Civil Liberties: Ten Years After 9/11
A commemorative and educational event organized by Long Island Neighbors for American Values about the state of civil liberties in a post-9/11 world. September 8, 2011

Keynote address by Prof. Eileen Kaufman, Touro Law School

Two and a half weeks after 9/11, Ehab Elmaghraby was arrested and confined in the Metropolitan Detention Center in Brooklyn. For 11 months, he was in a unit called Admax Shu, otherwise known as solitary confinement. In those 11 months, he was prohibited from leaving his cell for more than one hour a day, he was routinely subjected to humiliating body cavity searches, he was verbally and physically abused, he was denied access to basic medical care and to legal counsel, and he was denied adequate exercise and nutrition.

Lights were left on in his cell for 24 hours per day. In the winter, the air conditioning was turned on in his cell; in the summer, the heat was turned on.

He was not given a mattress, pillow or blanket nor was he given toilet paper.

Whenever he was removed from his cell, he was handcuffed and shackled around his legs and waist.

He was threatened with death; called a terrorist and an associate of Osama bin Laden, Al-Qaeda, and the Taliban; thrown against a wall, pushed, beaten, and dragged on the ground while chained and shackled.

His ability to practice his religion was interfered with by guards who deliberately banged on his cell while he was praying and who repeatedly confiscated his Koran.

What had Elmaghraby done to deserve this treatment? He was a Muslim in Manhattan at a time when the government was arresting and detaining hundreds of Muslims as part of its investigation into 9/11. According to the Special Report of the Justice Department Office of the Investigator General,

“Almost 60 percent of the 762 aliens detained in connection with the Government’s investigation of the September 11 terrorist attacks were arrested in the New York City area. The overwhelming majority of these aliens were arrested on immigration charges that, in a time and place other than New York City post-September 11, would have resulted in either no confinement at all or confinement in an INS . . . facility pending an immigration hearing. However, fear of additional terrorist attacks in New York City and
around the country changed the way aliens detained in connection with the investigation of the September 11 attacks were treated."

That same Inspector General Report confirmed a pattern of physical and verbal abuse of those detainees, particularly those considered to be of “high interest.” Neither Ehab Elmaghraby nor any one of the others detained and tortured as part of this indiscriminate sweep of non-citizen Muslims was ever determined to have the slightest connection to the 9/11 attacks or to terrorism.

Unfortunately, this is not the first time in our nation’s history that we have overreacted in times of crises and by overreacting I mean being too quick to sacrifice civil liberties in the name of national security. Burt Neuborne – an NYU law professor and past legal director of the ACLU – refers to the phenomenon as “the American collapsible constitution.” When we feel at risk, we jettison those liberties which in calmer times we cherish as defining our national character. Some historical examples of this type of government excess include:

• the Alien & Sedition Acts of 1798, which prohibited criticizing government – clearly an abridgement of free speech;

• Lincoln’s suspension of habeas corpus in 1861 and 1862 so that rebels and those thought to be disloyal could be arrested and detained without trial;

• the imprisonment of dissidents, mostly immigrants, during WWI for speaking out against the war and the Palmer raids of 1919 when after the politically motivated bombing of Attorney General Palmer’s home, thousands were rounded up, detained in bullpens, beaten into signed confessions, and hundreds were deported, not for any role in the bombing but for their political affiliations; the McCarthy era with its attendant blacklists and domestic spying and the McCarran-Walter Act that authorized the government to deport non-citizens who advocated Communism or other disfavored political ideas; and, of course,

• the Japanese internment during WWII and the Supreme Court’s affirmance of that abomination.

Each of these acts was regretted by later generations and seen as a total overreaction and a sacrifice of Constitutional principles.

Before I focus on the myriad ways that Muslims have been targeted in the post 9/11 world, I’d like to talk a little more about one of those earlier historical examples: WWII and the pervasive fear Americans experienced after the bombing of Pearl Harbor, a fear that led to the Japanese internment, because that historical episode is so clearly relevant to the detention of hundreds of Muslims in the aftermath of 9/11.
First, let’s remember the historical context. We’re talking about the 1940’s which puts us in a pre-Brown v. Education world. So this is an era where we see the mandatory racial segregation of schools alongside the mandatory internment of Japanese Americans. This intersectionality played out most starkly in a case where, seven years before Brown, a Hispanic couple moved to California and were asked by a Japanese individual to take care of his farm. Why? Because he had just received the order commanding him to go to an internment camp. The Hispanic family agreed to move in and care for his farm and then were unable to enroll their daughter in the local public school because of a California law that mandated segregated schools. A lawsuit was brought and the federal district and circuit court of appeals struck down the law mandating segregation and, interestingly, the governor of California chose not to appeal to the Supreme Court. That governor – Earl Warren – went on to become the Chief Justice of the United States replacing Fred Vinson who was reportedly prepared to re-affirm Plessy v. Ferguson and the separate but equal doctrine. This led Frankfurter to say it was the first proof he ever had that God existed. Unfortunately, the Supreme Court that decided Brown v. Board of Education was not the Supreme Court that decided Korematsu a decade earlier.

In a decision that has been thoroughly discredited but never overruled, the Supreme Court upheld the Executive Order requiring the internment of persons of Japanese ancestry, an order that resulted in 120,000 Japanese Americans being evacuated and interned. 70% of that number were US citizens; 43% were under the age of 15! Their detention was not accompanied by warrants; indeed no charges were ever filed against a single person. Persons of German ancestry and persons of Italian ancestry were not subject to internment even though we were at war with Germany and Italy. Despite that, the Supreme Court concluded that racial prejudice played no role in the challenged order.

Not all of the Justices’ vision was that myopic. Writing in dissent, Justice Owen Roberts described the relocation centers as nothing but a euphemism for concentrations camps. Justice Murphy referred to the internment as “a legalization of racism.” And, Justice Jackson emphasized that it was bad enough that the military did this, but the Court’s approval of the order would inflict a more serious and lasting blow to liberty. Listen to his words:

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. ... But once a judicial opinion rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. ... Nothing better illustrates this danger than does the Court’s opinion in this case.”
Four weeks ago, Japanese Americans interned during WWII gathered to remember and to unveil a wall commemorating that shameful chapter in American history. The bronze lettering on the wall reads “Let It Not Happen Again.” But, to far too great an extent, it is happening again. Frank Kitamoto, who was two when he was sent to an internment camp and is now 72, said “What is happening to the Muslims is very similar to what happened to us. That will continue until we decide not to let fear dictate our response to events.”

While Muslims have not been formally subjected to an order of internment, the story of Ehab Elmaghraby that I recounted earlier is certainly a 21st century version of that. And Elmaghraby’s story is representative of the stories of hundreds of non-citizen Muslims who, in the immediate aftermath of 9/11 and on the pretext of minor immigration violations, were rounded up, placed in solitary confinement, deprived of access to the outside world, and verbally and physically abused.

Unfortunately, that’s not the only way in which 9/11 fear has manifested itself against Muslims. A Senate Judiciary subcommittee held hearings in March of this year and heard testimony confirming that American Muslims are facing a rising tide of religious discrimination a full decade after 9/11.

- Mosques have been attacked
- Individuals wearing garb that identifies them as Muslim have been harassed
- Hate crimes against Muslim Americans have increased dramatically
- Claims of employment discrimination against Muslims have skyrocketed – a 150% jump, (including claims of co-workers calling colleagues ‘terrorist’ or ‘Osama’ and employers barring Muslims from wearing head scarves or taking prayer breaks). According to the EEOC, even though Muslims make up less than two percent of the U. S. population, they accounted for about a quarter of the religious discrimination claims filed with the EEOC.
- At the Senate hearing, the assistant US Attorney for Civil Rights testified about the dramatic surge in federal discrimination claims involving zoning boards preventing mosques from opening, and about the more than 800 incidents of anti-Muslim or anti-Arab violence, vandalism and arson. He said “In each city and town where I have met with Muslim leaders, I have been struck by the fear that pervades their lives.”
- The ACLU also testified at the Senate hearing and recounted horrific examples of anti-Muslim violence that had occurred just within the previous 10 months including:
In August 2010, a cab driver was attacked by a 21-year-old film student. Police said the student cursed at the driver after asking him if he was Muslim and then slashed his throat and stabbed him in several places when the cab driver answered in the affirmative.

In August 2010, a brick was thrown at the Madera Islamic Center in California. Later, signs were posted at the center, one of which stated, “Wake up America, the enemy is here.”

In August 2010, an apparently inebriated man entered a Queens mosque and shouted anti-Muslim slurs while urinating on prayer rugs and calling worshippers “terrorists”.

In May 2010, the Islamic Center of Northeast Florida in Jacksonville was filled with approximately 60 people when a pipe bomb went off.

In September 2010, teenagers were arrested in Carlton, NY, for firing a shotgun and yelling obscenities outside a mosque; and

In September 2010, the site of a new Tennessee mosque was damaged by arson.

Much of the post 9/11 anti-Muslim rhetoric suggests that the freedom of religion enshrined in the First Amendment – one of our most cherished freedoms - simply does not apply to Islam. One of the worst examples of that thinking occurred earlier this year when radio host Bryan Fischer wrote on his blog: “Islam has no fundamental First Amendment claims, for the simple reason that [the first amendment] was not written to protect the religion of Islam. Islam is entitled only to the religious liberty we extend to it out of courtesy.” Unfortunately, this is not the view of one isolated hatemonger. Remember, for a moment, the uproar when Keith Ellison, the first Muslim elected to Congress, indicated he would swear his oath of allegiance on a Koran, or, equally amazingly, the witness in a North Carolina courthouse who was not allowed to take an oath on a Koran when testifying. Consider also the current efforts to pass anti-Shariah laws, which would prevent judges from consulting Shariah but permit them to utilize Jewish law or canon law. That is just the most recent example of how one religion has been singled out and, in effect, demonized.

While much of the anti-Muslim vitriol has been expressed by private citizens, some has been fueled by government officials. Some examples include governmental opposition to mosque projects; denial of land use permits to operate prayer halls or space for religious study or cultural activities; the arrest of a devout Muslim who refused to remove her head covering; policies prohibiting religious head coverings worn by detainees in county custody or by employees working at detention facilities; and a policy preventing a Muslim woman from entering a public pool area because she would not remove her headscarf and long sleeves and don a bathing suit while watching her children swim.
The opposition to the proposed mosque in lower Manhattan is well known to everyone and in fact was the focus of a program here at the law school last year. Perhaps less well known are the many instances when local government has used zoning laws to block the development of mosques in ways that were blatantly discriminatory. One such case arose across the river in Bridgewater N.J., a town with 17 churches, a catholic convent, a synagogue, 2 Hindu temples, one Sikh temple, but no mosques. The local Muslim community had been looking for years for a location to create an Islamic center which would contain a mosque and a religious school as well as facilities for day care, after-school programs, and activities for senior citizens. It finally found an old Inn that seemed perfect for their purposes. They bought the property, hired experts who determined that it met all the zoning requirements, that no variance would be needed, and that it didn’t pose any traffic problems. Town officials agreed and a public hearing was scheduled. That’s when everything changed. 400-500 people attended what is ordinarily a routine meeting attended by a handful of people. Those in attendance expressed blatant hostility to the proposed mosque and death threats appeared on the internet. Eventually, the town caved into the pressure and changed the zoning law to eliminate houses of worship as a permitted use of the property. That was challenged and a lawyer took the case pro bono. That pro bono lawyer explained that the case crystallized for him what is so special about being a lawyer; that taking this case is what makes the lives of lawyers most meaningful and fulfilling. He explained that the blatant injustice of what the town had done collided with his faith in the ideals of American democracy, including religious tolerance and equal justice. He went on to say:

“This case is about striving to reach the ideals of this country – to make the nation more perfect. I don’t need to tell you how difficult that struggle is, especially now, after 9/11, and after real and justifiable concerns about terrorism have led in some quarters to unjustifiable bigotry against Muslims in general. But I do think it is important to say that, although the circumstances of each situation might be different, others have faced difficult struggles. They were faced by my people, the Jewish People, who saw many in this country turn their backs and revile us even as we were being incinerated in Europe. They were faced by Japanese American citizens who were incarcerated in camps on the West Coast simply because they were of Japanese ancestry. They were faced by African Americans whose ancestors were brought here in chains and who still must deal with that terrible legacy. And although they may have taken different forms and with different levels of intensity, many immigrant groups have faced similar challenges. “

The story of this one pro bono lawyer is instructive, I think, because, it suggests that each one of us has an obligation to speak out against discrimination that results from fear, and that we as lawyers and students of the law, have a particular obligation to educate others about our nation’s history of too readily sacrificing fiercely won constitutional protections when we feel threatened.
So one positive message to be derived from the Bridgewater episode is the power of lawyers to make a difference. The second positive aspect of the Bridgewater story is that it led to an interfaith coalition, organized by the Anti-Defamation League, which was horrified by the anti-Muslim bigotry expressed by the township. One of the rabbis who joined the coalition said he was motivated by “the Jewish obligation to welcome the stranger.” Other members of the coalition said “fear or anxiety cannot be allowed to manifest itself in any form of discrimination.”

In the few minutes remaining, I’d like to very briefly address one of the most important ways that civil liberties have been affected in the post 9/11 world and that is by the executive branch’s assertion of unbridled and unparalleled executive power, and a correspondingly limited or non-existent role for the courts. We obviously don’t have time to do justice to this very large and important topic but I can illustrate the theme by focusing on just one manifestation of our government’s apparent belief that it cannot simultaneously protect national security and civil liberties – that the two represent irreconcilable goals. I think we are all familiar with the “torture memos” and the shameful role that lawyers played in their preparation and use. The aspect of the use of torture that I’d like to spend a few minutes talking about is extraordinary rendition, whose use has been admitted by the US government.

Extraordinary rendition has been described as “outsourcing torture” whereby terrorism suspects are sent to a foreign state for the purpose of subjecting them to methods of interrogation that are illegal in the United States. Extraordinary rendition started in the mid 90’s, but after 9/11 reportedly “went out of control.” Although it is impossible to know the actual number of individuals subject to extraordinary rendition, 150 people have been thought to have been rendered since 9/11.

One of those people was Binyam Mohamed, who was arrested in Pakistan, flown to Morocco, transferred to American custody and flown to Afghanistan where he was detained in a CIA “dark prison.” He and four others who had also been subject to extraordinary rendition brought a lawsuit in which they detailed the horrific torture they suffered in “black site prisons” in Afghanistan, Egypt and Morocco. Their lawsuit was dismissed by the 9th circuit sitting en banc, not because they had failed to prove their claim, not because the government’s action didn’t violate domestic law and international law, but rather because “permitting a case challenging extraordinary rendition to go forward would create an unjustifiable risk of disclosing state secrets and would unjustifiably harm legitimate national security interests.” Ironically, the Court said that it could not more specifically explain that result because that too would mean revealing state secrets.

The state secrets doctrine has been repeatedly invoked in the post 9/11 world and has prevented challenges to various anti-terrorism policies from being heard. In fact the doctrine has prevented the litigation of virtually any claim of torture or extraordinary rendition, and thereby has immunized the most horrific governmental abuse imaginable. According to the government’s theory of the doctrine, “the Judiciary should effectively cordon off all secret government actions from judicial scrutiny, [thereby] immunizing the CIA and its partners from the demands and limits of the law.”
Some judges have recognized that this use of the state secrets doctrine “forces an unnecessary zero-sum decision between the Judiciary’s constitutional duty “to say what the law is,” and the Executive’s constitutional duty “to preserve the national security” and thus places the two branches “on an all-or-nothing collision course.” But, unfortunately, the prevailing view among the federal courts of appeals is that the state secrets doctrine warrants a dismissal of these claims, and the Supreme Court has denied cert in every such case. One was the highly publicized case involving Maher Arar, an innocent Canadian who was sent to Syria to be interrogated. He spent a year there, most of that year in a 6 x 3 foot underground cell, and beaten with fists and tortured with electric cables. Upon his release, officials conceded that he had no involvement with terrorism. He sued but the Second Circuit dismissed his case with Judge Jacobs writing that allowing suits against policymakers in rendition cases would affect diplomacy, foreign policy and the security of the nation and that judicial review of rendition would “offend the separation of powers.” Judge Calabrese, writing in dissent, said that the majority had gone astray in its “utter subservience to the executive branch. In calmer times, wise people will ask themselves, How could such able and worthy judges have done that?” And, as I said, the Supreme Court denied cert, so Arar received nothing from the United States government for his nightmarish year – no compensation; no admission of wrongdoing; not even an apology, although countries with lesser involvement, including Canada, did formally apologize and provide compensation.

There are many more examples but I think the Mohamed and Arar cases are illustrative of the pattern that we have seen in the post 9/11 world, a pattern that has surfaced at other times of national turmoil. The government overreacts to threats to national security, and all too frequently invokes a variety of justiciability doctrines - state secrets, or standing, or the political question doctrine - to prevent judicial review. This, of course, serves to compound the problem and insulate governmental misconduct from judicial scrutiny. In my mind, that represents a complete abdication of the judicial function, undermines our system of checks and balances and separation of powers, and lowers the esteem by which our country is held in the world. As an editorial in the NY Times said after the Court denied cert in the Arar case: “The court’s choice is a major stain on American justice. By slamming its door on these victims without explanation, it removed the essential judicial block against the executive branch’s use of claims of secrecy to cover up misconduct that shocks the conscience. It has further diminished any hope of obtaining a definitive ruling that the government’s conduct was illegal – a vital step for repairing damage and preventing future abuses.”

Let me close by thanking Amol Sinha and the Long Island Neighbors for American Values for organizing this event and for inviting me to speak. As we head into the weekend that marks the tenth anniversary of September 11th, when we remember the lives that were lost on that day and we remember the extraordinarily brave efforts of the firefighters and other emergency workers, I hope that we will also remember the very real dangers of sacrificing our cherished freedoms out of fear, and that we use the occasion to renew our commitment to oppose acts of intolerance and bigotry, whether practiced by individuals or, even more perniciously, by government.