) if there could be any changes made in the legislation
(5) and I became a believer of the fact that what was
(6) ultimately passed went further than some folks in
(7) Congress were ever comfortable with. To the point
(8) where there were many people in the Democratic sector
(9) who thought that the legislation -- if you tried to
(10) open it up and change some of the Bills, it would be
(11) withdrawn completely.
(12) So that is one of the reasons why you
(13) don't see Schumer, you don't see Clinton, you don't
(14) see a lot of the Democratic leaders out there trying
(15) to change the legislation. Because one of the
(16) things -- Clinton didn't like it when I told it to her
(17) staff, that I thought that she was muted on
(18) criticizing the legislation because of the needs of
(19) New York vis-a-vis the \$20 billion restoration package
(20) that the administration promised to the City of New
(21) York.
(22) So, ultimately, the regulations were put
(23) together. There was a common period. My task force
(24) came out, ultimately, in favor of the regulations,
(25) noting some significant disappointments in terms of

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(1) the imposition of the cap on noneconomic damages.
(2) Ken Feinberg is fond of saying that there
(3) is no cap. I think that is semantics. There is a cap
(4) in my view on noneconomic damages. But if you look at
(5) this legislation and if you talk to the people who
(6) passed it, it was never intended to replicate
(7) completely the tort litigation system. It's a
(8) government program. It is a government program that
(9) is imperfect. It's a government program that can
(10) treat people who have identical economic circumstances
(11) except for life insurance completely different.
(12) If someone has a lot of life insurance
(13) under the program, they've got major difficulties in
(14) collecting. And yet when you compare, at least in my
(15) judgment -- this is by way of background. You heard
(16) Dennis say it this morning, though. I don't write
(17) rules. I don't close real estate deals. I only
(18) represent plaintiffs.
(19) Yet, this is a program that I can endorse
(20) and do endorse. I think I'll be debating a little bit
(21) of that this morning with my friend Mitch, but that is
(22) some of the background that you won't read about
(23) elsewhere.
(24) (Applause.)
(25) PROFESSOR SALZBURG: I want to turn now

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(1) to Mike Rozen.
(2) Mike, you're pinch hitting for Ken
(3) Feinberg. Let me say before I turn this over to you
(4) that it is really a tribute, I think, to the pro bono
(5) efforts of so many people. Bob Clifford put in an
(6) enormous amount of time, as Dennis Drasco said. It is
(7) hard to imagine somebody giving up his practice to
(8) really work full-time on these issues which is what he
(9) did. Chairing the Litigation Section and running that
(10) committee, it was incredible how much time he put in
(11) and Ken Feinberg and his group are doing this without
(12) fee.
(13) So that whatever you think in the end,
(14) whether you're for or against or disturbed or happy
(15) about the way this thing all worked out. I mean, it
(16) is a tribute, I think, to their willingness to do
(17) something for the public good that so many people have
(18) pitched in.
(19) Mike, I was hoping that you might explain
(20) a little bit about the choices that you weren't able
(21) to make that -- in fact, for example, collateral
(22) sources. What Congress said about collateral sources
(23) and how you ended up approaching collateral sources
(24) and maybe a little bit more about some of the tough
(25) choices that you were called upon to make and why they

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(1) came out the way they did.
(2) MR. ROZEN: That's fine. I'm happy to
(3) address all of those issues to the extent that I'm
(4) able and encourage, as you said a moment ago --
(5) encourage anybody who has got any questions to raise
(6) their hand and ask them and, again, I and everybody
(7) else here, will try to answer them to the best that
(8) we're able.
(9) I think, clearly, one of the toughest
(10) choices that we had to make -- one of the toughest
(11) issues to address was the issue of collateral sources.
(12) Congress, as Bob said, specified that any awards,
(13) noneconomic and economic, should be offset by life
(14) insurance and a number of other third-party benefits
(15) including Workmen's Comp., pension funds and other
(16) things of that nature.
(17) And we have been heavily criticized
(18) for -- by a number of commenters, victims and
(19) otherwise, for offsetting life insurance. That is an
(20) issue that is simply not one for debate. We did not
(21) have any discretion in that area. We do not have the
(22) ability to usurp Congress' mandate and Congress
(23) specified, clearly, in the statute that life insurance
(24) would be something that would be offset against
(25) ultimate awards out of the fund.

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- (1) MR. ROZEN: Yes, Stephen.
(2) PROFESSOR SALZBURG: Just two things.
(3) Would you explain how you -- how the Special Master
(4) decided to approach the noneconomic damages and to
(5) treat that? That was a choice?
(6) MR. ROZEN: Yes.
(7) PROFESSOR SALZBURG: Also, at the upper
(8) end of the income scale did the decision to
(9) essentially say we're going to pick a 98 percent
(10) figure of average income in the United States. Would
(11) you explain those two choices? Because I think that
(12) will help.
(13) MR. ROZEN: Sure. I'm going to take
(14) them in reverse order and I'll be brief about it and
(15) we can debate it more, the income. The presumptive
(16) chart that you're referring to only go up to the 98
(17) percentile of income earners because we felt after the
(18) 98 percentile what you find is dramatically
(19) individualized circumstances for each of the victims.
(20) So that instead of being able to apply for a
(21) presumptive award, what we are saying is if you are
(22) above the 98 percentile -- if you made above \$225,000
(23) a year, present us the individual facts and
(24) circumstances. There will be a determination made.
(25) These are not caps. I can't stress that

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- (1) enough. If people want presumptions and they fall
(2) within the presumptive guidelines and they think those
(3) guidelines apply to their own circumstances, that is
(4) the most efficient and streamlined and quickest
(5) resolution.
(6) If you don't think they pertain to your
(7) individual circumstances -- if you made half a
(8) million dollars a year, \$1 million a year, or
(9) what-have-you, come to the Fund with your
(10) circumstances and a decision will be made that is
(11) outside those presumptive guidelines, in all
(12) likelihood.
(13) So that -- this is really -- again, we're
(14) trying to provide guidance to people. It is hard to
(15) provide guidance to people above that level without it
(16) looking a lot different than what the reality would
(17) be. Most of the people who were victims in this
(18) tragedy do not fall outside the 98 percentile.
(19) The overwhelming majority -- excuse me.
(20) On the noneconomic damages. That was a
(21) lot tougher question for us. We ultimately decided,
(22) in conjunction with and in consultation with the
(23) Justice Department and others, that the fairest way to
(24) view pain and suffering is not to try to make fine
(25) distinctions that are entirely subjective between the

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- (1) level of suffering for somebody on the 105th floor
(2) versus the level of suffering for somebody on the 55th
(3) floor versus the level of suffering for somebody who
(4) made it out and, maybe, was burned severely and then
(5) died later on.
(6) We didn't want to try to make those
(7) distinctions. We didn't want to make those kinds of
(8) distinctions.
(9) Well, you can quarrel with the number,
(10) \$250,000, the assumed number for noneconomic damages.
(11) I don't think that you can fairly say that treating
(12) everybody the same in terms of how much they suffered
(13) isn't the correct way to go. That was ultimately how
(14) we came down on that issue.
(15) PROFESSOR SALZBURG: Thank you.
(16) Now, one of the things you will notice
(17) about the panel is that it is not loaded in any
(18) direction with people who are here to praise the
(19) Special Master or praise the Fund. In fact, Michel
(20) Baumeister, seated to my left, represents, he'll tell
(21) you, a number of potential either plaintiffs or Fund
(22) participants.
(23) And it is going to be his decision to
(24) make recommendations to his clients as to which way to
(25) go. And I think it is fair to say that Mitch's view,

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- (1) from my brief conversations with him, is a lot less
(2) charitable towards the way in which the Fund is set
(3) up.
(4) And, Mitch, I'll open the door for you to
(5) talk about that.
(6) MR. BAUMEISTER: Good morning. Thank
(7) you for inviting me today. I appreciate the
(8) opportunity.
(9) Michael, tell Ken I miss him. I look
(10) forward to seeing him in the future.
(11) Let me start out by saying, initially,
(12) I'm not a politician. I'm simply a family advocate.
(13) I'm probably more personally involved in this case
(14) than any case in my 30 years of practicing law simply
(15) because commuting into New Jersey my office is two
(16) blocks from the World Trade Center.
(17) I sat on the Pulaski Skyway and watched
(18) the first World Tower burn and the second one actually
(19) have impacted with the plane. So I live day in and
(20) day out with the aftermath of the most horrific
(21) tragedy, looking into the eyes of the young women and
(22) children that I represent.
(23) They asked me, "How am I going to live
(24) the next 20 or 30 or 40 years, to put my kids through
(25) college, pay for the bills, do all of those things?"

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- (1) First and foremost, it's about the
(2) perception of being treated fairly. This is not a
(3) handout. This is not, as the Special Master has said,
(4) a needs-based test. There is nowhere in this statute
(5) where they even talk about the word "needs."
(6) He's flipped around individual
(7) circumstances to use it against many of the families.
(8) Many of the families have said, "This is the law? Why
(9) couldn't my government simply do the right thing under
(10) these horrific circumstances and live up to the law?"
(11) The bottom line is nowhere in the law
(12) does it give the Special Master the authority or the
(13) power to promulgate presumed guidelines or virtual
(14) caps. Nowhere in the law does it say that there can
(15) be a virtual cap on economic and noneconomic damages.
(16) Mr. Clifford's task force and my task
(17) force both said in our comments to the interim rules
(18) and the final rules is that the ABA is absolutely
(19) opposed to a matrix system. Absolutely opposed to
(20) these guidelines.
(21) I've got his quotes right here. So in
(22) the final analysis, we have limitations on the amount
(23) of awards to these families under the most horrific
(24) circumstances.
(25) Another irony. I represent people on

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- (1) United 93. American 77. Fully insured planes. They
(2) will receive full compensation. I don't advocate any
(3) family members do litigation, but many will be forced
(4) to do it. Indeed, I predict there will be a lawsuit
(5) to ultimately set aside the regulations as being in
(6) violation of the law in many aspects.
(7) One last aspect and I'll close. We said
(8) to Ken Feinberg in our meetings, and I've had many
(9) with him. Under the statute -- it says everybody can
(10) recover and it defines the class of beneficiaries as
(11) "relatives."
(12) We said, "Mr. Feinberg, define relatives.
(13) Look at federal statutes by analogy because this is a
(14) federal cause of action. Look at the Death on the
(15) High Seas Act, which provides recovery for spouses,
(16) for parents, for dependent relatives, for children,
(17) for siblings that were dependent.
(18) "No, I'm not going to do that."
(19) So what has happened now? Mr. Feinberg
(20) is saying, "I'm going to write one check to a personal
(21) administrator and push all of that down into
(22) Surrogate's Court."
(23) So he's created an inconsistent class of
(24) beneficiaries for purposes of an award. Because, as
(25) an example, in New Jersey if a parent or parents and

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- (1) dependent brothers and sisters survive the death of
(2) their son or daughter who is married with children,
(3) under New Jersey law they are cut off absolutely and
(4) for ever more.
(5) So we have created an inconsistent class
(6) of beneficiaries. He's failed to do the individual
(7) awards the way you do in a jury verdict system and
(8) he's created an inconsistent amount that can be
(9) recovered because he is now trying to engraft some
(10) limited state causes of action in violation of the
(11) federal statute.
(12) One last thing and then I will end. I
(13) feel pretty passionately about this because, God
(14) forbid, any one of us could be sitting out there today
(15) in the New York-New Jersey area. I pass by that World
(16) Trade Center every day. And all we ask for is -- I've
(17) said publicly and privately -- "I want 100 percent of
(18) my clients to go to a fair Fund."
(19) On terms of noneconomic losses. The
(20) government defined noneconomic losses as not just this
(21) word we hear "pain and suffering." That is one small
(22) element. The family members are entitled -- the
(23) relatives under this federal statute are entitled to
(24) recover for their physical and emotional pain, their
(25) physical and emotional suffering, their inconvenience,

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- (1) their physical impairment, their mental anguish, their
(2) loss of enjoyment as well as the deceased, of life,
(3) their loss of society and companionship, their loss of
(4) consortium, their dedonic damages. Every one of those
(5) individual items.
(6) And the trial judges out there know it
(7) and the trial lawyers know it. When we try a case, we
(8) have a jury say what are the individual facts for the
(9) father, for the mother, for the children? How do we
(10) take those facts?
(11) Let's give an individual jury award for
(12) each of these issues? They take all of those
(13) categories and say: Well, first, we'll give you
(14) 50,000 because I don't want to be Solomon-like.
(15) Now it is \$100,000 for everybody for a
(16) spouse and a dependent child under a tax return.
(17) Again, cutting off parents, cutting off brothers and
(18) sisters. I have a 23-year-old man who watched his
(19) father -- he just escaped from one of the towers. He
(20) watched his father die in the tower right in front of
(21) his eyes. He's not entitled to recover for his
(22) emotional loss. I can go on and on with the stories
(23) but I won't.
(24) Lastly, the collateral compensation. If
(25) Mr. Feinberg -- I don't mean it, Ken, personally or

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(1) We are committed to looking at some ways
(2) that we can help. But I can't emphasize enough,
(3) because of the shifting nature of the regulations, of
(4) the different levels of dependency who can file, who
(5) can be a personal representative, we need to be sure
(6) that whatever it is we do will accomplish what it is
(7) we want to accomplish. Only the Special Master can
(8) tell us that. So that is what we're hoping to
(9) accomplish tomorrow.

(10) PROFESSOR SALZBURG: One of the most
(11) difficult parts of this program is getting the judges
(12) involved in ways that are appropriate. Obviously,
(13) they can't comment on the validity of the regulations
(14) as compared to the statute that actually could come
(15) before them if a suit is filed. The judiciary is
(16) actually not part of the compensation fund.

(17) It is truly an alternative system that is
(18) designed to give choices. That is, you go in the Fund
(19) and give up your right to sue or you sue. What is
(20) interesting here is if you sue, you can only sue in
(21) New York, Southern District of New York, under this
(22) statute.

(23) And that means, fortunately for New
(24) Jersey judges, especially with the vacancies you have,
(25) that these suits are not going to be heard in New

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(1) District against United Airlines and the security
(2) company currently for the airport.

(3) The Complaint is for death and survival.
(4) There are, perhaps, other defendants that could be
(5) named. One of the things that I looked at is if I had
(6) a case like this come in where you had numerous cases
(7) that are filed, there are categories, perhaps, of
(8) defendants. You've got four airplanes involved. You
(9) got three airports. I guess you got Boston, Newark
(10) and Washington. So you've got security companies for
(11) each of those. You've got American Airlines. You've
(12) got United Airlines. Two different airlines.

(13) There is a possibility, perhaps, of
(14) bringing suit against the schools who trained some of
(15) these terrorists. But all of these lawsuits have to
(16) come to the Southern District.

(17) So I looked at it as we've got some
(18) categories here. Four different planes. I'm aware of
(19) two different security companies and then you've got
(20) different categories of victims. You've got victims
(21) who were in the World Trade Center. You've got
(22) victims who were passengers on the planes and you've
(23) got crew members who were victims.

(24) Common issues of liability are going to
(25) control in those issues -- in those cases. The

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(1) Jersey. Now, it is still possible that New York
(2) judges will disqualify themselves; in which case the
(3) Chief Justice may have to appoint judges to sit in
(4) these cases and the issues could, nonetheless, come
(5) before judges in their judicial capacity by
(6) assignment.

(7) But knowing there are limits on what
(8) judges can talk about, Judge Wolfson and I agree that
(9) what might really be helpful is for her to consider
(10) what a Magistrate Judge might have to deal with if
(11) this -- if suits are filed in the Southern District of
(12) New York and the pretrial scenario arises. Discovery
(13) issues come into play. What some of those issues
(14) might be that would come before a Magistrate Judge who
(15) is likely to have the supervision of the pretrial.

(16) JUDGE WOLFSON: We did talk about this
(17) yesterday. I voiced some concern as to what we were
(18) doing on the panel since New Jersey judges really
(19) wouldn't have a part in these cases. But some of the
(20) things that I've looked at if you, as lawyers, do end
(21) up filing suits on behalf of victims in the Southern
(22) District of New York -- and I will note that there
(23) have been some cases filed there. An attorney from
(24) L.A. -- a woman by the name of Mary Schiavo who has
(25) filed at least several lawsuits in the Southern

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(1) differences will be, with regard to any individual
(2) victims, what damages they've suffered, what category
(3) of victim they might be. But as to liability, I think
(4) there are common issues.

(5) My view would be if these cases came to
(6) me, I'd have to address with the attorneys at the
(7) outset should there be a consolidation of discovery on
(8) liability issues between these cases?

(9) I think that makes sense from a
(10) judicial-economy point of view. And if you get to
(11) that, then should we be talking about somehow having
(12) the various plaintiffs' lawyers have a lead counsel
(13) take part? All this like a class action situation?

(14) Certainly, when we get to individual
(15) damages, everyone's got their separate claim. That's
(16) one of the things I think you have to address at the
(17) outset. How to deal with the common issues of
(18) liability because there may be some questions on
(19) collateral estoppel.

(20) If one of these cases go forward and the
(21) others come down the line, I think the plaintiffs'
(22) lawyers would want to have a part in that early case
(23) and not be restricted to what the first plaintiff's
(24) lawyer -- the first one to file may do.

(25) Some of the other issues I think you'd

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(1) do is get all the lawyers in a room and require
(2) consent and send it to Judge Wolfson:

(3) (Laughter.)

(4) JUDGE GREENAWAY: Well, I mean, in that
(5) particular circumstance -- that situation where you --
(6) I'm assuming. As you said, that there is a limitation
(7) on the outside limits of what liability would be.
(8) Frankly, that is probably a case where I would lock
(9) everyone in my courtroom for a week and we'd try to
(10) settle.

(11) As far as requiring whether it be --
(12) whether it should proceed as a class or not,
(13) obviously, up until the time of trial that would seem
(14) to make sense. It would be the most efficient way to
(15) proceed. Past that, I don't know how you could force
(16) a joint review of all of those claims in a forum like
(17) a class action trial that you might have in another
(18) circumstance. That would be the difficult part.
(19) You'd probably be left with holding trials, you know,
(20) seriatim and going about it that way.

(21) PROFESSOR SALZBURG: I'm going to stand
(22) up because I want to take your question as well.

(23) Bob Clifford, you have a comment about
(24) that?

(25) MR. CLIFFORD: I think one of the things

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(1) up cases.

(2) One of the law firms goes from no cases
(3) to 130 cases or 50 cases. They criticize the Fund,
(4) though, but they're still signing them up. They're
(5) not doing it pro bono. They're charging five and 10
(6) percent fees.

(7) Hypothetically, if the government is
(8) right that the average award is \$1.85 million and you
(9) got one hundred of those cases. You're turning them
(10) over in a two-year period and you're charging a five
(11) to ten percent fee. Do the math. Okay?

(12) You can't have it both ways. If the
(13) Bar -- if lawyers who are going to criticize the Fund
(14) are really going to criticize the Fund by taking
(15) action, then they need to be doing that immediately.
(16) They need to be going into Federal Court and trying to
(17) enjoin the Special Master from processing these cases.
(18) Because these cases, in all likelihood -- Michel could
(19) tell you this more -- will be over in two, certainly
(20) no more than three years.

(21) It is a disservice to the public, it
(22) seems to me, to rattle the sabers about how unfair the
(23) program is and then turn around and dump people into
(24) the program. You can't have it both ways, at least in
(25) my assessment of this. So if we're to be responsible

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(1) that is very important to talk about -- three things,
(2) Number one, unrelated but very related. For the last
(3) year the Section on Litigation has been sponsoring a
(4) study on the perception -- public perception of
(5) lawyers.

(6) The purpose of the study was not to tell
(7) us what maybe is the obvious, that we all know. But
(8) the purpose of the study was to try to give the Bar
(9) advice about what individual lawyers, law firms and
(10) the Bar Associations can be doing to improve the
(11) perception of lawyers.

(12) Here's the relevant part. An interesting
(13) fact from the study is that post September 11th the
(14) public perception of lawyers has clicked up. The
(15) belief is, by the researchers, that it has clicked up
(16) because of the steady, measured, deliberate,
(17) controlled action by the Bar. Notably, the
(18) moratorium.

(19) ATLA gets a star doing something right.
(20) It is not too often that happens. But, anyway, that
(21) is what is out there. Now, here is where, to me, this
(22) is very important. I can't tell you how much I
(23) respect the work of men like Mitch and others. But
(24) the fact of the matter is that the story thus far is
(25) incomplete. They criticize the Fund and yet they sign

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(1) as a Bar and as members of the Bar -- if we're going
(2) to attack this program, then we ought to do it the
(3) right way.

(4) We ought to do it by challenging the
(5) program because I don't disagree with a lot of what
(6) Mitch said. I don't disagree that Feinberg didn't
(7) have the authority to put on the caps. I believe that
(8) Feinberg was stuck putting those caps on because of
(9) OMB, Ashcroft and the White House. And equally true,
(10) I don't think that he has as much discretion as he's
(11) exercising.

(12) Equally true I think what is good for the
(13) goose is good for the gander. If they would impose
(14) the cap, they can impose the cap on how they enforce
(15) the life insurance thing. There are a lot of
(16) criticism you can have. But if the Bar is going to
(17) act responsibly, in the best interest of the public,
(18) then we need to be doing so immediately.

(19) The final point I have is this. It is,
(20) maybe, one Mitch ought to speak to. One of the
(21) reasons why I have been supportive of the Fund is the
(22) reality of the alternative. In the federal courthouse
(23) you've got the property damage claims, the business
(24) interruption claims and the victims' families all
(25) against the pool of money that -- at least, the

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(1) airlines, the U.S. Government can subrogate to that
(2) and it won't be available in the tort system. That is
(3) a possibility.

(4) PROFESSOR SALZBURG: Mitch, you where
(5) going to say that.

(6) MR. BAUMEISTER: There's three or four
(7) points. I will try to make it brief. That's
(8) precisely -- OMB said \$6 billion in insurance. Keep
(9) the budget at \$6 billion. Use the matrix system and
(10) the cap on noneconomic to put it to the families and
(11) then we're going to go back and we're to join that
(12) lawsuit Bob, that you say, doesn't exist. We're going
(13) to get the six billion back. The net to the federal
(14) government is going to be zero and the families are
(15) going to get less.

(16) MR. CLIFFORD: If the lawsuit exists,
(17) tell me how the families are going to get money?

(18) MR. BAUMEISTER: The same way the
(19) government is going to get its six billion, Bob. And,
(20) number two, the government, as Mike just said, they're
(21) going to subrogate in that same lawsuit. So, you're
(22) going to have the people forced out of the Fund.
(23) You're going to have all of the property damage
(24) claims, business judgment claims, the supp pro claims,
(25) the people who suffered the World Trade Center plus

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(1) points. But for political expediency, he says, "Let's
(2) do it."

(3) I invite the ABA, in the interest of the
(4) public, Bob, to join in the ABA suit. I invited ATLA,
(5) in the interest of public justice, to join in the ABA
(6) suit because all of them say, privately, the regs
(7) violate the statute, but they all sit back and say,
(8) we're not involved with the aftermath of the families;
(9) therefore, we're not doing anything and you come
(10) forward and criticize me?

(11) The issue here isn't representing
(12) families or getting business, Bob. The issue here is
(13) the sad fact that the responsible lawyers don't have
(14) enough hours in the day to represent all the victims
(15) that want to have meaningful representation and I have
(16) to turn away on a daily basis clients who say, "Would
(17) you please represent me?"

(18) Why don't you join in the litigation, Mr.
(19) Clifford, and represent some of these people?

(20) PROFESSOR SALZBURG: Hold it.

(21) MR. BAUMEISTER: You told me you're not
(22) going to represent clients.

(23) PROFESSOR SALZBURG: Stop. I have a
(24) question for you. The second question I wanted to put
(25) to you is: Let's suppose suits are filed. Let's

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(1) federal government lining up the biggest wild card in
(2) the whole litigation is the Federal Aviation
(3) Administration.

(4) I've been litigating them for 30 years.
(5) They absolutely are -- the aviation security system
(6) was atrocious before. I was involved in the Lockerby
(7) trial. We improved it. It was atrocious before 9/11.
(8) It is a little better now.

(9) When the memories fade, it will get
(10) worse. The F.A.A. -- the government will hide under
(11) the Tort Claims Act. Behind the -- that is the way to
(12) get full damages in the litigation.

(13) You and I know, Bob, if the victims were
(14) left to the tort system, itself, without this
(15) political monkeying, they would have recovered full
(16) damages.

(17) Let me return to Bob Clifford. I find it
(18) strange that a plaintiff's lawyer says, on the one
(19) hand, he doesn't want litigation and he wants a
(20) moratorium. On the other hand, he invites us to bring
(21) a lawsuit to say that the regulations violate the law.

(22) I've met with four or five professors
(23) from Harvard, from Fordham, with a bunch of lawyers to
(24) assess the ABA suit. I've invited and invite the ABA,
(25) if it truly, as Bob said, he agrees with me on all the

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(1) suppose the regulations withstand the test and you
(2) decide as the California lawyer has done who had nine
(3) claimants to bring suit and Judge Greenaway calls you
(4) in and says, "How do I do this? I got limits of
(5) liability here. I got maybe \$6 million available.
(6) Maybe \$4 million in property insurance and maybe I got
(7) ten million. I got people who are seeking so much
(8) more than that."

(9) He says to you: What procedure would you
(10) recommend to me that I use here? Do I try these cases
(11) seriatim? Then do I not enter judgment in any of them
(12) until all of them are done so that everybody gets
(13) judgment at the same time?

(14) What does he do? He wants to know.

(15) MR. BAUMEISTER: Hold the F.A.A. liable
(16) under the Tort Claims Act. The answer is we thought
(17) this through. The bottom line is the judge --
(18) although it is not a class action, there will have to
(19) be a limited fund concept and a prioritizing of the
(20) claims from the wrongful death claims of people forced
(21) out of the Fund down through an assessment.

(22) It will be an extremely difficult task.

(23) That is the most important question. That is why I
(24) can't recommend looking in the eyes of these women and
(25) say let's go file a lawsuit. I can't say let's go

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(1) MR. BAUMEISTER: Brief response. What I
(2) tell each of the family members is right now through
(3) an economic analysis on collateral source potential
(4) economic earnings. We have to look at that closely.
(5) Plus, the noneconomical damages. How its impacted the
(6) family. Then what I would do is although the
(7) regulations do not allow you to get the written word
(8) ballpark estimate of the award -- they only allow you
(9) to get a ballpark estimate of the collateral
(10) deductions. Nevertheless, believe it or not, we
(11) actually respect and care for each other at this
(12) table.

(13) MR. CLIFFORD: Speak for yourself.

(14) (Laughter.)

(15) MR. BAUMEISTER: Let's take my name off
(16) the list, Bob.

(17) You know, as a Vietnam vet, I've known
(18) Ken Feinberg professionally and personally for 20
(19) years. He was involved in the Agent Orange case. The
(20) bottom line is I will go into Ken Feinberg in two
(21) weeks with eight or nine exemplar cases. Because Ken
(22) says and Mike says to me, "Come in. I want to really
(23) see if we can do something on Column A or Column B."

(24) So the first thing I'm going to do is for
(25) all my clients is I'm going in to test drive the

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(1) scared. A program they're advising people. The goal
(2) here of the state is to make sure that if there are
(3) things that we can do, we want to explore some ways
(4) that we can help under state law to make sure that the
(5) people who are truly victimized can somehow be
(6) included in the Fund.

(7) PROFESSOR SALZBURG: Then, Mike. Mike
(8) Rozen. Very factually. Tell me am I right about
(9) this, so the people out there understand? Cash in the
(10) bank is not a collateral source, right?

(11) MR. ROZEN: Correct.

(12) PROFESSOR SALZBURG: Stocks are not a
(13) collateral source?

(14) MR. ROZEN: Correct.

(15) PROFESSOR SALZBURG: Under the March 7th
(16) clarification, a 401-K plan is not a collateral
(17) source?

(18) MR. ROZEN: Correct.

(19) PROFESSOR SALZBURG: So those things do
(20) not result in deduction.

(21) I have a hand out there.

(22) MR. SHAPIRO: I have a question.

(23) Does this Act preempt state statutory and
(24) private contractual means?

(25) In New Jersey a Worker's Comp award

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(1) system without an election. If, truly, it is going to
(2) be a fair system and I truly will get ballpark
(3) estimates that are fair, then many of my clients will
(4) do that.

(5) Some clients want strict accountability.
(6) They want an investigation as to how our intelligence
(7) agencies, federal aviation and everybody else.
(8) Where's all the investigate -- they just want to go to
(9) a lawsuit. Other ones absolutely need to get money
(10) quickly. And if the system is fair, I predict a
(11) number will go to the Fund. A number will go into
(12) litigation and we will muddle through. If the system
(13) were a little more favorable, we'd get everything.

(14) MR. BAUMEISTER: I'd say to Ken and Mike
(15) I'd put 100 percent of my clients in that Fund if you
(16) just made two or three changes.

(17) PROFESSOR SALZBURG: Just two fast things
(18) here, John Hall. I think I know the answer, but tell
(19) us. Is the State taking any position? If somebody
(20) tried to call you and say what do I do here? From a
(21) family, "Should I enter the Fund?"

(22) Is the State taking any position on that?

(23) MR. HALL: No, no. I don't think that is
(24) an appropriate role for the state of New Jersey. The
(25) Trial Lawyers Association has the trial lawyers

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(1) becomes a lien on the third party recovery. Is this
(2) considered a third party recovery if you do the
(3) victims' fund and private health insurance under ERISA
(4) has liens against third party recovery? How have the
(5) regs dealt with that?

(6) MR. CLIFFORD: I'll give you two parts.
(7) The ABA position that we advocated and I believe the
(8) regs cover now is that if you don't preempt -- you go
(9) either of two ways. Don't make the deduction for a
(10) subrogable amount because it is a double hit for the
(11) family. You take a deduction in the calculation
(12) process. Then you have to pay dollars back. It is a
(13) double hit for the family. That, I understand, is
(14) something that they're going to take into account in
(15) all the calculations.

(16) MR. BAUMEISTER: The short answer is it
(17) is an open question. In fact, if you look at New
(18) York -- if you elect to weigh in the sense going into
(19) the Fund -- therefore, you give away your litigation
(20) rights by this election without the consent of the
(21) carrier -- you ultimately are still responsible for
(22) the money. So it is an open question amongst many
(23) open questions.

(24) PROFESSOR SALZBURG: Mike, three
(25) questions asked here. You can answer them for us

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(1) that Act has much broader implications than simply the
(2) prosecution of terrorists and terrorist-related
(3) organizations. It is very wide. I hope we hear
(4) something about that today.

(5) In any event, without further ado, Mark
(6) Olinsky.

(7) (Applause.)

(8) MR. OLINSKY: Thank you, Dick.

(9) Dick told us about two hours ago that a
(10) program like this doesn't just happen and he's right.
(11) But what he didn't tell you was the significant role
(12) that he had in putting it together and on behalf of
(13) both myself and Dennis, I'd like to thank Dick for the
(14) help that he gave us in bringing this all together as
(15) well.

(16) (Applause.)

(17) MR. OLINSKY: I learned something in
(18) pulling this together with Dick and with Dennis that
(19) is how to do a conference call. I sometimes felt that
(20) if I don't quite make it in the law, I'll have a
(21) future as an AT&T operator.

(22) We had a lot of calls to make this happen
(23) and to pull it all together. Again, thanks to
(24) everyone who participated.

(25) When you have as distinguished a panel as

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(1) inquiries regarding the terrorism investigation.

(2) I want to thank Matt for coming up and
(3) for participating.

(4) I'm going to skip past Bruce Green. He's
(5) our moderator. I'll come back to Bruce again as we
(6) get started.

(7) Let me tell you about Ron Chen. Ron is
(8) here also in a role of helping us out and pinch
(9) hitting because the ACLU representative we had, Ed
(10) Barocas, unfortunately, is ill. Ron is the Associate
(11) Dean for Academic Affairs at Rutgers. He's been at
(12) Rutgers since 1987, starting as an assistant professor
(13) of law. He sits on the boards of the ACLU, New Jersey
(14) Chapter, and on the national board and will be able to
(15) address some of the civil liberties/civil rights
(16) issues that come out of 9/11 and is involved, as
(17) you'll hear, in some of the litigation that has
(18) developed.

(19) The next two guys I want to introduce is
(20) kind of fun for me because I have a long personal and
(21) professional relationship with both of them. Starting
(22) off with Larry Lustberg. I had -- one my first cases
(23) in the U. S. Attorney's Office was against Larry and
(24) my parents came to watch the summations. Like any
(25) good parents, they told me how wonderful I was and

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(1) we have right now and the one that we had earlier this
(2) morning, the challenge is to be brief in introducing
(3) people because there is so much to say when we look at
(4) some of these backgrounds and resumes.

(5) I will, though, be brief and just tell
(6) you some of the highlights. I could spend a lot of
(7) time telling you more about the folks.

(8) As with the first panel, the judges that
(9) we have on this panel need no further introduction, no
(10) more than the first judges did. We thank them for
(11) joining us.

(12) Judge Orlofsky and Magistrate Judge
(13) Hedges at the end the table. Thank you very much for
(14) joining us here today.

(15) Next to them is Matthew Martens. Matthew
(16) is sitting in for Mike Chertoff. Let me tell you a
(17) little bit about Matt. He has a New Jersey
(18) connection. He was at Latham & Watkins and
(19) participated in some of the major criminal cases that
(20) that office was involved in.

(21) Right now Matt is the Deputy Chief of
(22) Staff and Counsel to the Assistant Attorney General
(23) for the Criminal Division -- that is, Mike Chertoff --
(24) and has had a very prominent role in developing the
(25) Justice Department's response to the Congressional

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(1) then they said, "That other guy was really good."

(2) (Laughter.)

(3) The "other guy" was Larry. Larry has
(4) been at the Gibbons, Del Deo firm since 1990. He's a
(5) partner there and Chairman of the Criminal Law
(6) Department. He was the first Gibbons Fellow and is
(7) the Director of the Gibbons Fellowship in Public
(8) Interest and Constitutional law. Larry has a lot of
(9) stuff on his resume. I'll tell you about it a little
(10) bit that fits in with today, as many of you must know.
(11) He is the President of the Association of Criminal
(12) Defense Lawyers for the State of New Jersey and he,
(13) too, as he will tell you, has been involved in some of
(14) the litigation that has come out of 9/11.

(15) The next guy to my immediate right is
(16) Mike Lampert. Mike and I were at the same law firm in
(17) New York 20 years ago. I was just starting out and
(18) Mike was a more senior associate. Mike was the kind
(19) of guy that everybody went to not just for answers but
(20) for the right answers when you needed help. Twenty
(21) years later he still is. You can still pick up the
(22) phone, as many of you know who are involved in the
(23) Federal practice book or who have ever looked at it.
(24) Mike wrote the chapter on removal. I still frequently
(25) call up Mike, like I did 20 years ago, and say, "Mike,

BSA

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- (1) What is their significance? How will they be
(2) implemented? Are they a wise reaction to terrorism?
(3) Are they an overreaction? Are they in some cases
(4) subject to Constitutional challenge?

(5) This group of distinguished panelists
(6) will examine these questions, focusing on the criminal
(7) side. Given our time limitations, unfortunately we
(8) have to paint -- maybe fortunately -- with a very
(9) broad brush. My role will be a limited one; to try to
(10) keep the discussion moving. And I invite the
(11) panelists to keep the conversation freewheeling and
(12) jump in any time.

(13) I want to make the same offer that Steve
(14) Salzburg made. If you have questions, feel free to
(15) raise them. If you get long winded, Steve will cut
(16) you off.

(17) (Laughter.)

(18) PROFESSOR GREEN: Let me start with some
(19) investigative issues. In particular, some of the
(20) provisions relating to investigation and gathering
(21) evidence.

(22) The Act has quite a number of provisions
(23) which enhance the ability of the criminal prosecutors
(24) and their investigators to get evidence. It includes
(25) provisions for roving wiretaps, for tracking e-mails

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- (1) provisions with the Attorney General, Mike Chertoff or
(2) the Attorney General testifying over that topic.

(3) Some of the more controversial
(4) provisions. I start by mentioning there are a number
(5) of provisions that are designed, at least in the
(6) Department's view, to make many existing powers --
(7) existing investigatory powers technology neutral.
(8) That is one of the continuing themes of the
(9) Department.

(10) We don't think crimes or investigatory
(11) tools should be defined based on the technology at
(12) issue. It should be consistent over various
(13) technologies. That drew a lot of criticism during the
(14) course of the legislative process. I think not
(15) because people were opposed to the idea of being
(16) technology neutral, but because there was some
(17) underlying disagreement with the powers, themselves.
(18) Whether or not we should be able to use pen registers
(19) and tapping or tracing devices without warrants. I
(20) think there was some underlying disagreement about
(21) those tools as a policy matter and not so much with
(22) the fact that they were being made technology neutral.

(23) Another big issue is the Foreign
(24) Intelligence Surveillance Act, which we call FISA for
(25) short. It is an issue that doesn't come up much for

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- (1) and computer use, for greater access to surveillance
(2) under the Foreign Intelligence Surveillance Act.

(3) It permits, in some cases, delayed
(4) notification of searches, sharing of information among
(5) Executive agencies, including Grand Jury information,
(6) and so on.

(7) Let me start with Matt Martens and ask
(8) him to just identify some of the provisions that he
(9) thinks are most important from the perspective of the
(10) government investigators and also those which he
(11) anticipates may be most controversial.

(12) MR. MARTENS: Thank you.

(13) I would just start by saying I take issue
(14) with the contention that there wasn't much debate over
(15) this Bill. Only someone who didn't participate in it
(16) could actually think that. Having spent many late
(17) nights, there's extensive debate over the Bill. As it
(18) developed, as you might imagine, days after September
(19) 11, the Department of Justice started developing and
(20) putting together a list of tools and amendments and
(21) statutory changes that would be helpful in combatting
(22) terrorism.

(23) There was an extensive back and forth
(24) with the Senate Judiciary Committee, in particular, as
(25) well as the House Judiciary Committee over those

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- (1) private practitioners because they're obtained ex
(2) parte on a regular basis. And what they are are
(3) warrants that allow wiretaps for, as the name says,
(4) foreign intelligence surveillance.

(5) The CIA or the FBI might use wiretaps for
(6) intelligence-gathering purposes. That left a very
(7) controversial issue because they've been taken out of
(8) the Fourth Amendment context. The Supreme Court has
(9) ruled that those types of warrant -- these types of
(10) wiretaps, to the extent they're not being used for
(11) criminal purposes, don't have to go through all of the
(12) probable cause requirements that you might need to go
(13) through for regular search warrants. That is a very
(14) controversial issue.

(15) The big issue was -- that arises in the
(16) Department of Justice is at what point can information
(17) that was gathered in intelligence gathering be shared
(18) with the criminal investigators and still not run
(19) afoul of the Fourth Amendment.

(20) The Patriot Act, without boring you with
(21) all the details, changed the standard from a primary
(22) purpose was to gather intelligence. I think the
(23) Department initially proposed a purpose for
(24) intelligence gathering. They settled on the view was
(25) a significant purpose or something along those lines.

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(1) don't know the numbers -- of people who have been
(2) detained in the wake of 9/11. The fact that we don't
(3) really know the exact numbers is itself a disturbing
(4) fact. The fact that people are being held for
(5) indefinite periods of time, sometimes incommunicado,
(6) often without us having any ability to know who they
(7) are or where they are is to me a tragedy that really,
(8) at least, requires us to ask the question about
(9) whether we lost this war before it started because
(10) these -- the fundamental protections that are issued
(11) here are so much a part of our American way of life, I
(12) worry by responding the way he have, as justified as
(13) that may be, there is even a greater threat.

(14) Having said that, we do what we, lawyers,
(15) do under these circumstances. We bring lawsuits. Ron
(16) can talk in a second about the lawsuit under the
(17) Freedom of Information Act which he's involved with.
(18) I'm involved in a lawsuit, which I won't comment on
(19) substantively, before this Court regarding opening up
(20) Immigration proceedings which are otherwise under a
(21) memo that was issued by the Chief Immigration Judge
(22) closed to the public.

(23) To summarize it, it is an interesting
(24) matter that the Court will decide. We have a long
(25) tradition in our country of having open judicial

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(1) we're quite sure -- it appears that a large number --
(2) perhaps a majority of the INS detainees nationwide are
(3) being held in New Jersey. Possibly, just because we
(4) have the excess jail space and the service agreements
(5) that we have -- that the INS has with County jails.

(6) I brought suit against Hudson County and
(7) Passaic County, their jails, in order for them -- to
(8) require them to disclose the names -- basically the
(9) names and other identifying information of detainees.
(10) I think my worthy opposing counsel -- I know he's
(11) present. I don't know where he is right now -- Mike
(12) Chagares of the U.S. Attorney's office. We have an
(13) appointment with Judge -- Assignment Judge D'Italia
(14) next Tuesday, which he will, presumably, rule on our
(15) cross-motions for summary judgment.

(16) PROFESSOR GREEN: Why do you want the
(17) names?

(18) MR. CHEN: The ACLU wants the names. It
(19) wants to contact them and ask them if they would like
(20) legal representation. It will be some Immigration
(21) matter. If they want that help, we will get it for
(22) them. If they don't, they don't.

(23) PROFESSOR GREEN: I take it, because it
(24) is not a criminal matter, there is no right under the
(25) Sixth Amendment to representation in these cases?

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(1) proceedings including open administrative proceedings,
(2) I would submit, and the Immigration proceedings
(3) regarding a select number of people who have been
(4) detained subsequent to 9/11 are now closed to the
(5) public.

(6) And I represent a number of newspapers
(7) that are seeking to get access to those proceedings.
(8) It is only an example of the way in which the
(9) government has reacted -- we submit overreacted. The
(10) government will submit it is proportionate reaction.
(11) Of course, there is disagreement there. The Court has
(12) to decide.

(13) But it is a way in which, I think, our
(14) fundamental civil liberties, at least, are put in
(15) issue as a result of the response to 9/11.

(16) PROFESSOR GREEN: Ron, do you want to
(17) tell us a little about that FOIA action?

(18) MR. CHEN: First, I should say it is not
(19) FOIA -- it was brought under a FOIA case being brought
(20) by the ACLU in the District of Columbia, which I'm not
(21) handling. The ACLU asked me to take on the case under
(22) the New Jersey Right To Know Law. And then the New
(23) Jersey statutes that require identifying information,
(24) inmates in County jails, to be made public.

(25) For whatever reason -- I don't know if

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(1) MR. CHEN: Yes.

(2) PROFESSOR GREEN: So far as I know, many
(3) of the people who were detained don't have lawyers?

(4) MR. CHEN: That is our -- that is our
(5) understanding. Of course, not knowing who they are
(6) makes it difficult to have specific facts.

(7) PROFESSOR GREEN: I guess we're fortunate
(8) here to have Matt Martens because the theme that I'm
(9) hearing is everything is kind of murky; we don't know
(10) exactly what the Justice Department and the INS are
(11) doing; we don't know who they're doing it to. But
(12) we're about to learn.

(13) (Laughter.)

(14) MR. MARTENS: I'm not going to give away
(15) any secrets today. There is no Sixth Amendment right
(16) -- Ron is correct -- to counsel in Immigration
(17) proceedings. That said, there is a statutory right in
(18) the sense that you can retain your own counsel. There
(19) is no statutory right to have counsel provided for you
(20) in Immigration proceedings.

(21) One thing the INS routinely does in these
(22) proceedings is to provide people with lists of various
(23) pro bono organizations that would provide counsel
(24) either at no cost or very low cost. This is provided.
(25) It is a policy to provide it to every inmate. I

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- (1) clearing themselves unless they are lucky enough to
(2) get a lawyer who frequently makes a couple of calls
(3) and then, suddenly, they are released.
(4) What we have seen in -- my firm has, in
(5) the wake of 9/11, handled a number of the cases of
(6) these detainees -- is that with a little intervention
(7) you can get the FBI to actually do the investigation
(8) that people are being held for them to do. They do
(9) it. They clear them and they're released.
(10) But in the absence of that intervention,
(11) which can often only come about once their identities
(12) and existences are known, people are being held, you
(13) know, often for very long periods of time away from
(14) their families, away from their communities and in a
(15) way that, really, to me, is antithetical to what our
(16) system of justice is supposed to be.
(17) I understand that there are
(18) investigations going on, that there are investigations
(19) that should go on and that often in the course of
(20) these investigations, that real Immigration violations
(21) are found.
(22) But it also strikes me as just
(23) unrealistic to think, when you look at the people that
(24) are showing up in connection with these
(25) investigations, that there is not some sort of

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- (1) additional attention that is being paid to people with
(2) particular types of names and particular types of
(3) ethnic heritages.
(4) So, I mean -- I believe Matt when he says
(5) there is nothing -- he knows of no policy to
(6) discriminatorily enforce the laws. But it is not
(7) consistent with our experience in terms of what we see
(8) in these local jails.
(9) I also think -- I appreciate -- I'm sure
(10) my clients appreciate the Justice Department's concern
(11) for their privacy rights. But I think there are other
(12) rights that they may be a little more concerned about.
(13) MR. CHEN: Just to make it clear.
(14) The ACLU is in favor of privacy rights as
(15) well. It is interesting you should mention the
(16) sex-offender cases.
(17) Judge Bissell remembers I have a little
(18) bit of experience with that. My recollection of the
(19) United States' position at the time in numerous cases
(20) was that there was no privacy right for what amounts
(21) to public records; arrests, convictions, et cetera.
(22) It seems a little inconsistent now. I'll
(23) argue that before Judge D'Italia on Tuesday. On the
(24) other issue, the larger issue of profiling, which,
(25) obviously, is of great concern, especially in New

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- (1) Jersey.
(2) I also do not question at all the good
(3) faith of the Department of Justice subjectively in not
(4) trying to engage in racial profiling. The fact is
(5) there are over 300,000 people in this country, at
(6) least my conservative estimate, who are out of
(7) status -- the Immigration status. Visas expired, et
(8) cetera.
(9) Therefore, it, at least, raises a fair
(10) question how it came to be these particular people if,
(11) in fact, they are predominantly Middle Eastern or
(12) South Asian men, which is what we would want to
(13) know -- if that is the case, then I think it does
(14) behoove all of us to make sure that both in effect and
(15) in intent that no type of improper profiling is going
(16) on.
(17) PROFESSOR GREEN: Let me move the
(18) discussion a little bit away from the U.S.A. Patriot
(19) Act investigations and over to the question of
(20) prosecuting alleged terrorists.
(21) The President's Executive Order in
(22) November authorized trials by military tribunals. It
(23) would apply to individuals designated by the President
(24) if they are or if the President has reason to believe
(25) they are members of Al Queda engaged in international

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- (1) terrorism or if they knowingly harbor a member of Al
(2) Queda or somebody engaged in international terrorism.
(3) The process, as I understand it,
(4) contemplates a lower standard of admission of evidence
(5) than would apply in a criminal proceeding in federal
(6) court. Convictions and sentencing based upon the
(7) concurrence of two-thirds of the members of the
(8) Commission and appeal only to the President or the
(9) Secretary of Defense.
(10) Let me ask start with Judge Orlofsky and
(11) ask the question: Is there precedent for this? Is it
(12) unprecedented? How do you view this historically?
(13) What do you think about this in general?
(14) JUDGE ORLOFSKY: Thank you.
(15) First, let me thank the Association of
(16) the Federal Bar for inviting me to speak this morning.
(17) For those of us in the Southern District (laughter),
(18) it is always an honor and privilege to come to Mayfair
(19) Farms. Not to mention a significant inconvenience, to
(20) quote Chief Judge Gerry.
(21) Now to return to the more important
(22) issue. The title of the President's Executive Order,
(23) which was issued on November 13, 2001 is "Detention,
(24) Treatment and Trial of Certain Noncitizens in the War
(25) Against Terrorism."

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(1) decided in 1950, called Johnson v. Eisentrager. That
(2) is an interesting case. Eisentrager also involved a
(3) petition for a writ of habeas corpus which had been
(4) filed on behalf of certain German nationals who had
(5) been tried before a military tribunal in China. They
(6) were charged with continuing to engage in hostile
(7) activities against the United States after Germany had
(8) officially surrendered.

(9) The military tribunal was appointed
(10) pursuant to an Order which is almost identical to the
(11) Order that President Bush issued in November. They
(12) were convicted of the crime charged. They were
(13) repatriated to Germany and were confined at a
(14) Germany -- at a prison in Germany over which a United
(15) States military officer was the custodian.

(16) The Court went through an extensive
(17) analysis of the military tribunal, the basis for such
(18) military tribunals and essentially concluded that
(19) nothing had happened in the territorial United States
(20) which would give any court in the United States -- any
(21) federal court -- for that matter, any state court
(22) jurisdiction to entertain a writ of habeas corpus on
(23) behalf of the petitioners.

(24) The crimes had been committed in China.
(25) The prisoners were detained in Germany, albeit in a

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(1) and put on civilian clothes and then proceeded to
(2) embark upon clandestine activities of sabotage, et
(3) cetera, et cetera.

(4) The Supreme Court did not have much --
(5) did not have any trouble, really, in concluding that
(6) the President, as Commander and Chief, had the
(7) authority to convene a military tribunal to try these
(8) individuals. In fact, they had originally been
(9) arrested by the FBI.

(10) When the President convened the military
(11) tribunal, they were turned over to the custody of the
(12) Provost Marshal for the District of Columbia. They
(13) were tried and convicted. And, basically, the Supreme
(14) Court said that this was consistent historically with
(15) the laws of war, was part of the President's authority
(16) under the Constitution to conduct war and to serve as
(17) the Commander and Chief of our Armed Forces and they
(18) were all convicted.

(19) I think all but two of them were
(20) ultimately executed. Two others were ultimately --
(21) were held in custody for a long time and ultimately
(22) repatriated to Germany.

(23) So, the short answer to the question --
(24) I'm going through the military tribunal issue rather
(25) quickly -- is that there is ample historical precedent

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(1) United States military prison there and, therefore,
(2) the writ of habeas corpus would not lie.

(3) So there is historical precedent for
(4) military tribunals. I'm sure that -- although Matt
(5) doesn't have to comment on this, I'm sure that the
(6) Department of Justice reviewed the Eisentrager
(7) decision as well as another decision called Ex Parte
(8) Quirin, which I'll get to in a minute, and essentially
(9) adopted an Order which is almost verbatim -- matches
(10) verbatim the Order which President Roosevelt issued in
(11) 1942.

(12) Now, what is interesting about the
(13) Executive Order is under the terms of the Order, it is
(14) up to the President or his designee, the Secretary of
(15) Defense, to decide when and where such military
(16) tribunals will be convened and who will be charged
(17) with offenses subject to the jurisdiction of the
(18) military tribunal.

(19) Now, another case that you should know
(20) about -- I'll go through it quickly -- is a case
(21) called Ex Parte Quirin, which was decided in 1942.
(22) That case involved German saboteurs who landed on the
(23) shores of the United States in uniform in two
(24) different locations.

(25) Upon landing, they buried their uniforms

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(1) to support the convening of military tribunals by the
(2) President of the United States.

(3) The question is this isn't right. You
(4) have seen one effort to challenge the detention in
(5) Guantanamo has already met with failure. I'm sure
(6) that case will be taken up to the Ninth Circuit Court
(7) of Appeals and ultimately to the Supreme Court. But,
(8) as the Court noted in the Central District of
(9) California, there is ample precedent to support for
(10) what is going on in Guantanamo. There is also ample
(11) evidence to support the convening of military
(12) tribunals by the President in time of war.

(13) Thank you.

(14) PROFESSOR GREEN: I guess the military
(15) tribunal issue raises a number of issues which
(16) probably won't be faced for a while. Some of them are
(17) legal issues. At least, as I read the Order, it would
(18) apply not exclusively to people who are detained
(19) abroad, but also people, alleged terrorists, who might
(20) be arrested in the U.S.

(21) I suppose that would raise some different
(22) issues, particularly arguments about whether the way
(23) the crime is defined is a war crime. It also, I
(24) think, raises policy or practical issues which, I
(25) guess, I'd ask Matt to address. Because if you can do

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- (1) try alleged terrorists in our ordinary criminal
(2) process or in international criminal courts, which was
(3) something you mentioned before, Matt.
(4) What is your reaction to that? What are
(5) the reasons not to try these cases either in
(6) international courts or in our own Federal District
(7) Courts?
(8) MR. MARTENS: What is interesting -- the
(9) President's Order, itself, provides that one of the
(10) criteria to be determined when the President, himself,
(11) must make the decision as to whether or not someone is
(12) or is not going to be placed before a military
(13) commission, one of the facts he must consider is
(14) whether it is in the interest of the United States to
(15) do so. That leaves open, obviously, the possibility
(16) for the President to consider whether -- what
(17) international reaction will be and international
(18) acceptance will be.
(19) There has also been a criticism. For
(20) example, Spain, I believe, said they won't extradite
(21) someone to the United States or suggested that they
(22) won't extradite someone to the United States if they'd
(23) be subjected to a military commission.
(24) Again, that is not an argument for never
(25) having a military commission. That is an argument

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- (1) why, in the particular circumstance when the President
(2) is making his evaluation a particular person should be
(3) put in a military commission. That's a fact he can
(4) consider just like in many cases countries won't
(5) extradite people back to the United States if they
(6) face the death penalty. The United States agrees in
(7) certain circumstances we'll waive the death penalty in
(8) order to achieve justice and subject them, perhaps, to
(9) a term of life in prison.
(10) Similarly, the President is perfectly
(11) free to in a particular case say if Spain will not
(12) send us back someone, or another country, the
(13) President could decide it is not in the best interest
(14) to put someone in a military commission because we're
(15) not going to get them back. So he can waive that
(16) provision or not invoke it.
(17) JUDGE ORLOFSKY: Matt, as I read the
(18) Order, the Secretary of Defense is empowered to issue
(19) orders and regulations as are necessary and
(20) appropriate to implement the President's Executive
(21) Order.
(22) Does the Secretary of Defense intend to
(23) promulgate such a regulation pursuant to the law?
(24) MR. MARTENS: I'm not at liberty to talk
(25) about exactly how the President or Secretary of

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- (1) Defense will or will not, frankly. It is not within
(2) our bailiwick at the Justice Department. I'm not at
(3) liberty to talk about exactly how that will be
(4) implemented.
(5) PROFESSOR BRUCE: I wonder, before we
(6) leave the subject, whether either of the judges have
(7) reflections on the practical difficulties of trying
(8) these cases in federal court? That might be something
(9) worth thinking about when the Justice Department makes
(10) the decision about which direction to go in.
(11) JUDGE ORLOFSKY: I do. It is my
(12) understanding that the first District Judge to try the
(13) first World Trade Center case is still under
(14) 24-hour-a-day protection. It is likely that the
(15) judges in the District of Virginia and New York who
(16) will try these cases will encounter the same kinds of
(17) security issues.
(18) It creates significant security problems
(19) for the Marshal's Service to provide security during
(20) one of these trials, to allow the public to enter, who
(21) gets into the courtroom. Just finding the courtroom
(22) where you can try some of these cases is often a
(23) problem.
(24) While those problems are not
(25) unsurmountable, indeed, such trials have already been

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- (1) conducted and can continue to be conducted.
(2) If the Justice Department decides it
(3) wants to prosecute one of the individuals in the
(4) United States District Court -- don't underestimate
(5) the significance of the logistical problems involved
(6) in conducting such trials both for the provision of
(7) security and for the -- not only to make sure that the
(8) trial is secure, but the ongoing and continuing
(9) security that the Marshal's Service will have to
(10) continue to provide for those involved in the trial,
(11) including the judge and perhaps the prosecutor and
(12) anybody else.
(13) MAGISTRATE JUDGE HEDGES: As a practical
(14) matter, if there is ever an extradition from Pakistan,
(15) our district is going to face those issues.
(16) Leaving that aside going to the question
(17) of these people who were detained for, perhaps, acts
(18) of war in Afghanistan, one wonders what venue they
(19) would be in. If there are hundreds of people, how is
(20) any Court going to deal with conceivably hundreds of
(21) defendants who are brought in incredibly high profile
(22) cases that have all the problems that Judge Orlofsky
(23) mentioned?
(24) I don't know how our District Courts are
(25) going to address issues like that.

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- (1) Obviously, the Department of Justice will
(2) get to pick and choose among the victims who speak
(3) because there won't be an adequate opportunity for all
(4) of them. I think there will be an opportunity there
(5) to participate.
(6) Not to cross lines of the first panel,
(7) there is an economically interesting question.
(8) 3663(a) of Title 18, adopted over the objections
(9) raised eloquently by Judge Barry when she was Chair of
(10) the appropriate Committee of the Judicial Conference,
(11) compels restitution in certain kinds of criminal
(12) cases.
(13) Assuming the terrorists have any money,
(14) which is sort of the second part of what I'll talk
(15) about in a minute, there is a question here whether
(16) there will be restitutionary orders and how they will
(17) interact with the whole structure of the first topic
(18) of discussion we heard.
(19) There are a number of ways in which
(20) victims, I think, do get involved in this process.
(21) PROFESSOR GREEN: Let me, unless others
(22) want to comment on the military trials issue, move the
(23) conversation, although I'll stick with you, Mike, to a
(24) topic that may have some implications for people in
(25) the room. I think to a large degree, those who aren't

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- (1) criminal practitioners may not be personally affected
(2) by many of the changes in the law and initiatives we
(3) talked about so far. But there are some provisions in
(4) the U.S.A. Patriot Act dealing with money laundering
(5) which I think may be relevant to the practices of
(6) folks in the room.
(7) Can you tell us a little bit about the
(8) new changes, Mike?
(9) MR. LAMPERT: Sure. Somebody earlier
(10) commented about the U.S.A. Patriot Act and the
(11) acronym -- and, actually, William Safire wrote a
(12) column about how the U.S.A. Patriot Act got its name
(13) and its acronym and it is, so far as anybody knows,
(14) the first Bill where the acronym is the result of a
(15) Conference Committee determination.
(16) The Senate came up with U.S.A. and the
(17) House came up with Patriot. If you want to know the
(18) history, you can look at it. Title 3 of the Patriot
(19) Act has its own name, the International Money
(20) Laundering Abatement and Anti-Terrorist Financing Act
(21) of 2001.
(22) It is a statute designed to deal with, as
(23) it says, money laundering very broadly almost -- there
(24) are a few sections in it that focus specifically on
(25) anti-terrorism funding. The bulk deals with money

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- (1) laundering.
(2) If I could, I have a question for the
(3) audience.
(4) Can I see a show of hands of everyone in
(5) the audience who either has, within the last year,
(6) done a real estate closing or his colleagues with
(7) others in a law firm who have done a real estate
(8) closing?
(9) Can I see how many people have either
(10) closed real estate or a partner or associate?
(11) Congratulations. You are all financial
(12) institutions within the meaning of Title 3 of the U.S.
(13) Patriot Act. You now have statutory obligations as
(14) financial institutions within the meaning of Title 3
(15) of the U.S. Patriot Act.
(16) There is a definition in the statute of
(17) "financial institution." It is -- it, obviously,
(18) includes the financial institutions everybody would
(19) expect. Banks.
(20) For the first time, interestingly, it
(21) includes securities firms as to which they've been a
(22) peculiar history. If they were owned by a bank, they
(23) were covered. If they weren't, they weren't.
(24) It doesn't seem to include insurance
(25) companies. It specifically includes car dealers. It

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- (1) includes persons who participate in real estate
(2) transactions.
(3) And while the Treasury Department has yet
(4) to issue specific regulations and there is some
(5) question whether the Treasury is going to exempt
(6) lawyers and, with due deference to our southern
(7) colleagues, who may have a better argument given the
(8) difference in the way we close title in North Jersey
(9) and South Jersey --
(10) JUDGE ORLOFSKY: Or at least a cheaper
(11) way of doing it.
(12) MR. LAMPERT: You may get out of the
(13) U.S.A. Patriot Act as a result of the relatively
(14) lesser involvement since their escrow agents are used
(15) to actually do or title companies do the closing.
(16) Within the definition as one reads the
(17) statute, unless the Treasury exempts it, lawyers who
(18) do real estate closings can be financial institution.
(19) You can go home and tell your spouse
(20) tonight that you're now a financial institution. The
(21) bad news is that whether you directly or your clients
(22) are -- let me just say there are a couple of other
(23) potentially surprising financial institutions you may
(24) want to think about.
(25) A whole set of people who had previously

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(1) communicate with each other to figure out what is
(2) really suspicious so they can report it to the federal
(3) government. And there is a whole, sort of, very
(4) interesting issue there about how you confine the uses
(5) of that information to the investigatory and statutory
(6) purposes that are identified.

(7) PROFESSOR GREEN: I want to turn to one
(8) last issue which may be controversial.

(9) I think the anti-money laundering
(10) provisions are justified in part as crime prevention
(11) provisions to make it harder to move cash around to
(12) support terrorist activities.

(13) Another provision which has been
(14) justified by -- as a matter of crime prevention,
(15) terrorist prevention is a Justice Department interim
(16) role that allows the monitoring of conversations
(17) between inmates who are suspected of being terrorists
(18) and their attorneys.

(19) Matt, can you tell us a little bit about
(20) what the rule does, why it was adopted? To the extent
(21) you can, how it might be implemented?

(22) MR. MARTENS: Just brief background.
(23) There is a procedure called "special administrative
(24) measures" that pre-existed the interim rule.

(25) The special administrative measures had

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(1) oath that there is a likelihood that if the
(2) attorney-client communication process would be used to
(3) transfer information to make communications --
(4) prohibited communications with outside entities. That
(5) provision has, obviously, generated a great deal of
(6) concern about whether or not that violates the Sixth
(7) Amendment privilege.

(8) There have been various arguments made.
(9) One of them is that there is a chilling effect because
(10) there are two options under the interim rule.

(11) One, when these procedures are
(12) implemented, in order to provide some judicial review
(13) the way it has been done is, on the one hand, either
(14) the detainee is notified of the fact they are
(15) subjected to attorney-client monitoring. That
(16) provides them, obviously, once they're notified the
(17) opportunity to go to court, if they believe the
(18) monitoring violates either the Sixth Amendment right
(19) to counsel or the Fifth Amendment right to counsel or
(20) the Fourth Amendment right against unreasonable
(21) searches and seizures, they can bring an action and
(22) challenge the monitoring.

(23) There is another option the Attorney
(24) General can pursue. He can monitor without notice to
(25) the detainee. That can only occur if there is first

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(1) felt people could be subjected to special
(2) administrative measures if they fell into two
(3) categories. One was violence or terrorism crimes --
(4) certain violence or terrorist crime. The other was
(5) espionage.

(6) Those measures govern the circumstances
(7) under which the person would be held without going
(8) into more detail than that.

(9) The interim rule adds an additional
(10) condition that someone could be subjected to if
(11) they're already subjected to special administrative
(12) measures.

(13) Just so you know, the people who are
(14) subjected to special administrative measures or SAMs,
(15) as we call them, are approximately 16; 12 terrorists
(16) and four espionage. That's public information.

(17) Those -- there is an additional procedure
(18) now possible where attorney-client communications can
(19) be monitored. I actually don't know how many of the
(20) 16 are subjected to that. I don't know if I could
(21) answer you even if I did. But those procedures now
(22) allow for the monitoring of attorney-client
(23) communications in certain circumstances.

(24) If the Attorney General makes an
(25) affirmative finding, I think he has to swear under

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(1) judicial approval, I believe, under the probable cause
(2) standard, but I'm not positive about that, if there is
(3) first judicial approval of the monitoring.

(4) PROFESSOR GREEN: Why don't you require
(5) judicial approval for monitoring even where there is
(6) notice given?

(7) In other words, ordinarily, in order to
(8) get a warrant, you would need a judicial determination
(9) of probable cause. Here, under the procedures as
(10) you've described them, as long as notice is given, you
(11) don't need any judicial determination and you don't
(12) need probable cause.

(13) MR. MARTENS: I think the rationale -- I
(14) believe it has been set out in the rule is twofold.
(15) One, by providing notice, obviously, the desire in
(16) that instance is to deter as opposed to when notice is
(17) not given, obviously, there is not going to be the
(18) deterrent effect. It is more the
(19) gathering-information, perhaps, effect.

(20) The reason that notice is not given, I
(21) think, is twofold.

(22) One, there is a desire sometimes to move
(23) quickly and the judicial review would obviously impede
(24) that.

(25) The second reason is that there are --

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AFTERNOON SESSION

- (1) MR. SHAPIRO: I think we're going to
(2) start the program so we can make good on the Tom
(3) Campion promise.
(4) As we have said, lunch is awaiting. I
(5) hope you all enjoy the change.
(6) The first item of business is for me to
(7) introduce Magistrate Ronald Hedges to report to us on
(8) the Historical Society's event -- recent event and
(9) what we have in store for the future.
(10) So without further ado, United States
(11) Magistrate Ronald Hedges.
(12) (Applause.)
(13) MAGISTRATE JUDGE HEDGES: Thank you.
(14) I'll be as verbose as I was on the panel upstairs.
(15) (Laughter.)
(16) MAGISTRATE JUDGE HEDGES: Two weeks ago a
(17) lot of you joined us at the Post Office Building in
(18) Newark for what we hope is the first in a series of
(19) annual affairs that the Historical Society will be
(20) conducting to talk to you about where the Court has
(21) been in the past and, hopefully, at times where the
(22) Court is going to be going in the future.
(23) The one thing I want to remind all of you
(24)
(25)

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- (1) or tell you about, if you're not familiar with it, is
(2) that the last of the attorney conference rooms in the
(3) District was dedicated two weeks ago. It is named
(4) after former Chief Judge Whipple. It is in the Post
(5) Office building and available to all members of the
(6) Bar if they have business in Newark and they need a
(7) place to work or to use faxes, or the like. An
(8) excellent room. We hope to see all of you in it.
(9) A couple of things the Society is going
(10) to be doing soon. On May 4th the Camden branch of the
(11) Historical Society is going to be videotaping a
(12) documentary on a trial of what was known as the
(13) "Camden 28." This was a group of draft protesters
(14) during the Vietnam War. A large cause celebre back in
(15) the 1970s. Everyone is invited to attend the taping.
(16) We hope it is going to be a stimulating historical
(17) event. And, hopefully, the documentary may be shown
(18) on television in the future. If not that, certainly
(19) at one of our events.
(20) I also want to invite you to something
(21) we're planning on doing in October. The Historical
(22) Society of the United States Supreme Court has
(23) approached us and asked if we would co-sponsor one of
(24) a series of visiting lectures that that Society hopes
(25) to start in the fall. It is going to be co-sponsored

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- (1) by us, by the Historical Society of the Eastern
(2) District of Pennsylvania and by the Third Circuit
(3) Historical Society. I can't tell you what the topic
(4) is yet. There is going to be a meeting in Washington
(5) this week to decide what the lecture topics are going
(6) to be, but it is going to be, I'm sure, an excellent
(7) event. And we'd like to see everyone down there.
(8) Also, at that October event, we should be
(9) coming near the end of the writing of the written
(10) history of the Court.
(11) Those of you who were at the Historical
(12) Society event two weeks ago heard our author talk
(13) about a prosecution of a counterfeiting ring in the
(14) 1790s. The publication of the Historical Society,
(15) which is available outside, has another part of the
(16) written history talking about the first rules of our
(17) court dating to the decade after the Revolution and I
(18) think you'll all enjoy the book when it comes out.
(19) I would ask all of you interested in
(20) supporting us Nunc Pro Tunc does have on the back of
(21) it a little piece of paper that you can all fill out
(22) and send us a check. We need contributions. We need
(23) the support of the Bar.
(24) The Historical Society has, in part,
(25) funded the Whipple room. It has funded the event. It

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- (1) is also funding historical displays, including the
(2) historical display that has partially been placed in
(3) the King Building in Newark. We hope to do a lot in
(4) the future and we hope for your support.
(5) Thank you.
(6) (Applause.)
(7) MR. SHAPIRO: As you know as
(8) professionals, one of the most important things that
(9) we can and lots of us do is pro bono work. Annually,
(10) there is a presentation of a pro bono award to a
(11) worthy attorney or firm. I would at this point like
(12) to introduce -- reintroduce, I guess, Chief Judge
(13) Bissell, who will award this year's pro bono award.
(14) Chief Judge Bissell.
(15) (Applause.)
(16) CHIEF JUDGE BISSELL: At this time I'd
(17) like to ask Darren Gelber of the firm of Wilentz,
(18) Goldman & Spitzer to join me on the podium, if you
(19) would.
(20) (Applause.)
(21) CHIEF JUDGE BISSELL: Darren, it is with
(22) great pleasure that I present to you, in appreciation
(23) of the valuable contributions of Wilentz, Goldman &
(24) Spitzer as a member of the court's civil pro bono
(25) panel, this year's fourth annual pro bono award.

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- (1) been placed by Martin Luther King and other civil
(2) rights workers in Alabama attacking the work of the
(3) Montgomery Police Department.
(4) The second great case, at least in the
(5) last half century was, of course, the Pentagon Papers
(6) case and, as I'll discuss a little bit later, that, of
(7) course, arose out of the Vietnam War and the clash
(8) between hawks and doves in our society. I think maybe
(9) it is the first part that is coming true.
(10) **(Applause.)**
(11) I could talk loudly. Even if the mike
(12) doesn't work, hopefully, you can hear me.
(13) The media's performance in covering 9/11,
(14) I think, and its aftermath has, by all accounts, been
(15) quite exceptional.
(16) Thank you.
(17) The media's performance in covering 9/11
(18) and its aftermath, as I think, by most accounts, has
(19) been quite exceptional.
(20) I'm not a biased speaker here since
(21) basically, I haven't been that involved in newsroom
(22) bedding of stories about Afghanistan. After all,
(23) Osama Bin Laden, I think we all can agree, of course,
(24) is libel proof. He needn't come to me to review those
(25) sort of stories.

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- (1) My subject today is really how the war on
(2) terrorism has influenced the delicate balance between
(3) the government and the press.
(4) In general, I believe, and in contrast to
(5) some of the other areas of Constitutional freedoms
(6) where civil liberties have been, perhaps, somewhat
(7) compromised, the First Amendment has stood up pretty
(8) well so far in the last six months. Indeed, though
(9) inevitably to some degree, the relationship between
(10) the press and the government has been altered in this
(11) wartime. The new cooperation that has resulted hasn't
(12) resulted in too much encroachment upon journalistic
(13) independence and freedom.
(14) Probably, very interestingly, the most
(15) egregious violation of kind of free speech principles
(16) was not at the hands of government but, rather, at the
(17) hands of publishers, themselves. In a shocking
(18) article late September, The Times report that two
(19) publishers, one in Texas and one in Oregon, had fired
(20) columnists because the columnists had dared give their
(21) opinions. In one case that President Bush had, quote,
(22) skedaddled around the country in Air Force One on
(23) September 11th. The other that he had flown around
(24) the country like a scared child.
(25) Whatever one's view of the President's

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- (1) actions on that day, certainly a columnist ought to be
(2) able to give his opinion all the more so when it seems
(3) it can be substantiated without being fired in aid of
(4) the thoughtless and zealous patriotism in, of all
(5) things, a newspaper publisher.
(6) In the core First Amendment battlefield
(7) the potential of government trying to restrain the
(8) press from publishing, the administration has acted
(9) honorably. The most visible venture in this area was
(10) Condoleezza Rice's request that the networks not
(11) telecast the tapes of Osama Ben Ladin's first talk
(12) back in September.
(13) Significantly, by all accounts, Ms. Rice
(14) employed a very understated approach asking for the
(15) networks' cooperation but never threatening them.
(16) Although it is hard to see why the
(17) administration cared so much, it seems incredible that
(18) Bin Laden's tape was really a means of communicating
(19) with his agents around the world or that the American
(20) people were going to be bought in by his propaganda.
(21) The networks for their own reasons pretty much
(22) complied. The significance is not in the results but,
(23) rather, in the fact that the government did not use
(24) any real pressure to enforce its wishes.
(25) In the subsequent months I've heard of

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- (1) instances where government has privately asked the
(2) press not to publish certain bits of information
(3) because it would hinder the intelligence or military
(4) effort.
(5) In the main, these requests have been
(6) honored. This is no different from the informal
(7) system of accommodation we have lived with for a long
(8) time. It is as it should be.
(9) If government asks and it can convince
(10) the press that information about to be published is
(11) injurious to our interests, the press has
(12) traditionally complied. Examples of this type of
(13) cooperation abound from The Times' agreeing not to
(14) publish news it had learned about the imminent Bay of
(15) Pigs invasion.
(16) You recall President Kennedy later wished
(17) that The Times had published so, perhaps, the invasion
(18) would have been aborted. To not publishing
(19) information about the locations of Americans who had
(20) escaped being taken hostage in Teheran.
(21) In times of war the media generally gives
(22) more of the benefit of the doubt to the government in
(23) response to such requests and given the reality of the
(24) current threats, such caution is understandable and,
(25) at least in my view, does not compromise the media's

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(1) brief in what became Brandsberg v. Hayes a year later
(2) in the Supreme Court.
(3) I think Goodale had on his mind this
(4) Pentagon Papers issue and had talked about it for a
(5) couple of minutes to Bickel, about it. And so at that
(6) point when Lord, Day & Lord said "no," he thought that
(7) Bickel was his man. There was only one problem, which
(8) is he had no idea how to find the guy. He was not at
(9) Yale. He had no idea how to track him down.
(10) So, thinking wisely, he went down to the
(11) Times newsroom and said, "You guys know how to find
(12) people. Go find Bickel."
(13) Ten minutes later he was produced at his
(14) grandmother's home on the West Side.
(15) Bickel said he wanted to take the case
(16) but he needs a firm behind him; he can't do it
(17) himself. That is how Cahill, Gordon was brought into
(18) the case; because Bickel's favorite student had been
(19) Floyd Abrams who was just a new partner at that time
(20) at Cahill, Gordon. By the unluck of the wheel, the
(21) case belonged to Murray Gurfein.
(22) It was his first week on the bench and he
(23) also, not great for The Times' interests, it turned
(24) out was a former military officer. Not the ideal
(25) judge you would want to get.

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(1) Nonetheless, Gurfein actually issued the
(2) most poignant opinion of all of the opinions that were
(3) to come down in a few -- in the next two weeks.
(4) He wrote as follows: "The security of
(5) the nation is not at the ramparts alone. Security
(6) also lies in the value of our free institutions. A
(7) cantankerous press, an obstinate press, a ubiquitous
(8) press must be suffered by those in authority in order
(9) to preserve the even greater values of freedom of
(10) expression and the right of the people to know.
(11) Despite those quite moving words and
(12) despite his decision in The Times' favor, The Times is
(13) still stayed from publication while the case moved up
(14) first to the Second Circuit and then really within 15
(15) days of the initiation of the case to the United
(16) States Supreme Court. Whereas, of course, you know,
(17) the Supreme Court in a 6-to-3 vote decided in favor of
(18) The Times and decided in Justice -- in the Court's
(19) opinion that there had to be a direct irreparable
(20) damage that could clearly be shown to the country and
(21) its people and that the government had not met that
(22) test.
(23) Interestingly, ten years later an article
(24) was written about it, a retrospective on the Pentagon
(25) Papers case, and in that article almost every witness

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(1) who had shown up for the government to say how this
(2) was going to harm national security during the
(3) hearings that took place behind closed doors in that
(4) 15-day period in interviews said that really they
(5) never really believed it and that there was no
(6) jeopardy to the military operations by the publication
(7) of the case.
(8) But I think what is important is that in
(9) that case the government really used legal pressure
(10) whereas at present that sort of thing has not been
(11) used. Indeed, perhaps because of the precedent we
(12) have from the Supreme Court in 1971.
(13) I get asked very often if the Pentagon
(14) Papers case scenario happened today in the context of
(15) Afghanistan what would happen.
(16) My answer has been that if it was the
(17) first time that this Court, without Justices Douglas
(18) and Black and Brennan and so on, the first time this
(19) Court was seeing the case, I'm not sure that that same
(20) 6-3 majority could be mustered.
(21) On the other hand, given the precedent of
(22) 30 years ago, I'm confident that with similar facts
(23) today's Supreme Court would come out the same way.
(24) What is also interesting, I think, are
(25) the instances in the press have voluntarily shared

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(1) information with government over the last six months.
(2) For example, the Wall Street Journal
(3) obtained the hard drive of computer -- a hard drive of
(4) a computer originally located in an al Qaeda home. It
(5) shared the news with its readers but gave the material
(6) to the government. It is certainly doubtful whether
(7) the paper would have been as forthcoming had it not
(8) been wartime.
(9) Likewise, I'm aware of threats being made
(10) on e-mails by an unknown and purported terrorist to a
(11) reporter. This purported terrorist had links with the
(12) actual hijackers, but the entire communication had
(13) been by e-mail.
(14) After awhile, the communication got a
(15) little heated and the terrorist started threatening
(16) not only the reporter, but also the city where she
(17) lived.
(18) Perhaps a year ago the newspaper involved
(19) decided on its own these threats weren't serious and
(20) to cast them aside. However, after September 11th it
(21) gave the threats as well as the prior communications
(22) which placed them all in context to the authorities.
(23) Both the journalist and the lawyers felt in the
(24) current situation it was not up to them to decide
(25) whether or not the threats were credible. They

THE ASSOCIATION OF FEDERAL BAR - MARCH 20, 2002
TWENTY-SIXTH ANNUAL JUDICIAL CONFERENCE

XMAX(43/43)

BSA

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- (1) George.
(2) Do I have a second?
(3) **(A second to the motion was received.)**
(4) MR. SHAPIRO: Okay. These proceedings
(5) are closed.
(6) Thank you, all. I hope you enjoyed it.
(7) I look forward to seeing you next year.
(8) - - -
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THE ASSOCIATION OF FEDERAL BAR - MARCH 20, 2002
 TWENTY-SIXTH ANNUAL JUDICIAL CONFERENCE

XMAX(1/44)

BSA

Concordance Report

Unique Words: **3,635**
 Total Occurrences: **12,546**
 Noise Words: **384**
 Total Words In File: **33,002**
 Single File Concordance
 Case Sensitive
 Noise Word List(s):
NOISE.NOI
 Cover Pages = **1**
 Includes **ALL** Text
 Occurrences
 Dates **ON**
 Includes Pure Numbers
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