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Freedom and Fear Post-9/11: Are We Again Fearing Witches and Burning Women Leo C. Goodwin Symposium: Tilting the Scales: The Changing Roles of Women in the Law and Legal Practice

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FREEDOM AND FEAR POST-9/11: ARE WE AGAIN FEARING WITCHES AND BURNING WOMEN?*

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* This essay is based on the lecture Professor Strossen delivered at Nova Southeastern University, Shepard Broad Law Center on November 13, 2006, as part of the Tenth Annual Leo Goodwin, Sr. Lecture Series, on the theme of *Tilting the Scales: The Changing Roles of Women in the Law and Legal Practice*.

+ Professor of Law, New York Law School; President, American Civil Liberties Union (ACLU). Professor Strossen thanks Lenora Lapidus, Director of the ACLU Women's Rights Project, for several ideas that are incorporated in this article, and also for all the valiant work that she and her Women's Rights Project colleagues perform, some of which this article describes. She thanks her colleagues at the ACLU's Florida affiliate for their important work, some of which this article describes. She also thanks Howard Simon, the Florida affiliate's Executive Director, and Randall Marshall, its Legal Director, for the information they provided about this work. For valuable assistance with the research and drafting of footnotes for this article, Professor Strossen gratefully acknowledges her Chief Aide, Steven Cunningham (New York Law School '99), her Assistant Danica Rue (New York Law School '09), her Research Assistants Corey Callahan (New York Law School '09), David Ofenloch (New York Law School '07), and Trisha Olson (New York Law School '08), and the *Nova Law Review* editors. They bear most of the credit and the responsibility for the footnotes.

I. INTRODUCTION

I am honored to participate in this important lecture series, and I would like to thank everyone at Nova Southeastern University's Shepard Broad Law Center who has worked to organize it. I would especially like to thank Associate Dean Linda F. Harrison,¹ my main contact at the Shepard Broad Law Center, who has been exceptionally helpful and hospitable. I would also like to thank the co-chairs of the lecture series, Professor Stephanie Aleong and Professor Olympia Duhart.

I would also like to thank Leo Goodwin, Sr. and his family for their generous endowment of this lecture series. Since the subject of this year's Goodwin Lecture series focuses on women and our accomplishments, I want to provide just a bit of information about the major woman in Leo Goodwin's life and career—his wife, Lillian—to complement the interesting information about him that your program contains.² According to the website of the company they founded, the Government Employees Insurance Corporation (GEICO): "Lillian Goodwin worked alongside her husband to launch the company and took an active role in virtually all aspects of the early operation."³ The history section of the GEICO website refers to "the Goodwins"—Lillian as well as Leo—as the company's founders.⁴ As it notes, "the Goodwins . . . in the mid-1930s—while the Great Depression was still in full fury—took a calculated risk to start up what has become one of the most successful and highly respected companies in the nation."⁵ At that time, when it was extremely unusual for women to be actively engaged in leadership positions in the business world,⁶ Lillian, "a bookkeeper by profession," not only "took on the [new company's] accounting tasks but also worked to underwrite policies, set rates, issue policies and market . . . insurance to GEICO's target customers, federal employees and . . . top . . . non-commissioned Military officers."⁷ In short, along with her husband Leo, Lillian Goodwin was a remarkable business pioneer and leader in her own right.⁸

1. Associate Dean Linda F. Harrison prefers her name to be spelled with lowercase letters.

2. See GEICO History, <http://www.geico.com/about/background/geicoHistory.htm> (last visited May 15, 2007) [hereinafter GEICO History].

3. *Id.*

4. *Id.*

5. *Id.*

6. See DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 30–31 (1989) (noting the negative view of working women prior to World War II, and the general notion that marriage was more lucrative).

7. GEICO History, *supra* note 2.

8. See *id.*

I was invited to address what I consider to be the single most important, overarching civil liberties threat we all face:⁹ the extent to which the government has unduly played upon understandable fears of terrorism post-9/11, to unjustifiably expand its powers in ways that violate not only core constitutional checks and balances,¹⁰ but also individual rights.¹¹ These overreaching measures have undermined the rights of everyone in this country, including those of us who are not even suspected of any crime at all, let alone terrorism.¹² Additionally, consistent with the Goodwin Lectures' theme, I will stress the adverse impact on women in particular.

Before I turn to those issues, though, since I am a New Yorker who is always happy to be here in your fair state of Florida, I want to tell you one of my favorite stories about both of our states. In keeping with the Goodwin Lectures' theme, it involves women, specifically four women who are driving across the United States, one each from Florida, New York, Idaho, and Nebraska. Shortly after the trip begins, the woman from Idaho starts pulling potatoes from her bag and throwing them out the window. When the others ask her why she is doing that she says: "We have so many of these darn things in Idaho, I'm just sick of looking at them!" A moment later, the

9. I have previously addressed these issues in the following publications: Nadine Strossen, *Terrorism's Toll on Civil Liberties*, in *THE TRAUMA OF TERRORISM: SHARING KNOWLEDGE AND SHARED CARE, AN INTERNATIONAL HANDBOOK* 365 (Yael Danieli et al. eds., 2005); Nadine Strossen, Presentation, *Free Speech in Wartime*, 36 *RUTGERS L.J.* 927 (2005) [hereinafter Strossen, Presentation, *Free Speech in Wartime*]; Nadine Strossen, *Safety and Freedom: Common Concerns for Conservatives, Libertarians, and Civil Libertarians*, 29 *HARV. J.L. & PUB. POL'Y* 73 (2005) [hereinafter Strossen, *Safety and Freedom*]; Nadine Strossen, Keynote Address, *The Society of American Archivists 68th Annual Meeting* (Aug. 5, 2004), <http://www.archivists.org/conference/boston2004/strossen.asp>; Nadine Strossen, *Suspected Terrorists One and All: Reclaiming Our Civil Liberties in Coalition*, 2 *SEATTLE J. SOC. JUST.* 15 (2003); Nadine Strossen, *Preserving Safety and Freedom Post 9-11*, 3 *J. INST. JUST. & INT'L STUD.* 1 (2003); Nadine Strossen, *Maintaining Human Rights in a Time of Terrorism: A Case Study in the Value of Legal Scholarship in Shaping Law and Public Policy*, 19 *N.Y.L. SCH. J. HUM. RTS.* 3 (2003); Nadine Strossen, *Conservatives and Liberals Unite to Conserve Liberty and Security*, in *IT'S A FREE COUNTRY: PERSONAL FREEDOM IN AMERICA AFTER SEPTEMBER 11* (Danny Goldberg et al. eds., 2003).

10. See GENE HEALY & TIMOTHY LYNCH, *POWER SURGE: THE CONSTITUTIONAL RECORD OF GEORGE W. BUSH 1* (2006), available at www.cato.org/pubs/wtpapers/powersurge_healy_lynch.pdf.

11. See *United States of America: Five Years on 'The Dark Side': A Look Back at 'War on Terror' Detentions*, AMNESTY INT'L, Dec. 13, 2006, at 1, available at [http://web.amnesty.org/library/pdf/AMR511952006ENGLISH/\\$File/AMR5119506.pdf](http://web.amnesty.org/library/pdf/AMR511952006ENGLISH/$File/AMR5119506.pdf); Human Rights Watch, *The Wrong Lessons from September 11* (Sept. 9, 2006), <http://hrw.org/english/docs/2006/09/09/usint14163.htm>; Press Release, Human Rights First, *Human Rights First Statement on the Fifth Anniversary of September 11* (Sept. 8, 2006), <http://www.humanrightsfirst.org/media/usls/2006/statement/257>.

12. See, e.g., HEALY & LYNCH, *supra* note 10, at 22–23.

woman from Nebraska starts pulling ears of corn from her bag and tossing them out the window. When the others ask her why she is doing that, she says: "We have so many of these darn things in Nebraska, I'm just sick of looking at them!" Inspired by these two other passengers, the Florida woman opens the car door and tosses out . . . the New York woman!¹³

II. THE MUTUALLY REINFORCING RELATIONSHIP BETWEEN NATIONAL SECURITY AND CIVIL LIBERTIES

The title of my speech is drawn from a famous line in a famous concurring opinion by the great former United States Supreme Court Justice Louis Brandeis.¹⁴ The case involved—notably for this year's Goodwin Lectures' theme—a woman who had been convicted of terrorism merely for exercising her First Amendment rights to advocate peaceful political reform.¹⁵ In the fearful, scapegoating climate of the post-World War I "Red Scare" (1918-21), Anita Whitney was convicted of violating a law that made it a crime to "aid[] and abet[] . . . terrorism as a means of accomplishing . . . political change."¹⁶

Justice Brandeis wrote a separate opinion, rejecting the majority's view that suppressing Anita Whitney's freedoms was justified because it would advance national security.¹⁷ A central passage from this important opinion applies fully to our current, post-9/11 climate which is likewise fearful and scapegoating:

Fear of serious injury cannot alone justify suppression of [freedom]. Men feared witches and burnt women

Those who won our independence by revolution were not cowards They did not exalt order at the cost of liberty. [They were] courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government.¹⁸

13. The author gratefully acknowledges the source of this joke, as well as many others that lighten her life: The Honorable Alex Kozinski, Judge on the Ninth Circuit Court of Appeals.

14. *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

15. *See id.* Whitney "testified that it was not her intention that the Communist Labor Party of California should be an instrument of terrorism or violence, and that it was not her purpose . . . to violate any known law." *Id.* at 366.

16. California Criminal Syndicalism Act of 1919, CAL. PENAL CODE § 11401 (West 2000) (repealed 1991).

17. *See Whitney*, 274 U.S. at 379 (Brandeis, J., concurring).

18. *Id.* at 376-77.

Indeed, as Justice Brandeis explained, suppressing the freedoms of Ms. Whitney and other government critics could actually undermine security. Let me quote one more excerpt from this enduringly important opinion that stresses this key point, so significant in our post-9/11 world. While Justice Brandeis focuses on the First Amendment freedoms that were directly at issue in that case, his general point—that undermining rights also undermines security—applies fully to all freedoms, and at all times, including the present.¹⁹ As he declared:

Those who won our independence believed . . . liberty to be the secret of happiness and courage to be the secret of liberty They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; . . . that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies²⁰

In short, Justice Brandeis reminds us that in our democracy, the “F” word that should be our guiding spirit is not “fear,” but rather, “freedom.”²¹ That is precisely the theme that the ACLU has stressed ever since the 9/11 attacks in our “Safe and Free” campaign.²² As that name underscores, consistent with Justice Brandeis’s world view, and contrary to too much current political rhetoric, national security, and civil liberties are not inherently antagonistic; to the contrary, they are mutually reinforcing.²³

Justice Brandeis’s passage explains why protecting First Amendment freedoms promotes national security.²⁴ The very same constitutional principles that guarantee individual liberty also promote national security.²⁵ As another example of this mutually reinforcing relationship between safety and freedom, consider the fundamental Fourth Amendment principle that is at stake in so many post-9/11 programs: The government may not invade anyone’s freedom or privacy without individualized suspicion—a particular reason to believe that a particular person poses a threat.²⁶ The Fourth Amend-

19. *See id.*

20. *Id.* at 375.

21. *Id.* at 377.

22. *See, e.g.,* Anthony D. Romero, ACLU Insists on Need to Be Safe and Free (Feb. 6, 2002), <http://www.aclu.org/natsec/emergpowers/14390prs20020206.html>.

23. *See, e.g., Whitney*, 274 U.S. at 377 (Brandeis, J., concurring).

24. *Id.* at 375.

25. *See id.*

26. *See* U.S. CONST. amend IV.

ment bars dragnet surveillance measures that sweep through broad groups of people.²⁷

Of course, the Fourth Amendment's individualized suspicion requirement protects individual liberty. Specifically, it protects each of us from government surveillance based on group stereotyping and guilt by association.²⁸ Moreover, this individualized suspicion requirement also promotes national security. It channels our government's resources—in other words, our precious tax dollars—in the most strategic, effective way, toward those persons who actually pose a threat. Precisely for this reason, experts in national security and counter-intelligence, as well as civil libertarians, have opposed many of the post-9/11 measures that involve mass surveillance.²⁹ In short, these measures are the worst of both worlds: they make all of us less free, yet they do not make any of us safer.

One important example of the many doubly-flawed post-9/11 mass surveillance measures is the domestic spying program by the super-secret National Security Agency (NSA).³⁰ A federal judge struck down the program in 2006, in the landmark lawsuit entitled *American Civil Liberties Union v. National Security Agency*.³¹ I'm proud to say! I should also note, in keeping with this, that Judge Anna Diggs Taylor wrote the opinion for the Sixth Circuit Court of Appeals.³²

The NSA domestic spying program has been sweeping in countless e-mails and phone calls of American citizens who are not suspected of any illegal activity, let alone terrorism.³³ Therefore, the program's harshest crit-

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

27. See, e.g., *Davis v. Mississippi*, 394 U.S. 721, 723–25 (1969) (suspects were wrongfully detained by police merely because of the color of their skin).

28. See *id.* at 726.

29. See, e.g., Press Release, ACLU, ACLU Applauds Local Police Departments for Refusing to Join in Justice Department "Dragnet", (Mar. 4, 2002), <http://www.aclu.org/police/gen/14530res20020304.html>. It cites "jurisdictions in Detroit, MI; Portland, Hillsboro, and Corvallis, OR; Richardson and Austin, TX; and San Francisco and San Jose, CA" that have raised objections to requests from the Justice Department to conduct "dragnet investigation[s] of 5,000 immigrants, saying that the police should not be asked to ignore basic legal procedures or to use ethnic and racial origin as the basis for suspicion." *Id.*

30. See *ACLU v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

31. See *id.*

32. *Id.*; see also *Judge Shaped by Civil Rights Era*, CHI. TRIB., Aug. 18, 2006, at 26.

33. See generally *ACLU*, 438 F. Supp. 2d at 773–75.

ics include FBI agents.³⁴ The agents complain about the huge amount of time they have been wasting in tracking down the thousands of completely innocent Americans whose communications have been swept up in this NSA fishing expedition.³⁵

This same dual flaw infects the even more sweeping secret surveillance program that *USA Today* revealed in 2006,³⁶ which the ACLU is also challenging across the country,³⁷ including right here in Florida.³⁸ The disclosure reveals that the Bush administration's measures apparently³⁹ seek to collect data about all phone and online communications from all of the United States telephone companies about all of their customers.⁴⁰ The government asserts that it is using these massive customer calling records for "data-mining," looking for patterns of calls according to certain mathematical formulas that, it says, might point to suspected terrorists.⁴¹ However, this whole data-mining approach has been denounced as "junk science" by prominent experts in mathematics and computer science.⁴² For example, this perspective was stressed by Jonathan David Farley, who was not only a mathematics professor at Harvard University, but is also a science fellow at Stanford University's Center for International Security and Cooperation.⁴³ As he wrote: "[T]he National Security Agency's entire spying program

34. See, e.g., Lowell Bergman et al., *Spy Agency Data After Sept. 11 Led F.B.I. to Dead Ends*, N.Y. TIMES, Jan. 17, 2006, at A1.

35. See *id.* "F.B.I. officials repeatedly complained to the spy agency that the unfiltered information was swamping investigators" and said that "the torrent of tips led them to few potential terrorists inside the country they did not know of from other sources and diverted agents from counterterrorism work they viewed as more productive." *Id.*

36. Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY, May 11, 2006, at A1.

37. See generally *ACLU*, 438 F. Supp. 2d at 754; *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005); *ACLU, Safe and Free: Secrecy*, <http://www.aclu.org/safefree/secrecy/index.html> (last visited May 15, 2007).

38. Press Release, ACLU, *ACLU of Florida Joins National Lawsuit to Uncover Details of Pentagon Surveillance of Law-Abiding Americans*, (June 14, 2006), http://www.aclufl.org/news_events/?action=viewRelease&emailAlertID=1931.

39. I include the qualifying word "apparently" since the clandestine nature of this program, as well as conflicting government statements about it in the wake of the *USA Today* disclosure, have obscured its precise nature. See *A Note to Our Readers*, USA TODAY, June 30, 2006, at A2; Frank Ahrens & Howard Kurtz, *USA Today Says It Can't Prove Key Points in Phone Records Story*, STAR-LEDGER, July 2, 2006, at 16.

40. Cauley, *supra* note 36.

41. See, e.g., *Elec. Privacy Info. Ctr. v. Dep't of Def.*, 355 F. Supp. 2d 98, 99 (D.D.C. 2004).

42. See CPSR: CPSR Signs ACLU Letter Supporting 132, Oct. 23, 2005, <http://www.cpsr.org/issues/privacy/support132>; see also Jonathan David Farley, *The N.S.A.'s Math Problem*, N.Y. TIMES, May 16, 2006, at A25.

43. *Id.*

seems to be based on a false assumption: that you can work out who might be a terrorist based on calling patterns Guilt by association is not just bad law, it's [also] bad mathematics."⁴⁴

The NSA domestic spying and data-mining programs, as well as many other post-9/11 surveillance programs, are overly broad dragnets or fishing expeditions. Thus, by definition, they are doubly flawed: they sweep in too much information about too many innocent people, and they make it harder to hone in on the dangerous ones. As one ACLU critic memorably put it: "You don't look for a needle in a haystack by adding more hay to the pile!"⁴⁵

The progressively disturbing revelations about the government's increasingly pervasive forms of secret, unauthorized domestic surveillance were well captured in an editorial cartoon by Darrin Bell in *Candorville* shortly after the May 2006 *USA Today* revelation about the telephone companies' collusion in government data-mining.⁴⁶ It starts in 2004, when civil libertarians were objecting to the drastically reduced warrant requirements for electronic surveillance under the USA PATRIOT Act.⁴⁷ It then goes on to 2005, when the *New York Times* broke the story about the completely warrantless NSA electronic surveillance,⁴⁸ and then on to 2006, when *USA Today* broke the story about the telephone companies' wholesale turnover of customer data to the NSA.⁴⁹ The cartoon strip shows a man watching TV, listening to a Bush administration official.⁵⁰ Every quote in this strip is actually an exact quote from either the president himself or another top official. In 2004, the official says: "We're not spying on anyone's phone calls without a warrant. Trust us."⁵¹ In 2005, the official says: "OK, [we are] spying on calls without getting warrants, but it's only a few terrorist suspects. Trust

44. *Id.*

45. See Barry Steinhardt, Dir. of ACLU Tech. & Liberty Program, Testimony on Government Data Mining, House Gov't Reform Subcomm. on Tech., Info. Policy, Intergovernmental Relations & the Census (May 20, 2003), <http://www.aclu.org/safefree/general/17262leg20030520.html>; Ken Clark, *Cherish Our Rights*, PITTSBURGH POST-GAZETTE, May 18, 2006, at B6 ("[T]he government is looking for a needle in a haystack while piling more hay on the stack.").

46. See Cartoonist Group, *Candorville* by Darrin Bell, <http://www.cartoonistgroup.com/store/add.php?iid=13791> (last visited May 15, 2007).

47. See, e.g., ACLU, Reform the Patriot Act, The Sun Also Sets: Understanding the Patriot Act "Sunsets", <http://action.aclu.org/reformthepatriotact/sunsets.html> (last visited May 15, 2007) [hereinafter ACLU, Reform the Patriot Act]; see also USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

48. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

49. See Cauley, *supra* note 36.

50. Cartoonist Group, *supra* note 46.

51. *Id.*

us.”⁵² In 2006, the official says: “OK, [we are] spying on every single phone call made by almost everyone in America, but we’re not actually listening to the calls. Trust us.”⁵³ This brings to mind the old saying: “Fool me once, shame on you. Fool me twice, shame on me!”

Former United States Supreme Court Justice Louis Brandeis, whose eloquent words were quoted in the title of this article, also warned against the “trust us” rationale for ceding power to government officials to restrict individual liberty, no matter how well-intentioned the officials might appear.⁵⁴ His justly famous words ring particularly prophetic in the post-9/11 context: “Experience should teach us to be most on our guard to protect liberty when the Government’s purposes are beneficent The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”⁵⁵

The Bush administration maintains that its exercise of unilateral powers and its restrictions on individual rights are somehow justified in the “War on Terror.”⁵⁶ But these claims are flawed on both factual and legal grounds. As a matter of fact, as I have already indicated, various national security experts maintain that many of the overreaching, rights-repressing post-9/11 measures do not actually advance national security.⁵⁷ Conversely, many measures that will actually advance national security are completely consistent with civil liberties. That is true, for instance, of most of the specific proposals that were made by the bipartisan 9/11 Commission,⁵⁸ including such mundane but essential measures as: updating the FBI’s antiquated computer system,⁵⁹ hiring more interpreters for the pertinent languages,⁶⁰ and ending the bureaucratic turf battles between various agencies.⁶¹

52. *Id.*

53. *Id.*

54. *See* *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

55. *Id.*

56. *See* JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR* 205 (2006). John Yoo was an Assistant Attorney General with the Department of Justice’s Office of Legal Counsel from 2001–2003. *Id.* at 19.

57. *See generally* RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA’S WAR ON TERROR* (2004); BRUCE SCHNEIER, *BEYOND FEAR: THINKING SENSIBLY ABOUT SECURITY IN AN UNCERTAIN WORLD* (2003).

58. *See generally* THE 9/11 COMMISSION REPORT (July 22, 2004), *available at* <http://www.9-11commission.gov/report/911Report.pdf>; *accord* U.S. S. SELECT COMM. ON INTELLIGENCE & U.S. H. PERMANENT SELECT COMM. ON INTELLIGENCE, JOINT INQUIRY INTO INTELLIGENCE COMMUNITY ACTIVITIES BEFORE AND AFTER THE TERRORIST ATTACKS OF SEPT. 11, 2001, S. REP. NO. 107-351, at 1–2 (2d Sess. 2002).

59. THE 9/11 COMMISSION REPORT, *supra* note 58, at 427.

60. *Id.* at 426.

61. *See id.* at 400.

III. THE BUSH ADMINISTRATION'S POST-9/11 ABUSES OF POWER, WHICH HAVE BEEN CONDEMNED BY IDEOLOGICALLY DIVERSE JUDGES AND OTHER LEGAL EXPERTS

Now let me summarize the bottom-line legal flaw in the Bush administration's position: Neither the pertinent statutes,⁶² nor the United States Constitution, contain any blanket exception for national security emergencies of the sort that President Bush and proponents of his broadly-viewed executive power are reading into them.⁶³ Therefore, the ACLU has brought various lawsuits to challenge many post-9/11 civil liberties violations, and many judges, across the ideological spectrum, have ruled in their favor.⁶⁴

The administration's overreaching has earned two unusual repudiations from the United States Supreme Court in two cases it has decided on point: *Hamdi v. Rumsfeld*⁶⁵ and *Hamdan v. Rumsfeld*.⁶⁶ Most of the Justices who ruled in these cases are conservative republicans who were appointed by conservative republican presidents. Moreover, most of them have very broad views of presidential power.⁶⁷ Therefore, it is really noteworthy that even they have rebuffed the administration's claims of unilateral, unchecked power in the "War on Terror." That underscores how extreme these claims are. Specifically, the Court rejected the administration's claimed power to imprison anyone—even an American citizen—forever, without access to a lawyer or a court.⁶⁸ The Court also rejected the administration's claimed power to try non-citizens before military commissions that violate the minimal fundamental fairness principles in the Geneva Conventions⁶⁹—and our

62. See, e.g., USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001); Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048 (1998) (codified as amended 55 U.S.C. § 552 (2000)); Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1811, 1821-1829, 1841-1846, 1861-1862 (2000).

63. See, e.g., Elizabeth Drew, *Power Grab*, 53 N.Y. REV. OF BOOKS 11, June 22, 2006, available at <http://www.nybooks.com/articles/19092?email>; Nat Hentoff, *Don't Ask, Don't Tell*, THE VILLAGE VOICE, Jan. 27, 2006, available at <http://www.villagevoice.com/news/0605,hentoff,71946,6.html>.

64. See, e.g., ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006); Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004).

65. 542 U.S. 507 (2004).

66. No. 05-184, slip op. at 1 (U.S. June 29, 2006).

67. See Bernard Schwartz, *A Decade of Administrative Law: 1987-1996*, 32 TULSA L.J. 493, 552 (1997) (noting the Rehnquist Court's deference to presidential power); Harold Hongju Koh, *Reflections on Refoulement and Haitian Centers Council*, 35 HARV. INT'L L.J. 1, 2 (1994) (claiming that the Rehnquist Court showed a disturbing pattern of reflexive deference to presidential power in foreign affairs).

68. *Hamdi*, 542 U.S. at 509.

69. See *Hamdan*, No. 05-184, slip op. at 49.

own Constitution⁷⁰—thus endangering members of our own military when they are captured by our enemies.⁷¹

In *Hamdi*, the United States Supreme Court's first decision considering the executive branch's power in the "War on Terror," the Court strongly condemned the Bush administration's post-9/11 overreaching in general.⁷² Significantly for this Goodwin Lecture series' theme, the Court's plurality opinion was written by none other than Justice Sandra Day O'Connor, who is, of course, the Court's first female Justice.⁷³ Her forceful language not only rebuffed the administration's specific overreaching at issue in that case, but it also signaled the unconstitutionality of many other post-9/11 measures.⁷⁴ In fact, Justice O'Connor's opinion has been widely cited and quoted in many later lower court decisions in which the ACLU and others have successfully challenged many other abuses.⁷⁵ These abuses range from warrantless, suspicion-less searches of library records under the USA PATRIOT Act,⁷⁶ to invasions of the free speech and privacy rights of people who are just peacefully protesting government policies.⁷⁷ Justice O'Connor condemned the administration's efforts to "condense power into a single branch of government," and she eloquently declared that "a state of war is not a

70. See *id.* at 38.

71. See, e.g., Julian E. Barnes, *The Guantanamo Decision: Military Fought to Abide by War Rules*, L.A. TIMES, June 30, 2006, at A1.

"We argued that this would come back to haunt us and it would taint the military justice system," said retired Rear Adm. Donald Guter, the Navy's top uniformed lawyer when "military commission" trials for Guantanamo Bay detainees were first proposed in 2001. "We were warning that you would have to be careful to provide basic protections."

Id.; see also Mark Mazzetti & Neil A. Lewis, *Military Lawyers Caught in Middle on Tribunals*, N.Y. TIMES, Sept. 16, 2006, at A1 ("The top uniformed Marine lawyer, Brig. Gen. James C. Walker, said in his testimony that no civilized country ought to deny defendants the right to see evidence against them and that the United States 'should not be the first.'"); Charlie Savage, *Military Lawyers See Limits on Trial Input*, BOSTON GLOBE, Aug. 27, 2006, at A1 ("Most military lawyers strongly oppose allowing secret evidence, arguing that such a plan would probably violate the Geneva Conventions and create a precedent for enemies of the United States to use show-trials for captured Americans.").

72. See *Hamdi*, 542 U.S. at 535–38.

73. *Id.*

74. See *id.*

75. See, e.g., *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 477 (S.D.N.Y. 2004); *United States v. Al-Arian*, 329 F. Supp. 2d 1294, 1297 (M.D. Fla. 2004) ("[I]n 'our most challenging and uncertain moments . . . we must preserve our commitment at home to the principles for which we fight abroad.'" (quoting *Hamdi*, 542 U.S. at 532)).

76. See, e.g., *Doe v. Gonzales*, 386 F. Supp. 2d 66, 76 (D. Conn. 2005), *dismissed as moot*, 449 F.3d 415 (2d Cir. 2006).

77. See, e.g., *ACLU v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754, 771 (E.D. Mich. 2006); *Hepting v. AT&T Corp.*, 439 F. Supp. 2d 974, 995 (N.D. Cal. 2006).

blank check for the president when it comes to the rights of the Nation's citizens."⁷⁸

Despite this emphatic United States Supreme Court ruling, the Bush administration has continued to act precisely as if the "War on Terror" is indeed a blank check for the president to ignore not only the constitutional rights of the Nation's citizens, but also the constitutional powers of the other branches of our national government. Indeed, when Attorney General Alberto Gonzales testified before the Senate to defend the NSA's warrantless domestic spying in 2006, he refused to recognize that there was anything the president could not do in the name of national security.⁷⁹

In opposition to that limitless concept of executive power, I would like to quote one of the constitutional scholars who also testified before the Senate on this issue. His name is Bruce Fein, and he is a conservative republican who served in both the Nixon and Reagan administrations.⁸⁰ Again, I am stressing the important theme that critiques of the Bush administration's overreaching come from across the political and ideological spectrum. In Bruce Fein's words:

The theory invoked by the president [in an attempt] to justify [the NSA domestic spying] . . . would equally justify mail openings, burglaries, torture or internment camps, all in the name of gathering foreign intelligence Unless rebuked, it will lie

78. *Hamdi*, 542 U.S. at 536.

79. See Dana Milbank, *In Quizzing a Reticent Gonzales, Senators Encounter a Power Shortage*, WASH. POST, Feb. 7, 2006, at A2. Gonzales was asked whether "President Bush, invoking his 'inherent powers' under the Constitution, also authorized warrantless eavesdropping on domestic calls, opening of Americans' mail and e-mail, and searches of their homes and offices?" *Id.* The Attorney General responded, "I am not comfortable going down the road of saying yes or no as to what the president has or has not authorized." *Id.* (quoting Attorney General Gonzales). See also Nat Hentoff, *Nominee Gonzales Speaks for Himself, Sort of*, TULSA WORLD, Jan. 25, 2005, at A15.

Sen. Russ Feingold, D-Wis., asked Gonzales whether the president has "the authority to authorize violations of the criminal law under duly enacted statutes (by Congress) simply because he's commander in chief?"

Gonzales [replied]: "To the extent that there is a decision made to ignore a statute, I consider that a very significant decision, and one that I would personally be involved with...with a great deal of care and seriousness."

"Well," Feingold said, "that sounds to me like the president still remains above the law."

When [Senator] Kennedy asked the same question, Gonzales said it was "a very, very difficult question."

Id.

80. See Charles Babington & Dan Eggen, *Gonzales Seeks to Clarify Testimony on Spying*, WASH. POST, Mar. 1, 2006, at A8 (describing Bruce Fein as "a government lawyer in the Nixon, Carter, and Reagan administrations"); see also Brian Gilmore, *A Conservative for Impeachment*, PROGRESSIVE, Dec. 2006, at 23.

around like a loaded weapon, ready to be used by any [president] who claims an urgent need.⁸¹

Indeed, the Bush administration has insisted on its power to pursue some of the very policies that Bruce Fein deplored, including torture,⁸² despite international⁸³ and United States law⁸⁴ that absolutely outlaws it under any circumstances.⁸⁵ In the Fall of 2006, the ACLU held its nationwide membership conference in Washington, D.C.⁸⁶ The ACLU's Executive Director, Anthony Romero, gave a stirring opening address, and I especially loved one of his lines after he had described some of President George W. Bush's abuses of power. Romero then denounced President Bush as: "that son of a . . . Bush!"⁸⁷

IV. THE NON-PARTISAN NATURE OF CIVIL LIBERTIES VIOLATIONS INCLUDING VIOLATIONS DURING THE CURRENT "WAR ON TERROR," AND OTHER NATIONAL CRISES

Before I level any more criticism at particular positions that the Bush administration has taken, I want to stress that the ACLU always has been staunchly non-partisan, never endorsing or opposing officials, but rather,

81. Jim Malone, *VOA News: Congress, Legal Scholars Debate U.S. Domestic Spying*, U.S. FED. NEWS SERV., Mar. 1, 2006.

82. Leon Panetta, *A Republic . . . If You Can Keep It*, MONTEREY COUNTY HERALD, July 9, 2006, available at <http://www.panettainstitute.org/Commentaries/070906.htm>. "Bruce Fein . . . said that Addington and other [p]residential legal advisors had 'staked out powers that are a universe beyond any other administration . . . [with the] ability to collect intelligence, to open mail, to commit torture, to use electronic surveillance.'" *Id.*

83. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (ratified by the United States, Oct. 21, 1994).

On 3 June 1994, the Secretary-General received a communication from the Government of the United States of America requesting, in compliance with a condition set forth by the Senate of the United States of America, in giving advice and consent to the ratification of the Convention, and in contemplation of the deposit of an instrument of ratification of the Convention by the Government of the United States of America, that a notification should be made to all present and prospective ratifying Parties to the Convention to the effect that: "...nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

Id. at n.12 (alteration in original).

84. 18 U.S.C. §§ 2340A, 2441 (2000).

85. *See id.*

86. ACLU 2006 Membership Conference, <http://action.aclu.org/conference/agenda.html> (last visited May 15, 2007).

87. Anthony D. Romero, ACLU Executive Dir., Keynote Address at the 2006 ACLU Membership Conference (Oct. 16, 2006), audio available at <http://action.aclu.org/conference/webcasts.html#oct15>.

criticizing or praising each official's position on particular issues.⁸⁸ Throughout history, presidents have consistently earned criticism for unjustifiably invading freedoms in the name of national security. This has been true regardless of who was president, or what his political party was. Accordingly, I keep telling my liberal friends that they should not disproportionately demonize President Bush and former Attorney General John Ashcroft, who was a special lightning rod for critics. That is because, alas, President Bush's and Attorney General Ashcroft's actions are typical of what all presidents and all attorneys general have done in response to all national security crises.

After all, prior to 9/11, the worst terrorist attack on United States soil was the 1995 Oklahoma City bombing, and former President Bill Clinton and former Attorney General Janet Reno reacted much the same way that George W. Bush and John Ashcroft did after 9/11. President Clinton and Attorney General Reno pressured Congress to pass an "anti-terrorism" law⁸⁹ that, in fact, extended far beyond terrorism and indeed undermined vital freedoms even for people not suspected of any crime at all.⁹⁰

Just as civil liberties violations cross party lines, the same is true for civil liberties support.⁹¹ Many members of Congress, both Republicans and Democrats, have deplored the many unilateral post-9/11 rights-repressive actions by the Executive Branch.⁹²

Additionally, we have also seen strong bipartisan critiques of overreaching congressional measures, including provisions in the USA PATRIOT Act,⁹³ which was rushed through Congress and signed by the president just forty-five days after the terrorist attacks, with almost no hearings and almost no debate, under enormous pressure from the Bush administration.⁹⁴ One of the strongest congressional critics of the USA PATRIOT Act is actually a member of the House Republican Leadership—Alaska Congressman Don

88. See generally WOODY KLEIN, *LIBERTIES LOST: THE ENDANGERED LEGACY OF THE ACLU* (2006); SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES* (2d ed., So. Ill. Univ. Press 1999) (1990).

89. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996).

90. See, e.g., Nadine Strossen, *Speech and Privacy*, in *THE RULE OF LAW IN THE WAKE OF CLINTON* (Roger Pilon ed., 2000).

91. See Press Release, ACLU, *ACLU Joins Conservatives to Restore Freedoms Lost Under Patriot Act: "Patriots to Restore Checks and Balances" Hopes to Shape National Dialogue* (Mar. 22, 2005), <http://www.aclu.org/SafeandFree/general/17577prs20050322.html>. cfm?ID=17798&c=206 [hereinafter ACLU Press Release, ACLU Joins Conservatives].

92. *Id.*

93. See, e.g., Strossen, *Safety and Freedom*, *supra* note 9, at 79–80.

94. Bob Egelko, *FBI May Check People's Reading Habits*, HOUS. CHRON., June 30, 2002, at 12.

Young.⁹⁵ Consider his extremely harsh condemnation of that law: “Worst act we ever passed Everybody voted for it, but it was stupid. It was . . . ‘emotional voting.’”⁹⁶ Some USA PATRIOT Act provisions were even questioned by the chairman of President Bush’s re-election campaign, Mark Racicot, former chairman of the Republican National Committee.⁹⁷

The ACLU’s “Safe and Free” allies have included conservative citizens’ groups and officials such as the American Conservative Union, Americans for Tax Reform, Phyllis Schlafly’s Eagle Forum, and major gunowners’ organizations.⁹⁸ Wayne LaPierre of the National Rifle Association (NRA) explained to NRA members why they should support the ACLU’s “Safe and Free” campaign, despite their enthusiastic support for President Bush on gun rights and other issues.⁹⁹ He said:

Maybe you think that with President George W. Bush in the White House, everything is safe. You think you can put aside your principles, just this once, to be a loyal conservative.

. . . .

. . . But if we, as conservatives, don’t stand up for these fundamental truths, who will?

Never accept the idea that surrendering freedom—any freedom—is the price of feeling safe.¹⁰⁰

In the same vein, we have also heard strikingly strong criticisms from the so-called “Religious Right,” conservative Christians who campaigned for John Ashcroft’s appointment as Attorney General because they agree with his views on abortion and gay rights.¹⁰¹ Yet they still have decried the new investigative guidelines Attorney General Ashcroft issued after the terrorist attacks, which allow surveillance and infiltration of religious and political groups without any suspicion whatsoever.¹⁰² For example, the former head

95. See Rick Montgomery, *Federal Patriot Act Meets with Grass-Roots Resistance*, KAN. CITY STAR, May 19, 2003 at A1.

96. *Id.*

97. See Audrey Hudson, *Kerry Criticized on Patriot Act: Cheney Says Democrat’s Original Stance ‘Was Right’*, WASH. TIMES, June 2, 2004, at A07.

98. See ACLU Press Release, *ACLU Joins Conservatives*, *supra* note 91.

99. Wayne LaPierre, NRA, *The Conservative Political Action Conference: Frightened or Free?* (Feb. 2002), <http://www.nrahq.org/transcripts/cpac0202.asp>.

100. *Id.*

101. See Neil A. Lewis, *Ashcroft’s Terrorism Policies Dismay Some Conservatives*, N.Y. TIMES, July 24, 2002, at A1.

102. *Id.*; see also JOHN ASHCROFT, *THE ATTORNEY GENERAL’S GUIDELINES FOR FBI NATIONAL SECURITY INVESTIGATIONS AND FOREIGN INTELLIGENCE COLLECTION* (Oct. 31, 2003), available at <http://www.fas.org/irp/agency/doj/fbi/nsguidelines.pdf>.

of the Family Research Council, Ken Connor, said: “‘It’s important that we [religious] conservatives maintain a high degree of vigilance We need to ask ourselves . . . [h]ow would our groups fare under these new rules?’”¹⁰³

The extraordinarily diverse critics of the government’s post-9/11 over-reaching have included: prominent republican officials and conservative citizens’ groups; experts with enormous experience in national security, counter-intelligence, and law enforcement; leaders of the business community; and groups that never before have taken public positions on these kinds of issues—the United States Chamber of Commerce, the National Association of Manufacturers, the National Association of Realtors, the Financial Services Roundtable, and—of special significance in this law school forum—the Association of Corporate Counsel.¹⁰⁴ On October 4, 2005, these organizations wrote to Senator Arlen Specter, Chairman of the Senate Judiciary Committee, to call for cutbacks on the USA PATRIOT Act’s expansion of the government’s power to obtain “voluminous and often sensitive records from American businesses, without judicial oversight or other meaningful checks on the government’s power.”¹⁰⁵ These organizations objected to the USA PATRIOT Act’s invasions of the confidentiality rights of business entities themselves, as well as the Act’s invasions of the privacy rights of the entities’ customers.¹⁰⁶ As they wrote to Senator Specter:

[T]he rights of businesses to confidential files—records about our customers or our employees, as well as our trade secrets and other proprietary information—can too easily be obtained . . . under . . . the Patriot Act

. . . . Reforming the Patriot Act is an important step to ensure that powerful law enforcement tools are focused on those who would do us harm and that privacy rights and business[] interests are protected¹⁰⁷

I can sum up my points about all of the unjustified, unconstitutional post-9/11 measures by quoting a couple satiric, but apt, definitions from the *Nation Magazine’s* dictionary of current political terminology. Here are its two definitions for USA PATRIOT Act: “1. The pre-emptive strike on

103. Lewis, *supra* note 101.

104. Letter from Ass’n of Corp. Counsel et al. to Arlen Specter, Chairman, Senate Judiciary Comm. (Oct. 4, 2005), available at <http://www.ala.org/ala/washoff/WOissues/civilliberties/theusapatriotact/BusgrpLtr04oct05.pdf>.

105. *Id.*

106. *Id.*

107. *Id.*

American freedoms to prevent the terrorists from destroying them first. 2. The elimination of one of the reasons why they hate us.”¹⁰⁸ In the same vein, here is how the *Nation's* dictionary defines 9/11: “Tragedy used to justify any administration policy.”¹⁰⁹

V. GENERAL CONSTITUTIONAL PRINCIPLES THAT GOVERN CIVIL LIBERTIES DURING A NATIONAL SECURITY CRISIS

For details about the many specific post-9/11 issues and cases, I urge you to visit the ACLU's website.¹¹⁰ It is a treasure trove of information, including all of the pertinent statutes, court rulings, and lawyers' briefs. Now I will lay out the general constitutional principles that govern civil liberties in a time of a national security crisis—the general standards that we apply in assessing any specific post-9/11 measure.

As to individual rights in the context of national emergencies, the United States Constitution contains only one express limitation on just one right in solely two specified types of national emergencies.¹¹¹ The “Suspension Clause” empowers Congress to suspend the writ of habeas corpus, the time-honored procedure for challenging government detention.¹¹² Further, the “Suspension Clause” strictly limits Congress' suspension power to “Cases of Rebellion or Invasion,” and even in such cases it permits suspension of the writ only when “the public Safety may require it.”¹¹³

Beyond the strictly limited circumstances in which the Constitution authorizes Congress to suspend the writ of habeas corpus, the Constitution provides no textual warrant for any further limits on rights when the national security may be in peril. In that key respect, it is distinguishable from both the constitutions of many other countries¹¹⁴ and from regional and international human rights treaties.¹¹⁵

In short, the Framers of the United States Constitution deliberately rejected a general provision of more government power and fewer individual

108. Katrina vanden Heuvel, *Dictionary of Republicanisms*, THE NATION, Dec. 12, 2005, at 23.

109. *Id.*

110. <http://www.aclu.org>.

111. See U.S. CONST. art. I, § 9, cl. 2.

112. *Id.* “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” *Id.*

113. *Id.* (emphasis added).

114. See, e.g., NORMAN DORSEN ET AL., *COMPARATIVE CONSTITUTIONALISM, CASES AND MATERIALS* (2003).

115. See, e.g., HENRY J. STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* (2d ed. 2000).

rights, in any national security or other emergency. This key point has been stressed by important United States Supreme Court opinions arising from various emergencies throughout United States history, from the Civil War¹¹⁶ to the Korean War.¹¹⁷ For example, in 1934, the Court declared:

[W]e must consider the relation of emergency to constitutional power

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power . . . and its limitations of . . . power . . . were determined in the light of emergency and they are not altered by emergency.¹¹⁸

This same crucial point was stressed, specifically in the post-9/11 context, by United States Supreme Court Justice Antonin Scalia, in his opinion in the *Hamdi* case.¹¹⁹ Of all the Court's post-9/11 opinions, Justice Scalia's opinion in that case most strongly condemned the Bush administration's claims of executive power and most strongly supported individual constitutional rights. Notably, that opinion was joined by Justice John Paul Stevens.¹²⁰ I say "notably" because Justice Stevens is the Court's most outspoken liberal, whereas Justice Scalia is its most outspoken conservative.

116. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1866).

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of [the] government.

Id.

117. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649–50 (1952) (Jackson, J., concurring).

The appeal . . . that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work

Id.

118. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425–26 (1934).

119. *Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting). "The Suspension Clause was by design a safety valve, the Constitution's only 'express provision for exercise of extraordinary authority because of a crisis.'" *Id.* (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 650 (Jackson, J., concurring)).

120. *Id.* at 554.

In sum, apart from the writ of habeas corpus, the Constitution affords the same strong protection to individual rights during national crises as at any other time. For example, the government's many post-9/11 restrictions on First Amendment freedoms of speech, press, and association are still presumptively unconstitutional, even during a national emergency.¹²¹ The United States Supreme Court resoundingly reaffirmed this core constitutional principle in the famous "Pentagon Papers Case" in 1971, while the United States was engaged in the Vietnam War.¹²² The Nixon administration claimed that publication of the Pentagon Papers—the government's secret study of United States' involvement in Vietnam—would endanger many American lives, as well as national security.¹²³ Yet, the Court rejected this claim, because the government did not satisfy its heavy constitutional burden of proof under the strict scrutiny standard.¹²⁴ Under that standard, any rights-restricting measure is presumptively unconstitutional and the government can overcome that presumption only by proving that the restriction is necessary to promote a purpose of compelling importance.¹²⁵

The government can easily satisfy the compelling purpose prong of this strict scrutiny standard for any post-9/11 measure; of course, protecting national security meets that test. But it is much harder for the government to satisfy the second prong of strict scrutiny, by proving that the measure is necessary or, as the United States Supreme Court often phrases it, that the measure is the least restrictive alternative. In other words, if the government could promote national security through alternative means, which are less restrictive of fundamental rights, then it must do so.¹²⁶

It really does maximize security, with the minimal feasible cost to liberty. Not only is this the very same analysis that the United States Supreme Court uses as a matter of constitutional law, strict judicial scrutiny, but it also reflects just plain common sense. After all, why should we give up our free-

121. See, e.g., Strossen, Presentation, *Free Speech in Wartime*, *supra* note 9, at 930. See generally ACLU, *FREEDOM UNDER FIRE: DISSENT IN POST-9/11 AMERICA* (May 2003).

122. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

123. Brief for the United States at 3, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (Nos. 1873 & 1885). The government "now seeks to bar only the publication of a relatively small number of documents whose disclosure would pose a 'grave and immediate danger to the security of the United States.'" *Id.* at 3. "[P]ublication of the Defense Department studies would pose a serious danger to the armed forces." *Id.* at 18.

124. *N.Y. Times Co.*, 403 U.S. at 714.

125. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 534–55, 761–889 (2d ed. 2002) (describing the various levels of scrutiny applied by courts to restrictions on fundamental rights).

126. See *United States v. Playboy Entm't Group*, 529 U.S. 803, 813 (2000) (articulating the least restrictive alternative test).

dom if we do not gain security in return? Or, could we gain as much security without giving up as much freedom?

In short, the general constitutional standard for assessing rights restrictions, including during times of war and other national emergencies, is also a sensible policy analysis. It is the very standard that was unanimously endorsed by the bipartisan 9/11 Commission, which was chaired by New Jersey's former Governor Tom Kean, a republican, and co-chaired by former Indiana Congressman Lee Hamilton, a democrat.¹²⁷

Applying this sensible and constitutional test to the myriad post-9/11 policies that have been implemented or proposed, many have passed scrutiny, and hence, have not been opposed by the ACLU or our many diverse allies. For example, of the over 150 provisions in the USA PATRIOT Act, the ACLU and our allies have criticized only about twenty.¹²⁸ Moreover, even as to those provisions, we have not advocated repeal, but rather, reform: revisions that would preserve the core of the powers the government says it needs to protect our lives, but subject to judicial review, Congressional oversight, and other limits to bring them back in line with constitutional checks and balances.¹²⁹

This constrained and constructive criticism hardly warrants the charges of "hysteria,"¹³⁰ and even treason,¹³¹ that John Ashcroft leveled at his civil libertarian critics while he was Attorney General. Specifically, he said that we "only aid terrorists . . . [and] give ammunition to America's enemies."¹³²

127. See THE 9/11 COMMISSION REPORT, *supra* note 58, at xi.

Recommendation: The burden of proof for retaining a particular governmental power should be on the executive, to explain (a) that the power actually materially enhances security and (b) that there is adequate supervision of the executive's use of the powers to ensure protection of civil liberties. If the power is granted, there must be adequate guidelines and oversight to properly confine its use.

Id. at 394–95.

128. See, e.g., ACLU, Reform the Patriot Act, *supra* note 47.

129. ACLU, The Patriot Act: Where it Stands, <http://action.aclu.org/reformthepatriotact/whereitstands.html> (last visited May 15, 2007).

130. Curt Anderson, *Ashcroft Slams Critics' 'Hysteria'*, CBS NEWS.COM, Sept. 16, 2003, <http://www.cbsnews.com/stories/2003/09/18/national/main573894.shtml>.

131. See Elisabeth Bumiller, *Ashcroft Quits Top Justice Post*, N.Y. TIMES, Nov. 10, 2004.

132. *Dep't of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (Dec. 6, 2001) (testimony of Attorney General John Ashcroft), available at www.usdoj.gov/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm.

We need honest, reasoned debate; not fearmongering. To those who pit Americans against immigrants, and citizens against non-citizens; to those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists—for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends. They encourage people of good will to remain silent in the face of evil.

I say “we” advisedly, since Attorney General John Ashcroft made that accusation when he testified before the Senate Judiciary Committee several years ago, and Yours Truly had testified shortly before him!¹³³ This reminds me of a headline in one of my favorite publications, *The Onion*. This particular headline read: “Bush Asks Congress for \$30 Billion to Help Fight War on Criticism.”¹³⁴ In the same vein, another *Onion* headline warned: “Revised Patriot Act Will Make It Illegal to Read [Original] Patriot Act.”¹³⁵ Well, most members of Congress would not have to worry, since they have admitted that they did not even read the USA PATRIOT Act before voting for it!¹³⁶

VI. POST-9/11 CONCERNS SPECIFICALLY REGARDING WOMEN

For the remainder of this article, in keeping with the theme of this year’s Goodwin Lecture Series, I am going to discuss some post-9/11 concerns specifically regarding women. These concerns have been the focus of much of the ACLU’s work in the past five years, not only by our staff members who have been working on our “Safe and Free” campaign, but also by our Women’s Rights Project, which was founded by Justice Ruth Bader Ginsburg in 1972.¹³⁷

Let me first list a half dozen of the major ways in which the civil liberties of women, in particular, have been affected post-9/11. I will then elaborate on a couple of these:

First, Muslim women have been subjected to discriminatory, harassing treatment based solely on their religious attire.¹³⁸

Second, certain immigrant women, as well as their families and communities, have suffered devastating consequences as a result of the unwar-

Id.

133. *Dep’t of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the H. Comm. on the Judiciary*, 107th Cong. (Dec. 4, 2001) (testimony of Nadine Strossen, President, ACLU), available at http://judiciary.senate.gov/print_testimony.cfm?id=128&wit_id=83.

134. *Bush Asks Congress for \$30 Billion to Help Fight War on Criticism*, THE ONION, July 2, 2003, <http://www.theonion.com/content/node/28954>.

135. *Revised Patriot Act Will Make It Illegal to Read Patriot Act*, THE ONION, Sept. 17, 2003, <http://www.theonion.com/content/node/32312>.

136. See generally Declan McCullagh, *Congress Plans Scrutiny of Patriot Act*, CNET NEWS.COM, May 9, 2005, http://news.com.com/Congress+plans+scrutiny+of+Patriot+Act/2100-1028_3-5700986.html (noting that many members of Congress did not read the initial enacted version of the USA PATRIOT Act).

137. See, e.g., SHANTI HUBBARD, ACLU WOMEN’S RIGHTS PROJECT, ANNUAL REPORT 2005, available at <http://www.aclu.org/pdfs/wrpannuareport2005.pdf>.

138. See *infra* part VII.

ranted mass detentions and deportations of the men in their lives, based on ethnic and religious profiling. The ACLU documented these problems in a report issued in 2004, *Worlds Apart: How Deporting Immigrants after 9/11 Tore Families Apart and Shattered Communities*.¹³⁹ The ACLU also has pursued various legal remedies for these violations not only in the United States,¹⁴⁰ but also before the United Nation's Special Working Group on Arbitrary Detention, in Geneva.¹⁴¹

Third, as a result of the post-9/11 crackdowns on immigrants in general, female victims of domestic violence and other crimes in immigrant communities are now chilled in their efforts to seek safety, due to greater likelihood that they, or their family members, will face deportation.¹⁴²

Fourth, similarly, immigrant women workers who face exploitation, discrimination, and sexual abuse on the job have been deterred from reporting these violations, and hence are increasingly preyed upon.¹⁴³ The ACLU detailed these problems in a complaint filed with the Inter-American Commission on Human Rights in 2006,¹⁴⁴ since they violate international human rights standards that bind the United States.

Fifth, one of the many problems resulting from the expanded police powers that have flourished since 9/11 is the migration of those methods to non-terrorism-related law enforcement, including drug law enforcement.¹⁴⁵

139. ACLU, *WORLDS APART: HOW DEPORTING IMMIGRANTS AFTER 9/11 TORE FAMILIES APART AND SHATTERED COMMUNITIES* (Dec. 2004), available at <http://www.aclu.org/FilesPDFs/worldsapart.pdf>.

140. See, e.g., *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002).

141. See, e.g., Petition to the United Nations Working Group on Arbitrary Detention, Jan. 27, 2004, available at <http://aclu.org/FilesPDFs/complaint.final.012704.pdf> (submitted on behalf of certain immigrants detained by the United States in connection with its investigation into the events of 9/11); see also ACLU, *AMERICA'S DISAPPEARED: SEEKING INTERNATIONAL JUSTICE FOR IMMIGRANTS DETAINED AFTER SEPTEMBER 11 (2004)*, available at <http://www.aclu.org/FilesPDFs/un%20report.pdf>.

142. See, e.g., Norman Miller, *Newcomers to U.S. Hesitant to Report Domestic Abuse*, BOSTON HERALD, May 27, 2006, at 80; Fernando Quintero, *Immigrants Often Silent on Family Violence*, ROCKY MTN. NEWS, Sept. 2, 2006, at 19A; Amanda Keim, *Battered Immigrants Fear Police As Much As Husbands*, L.A. TIMES, Oct. 16, 2005, at A18.

143. See *infra* part VIII.

144. ACLU et al., Petition Alleging Violations of the Human Rights of Undocumented Workers by the United States of America, Inter-Am. C.H.R. (Nov. 1, 2006), available at http://www.aclu.org/images/asset_upload_file946_27232.pdf; see also Press Release, ACLU, Undocumented Workers Bring Plea for Non-Discrimination to Human Rights Body (Nov. 1, 2006), <http://www.aclu.org/immigrants/discrim/27235prs20061101.html>.

145. ACLU, *CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES 16* (2005), available at http://www.aclu.org/images/asset_upload_file393_23513.pdf.

As a result, the number of women in prison has skyrocketed and their children are often left parentless, to flounder in the foster care system.¹⁴⁶ The ACLU Women's Rights Project documented these devastating problems in a 2005 report, *Caught in the Net: The Impact of Drug Policies on Women and Families*.¹⁴⁷

Sixth, many of the key post-9/11 players on all issues—including plaintiffs,¹⁴⁸ lawyers,¹⁴⁹ government officials,¹⁵⁰ whistleblowers,¹⁵¹ judges,¹⁵² and

146. *Id.* at 49–50.

147. *Id.*

148. See *Muslim Cmty. Ass'n of Ann Arbor v. Ashcroft*, 459 F. Supp. 2d 592 (E.D. Mich. 2006) (plaintiffs included several organizations that either are headed by women and/or work for women's rights); *Gordon v. FBI*, 388 F. Supp. 2d 1028 (N.D. Cal. 2005) (plaintiff was Rebecca A. Gordon); *Edmonds v. U.S. Dep't of Justice*, 323 F. Supp. 2d 65 (D.D.C. 2004) (plaintiff was Sibel Edmonds); *ACORN v. Philadelphia*, No. 03-4312 (E.D. Pa. May 6, 2004) (plaintiff was the National Organization for Women); *Complaint, Am. Friends Serv. Comm. v. Dep't of Def.*, No. 06-2529, (E.D. Pa. Mar. 19, 2007) (plaintiffs included several organizations that are headed by women and/or work for women's rights).

149. Prominent female lawyers handling major post-9/11 lawsuits include: Kate Martin, Director of the Center for National Security Studies who played a key role in, among others, the challenge to government secrecy of the names of post-9/11 detainees, see *Center for National Security Studies v. U.S. Department of Justice*, 215 F. Supp. 2d 94 (D.D.C. 2002); Barbara Olshansky, Assistant Legal Director for the Center for Constitutional Rights, represented Guantanamo Bay detainees in *Rasul v. Bush*, which held that detainees held at the Guantanamo Bay facility could challenge their incarceration in federal court, *Rasul v. Bush*, 542 U.S. 466 (2004); Ann Beeson, Associate Legal Director of the ACLU, was the lead counsel on many important challenges to the government's post-9/11 overreaching, including the NSA lawsuit and USA PATRIOT Act challenges, ACLU, Ann Beeson, Associate Legal Director, <http://www.aclu.org/safefree/resources/17310res20030415.html> (last visited May 15, 2007); and Donna Newman represented Jose Padilla—the citizen who has been imprisoned as an alleged “enemy combatant” whose case went to the United States Supreme Court, *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

150. E.g., Condoleezza Rice was Secretary of State, and former National Security Advisor, Valerie E. Caproni, was General Counsel for the FBI. Federal Bureau of Investigation: FBI Executives—Valerie E. Caproni, <http://www.fbi.gov/libref/executives/caproni.htm> (last visited May 15, 2007). Elizabeth Redman is Assistant Inspector General for Investigations and has held this position at the Department of Homeland Security since the inception of the Office of Inspector General in March 2003. Dep't of Homeland Security, Office of Inspector Gen., Semiannual Report to Cong. 4, available at http://www.dhs.gov/xoig/assets/semiannlrpts/OIG_Fall_2003_SAR.pdf. Jamie Gorelick held key positions in the Clinton administration and was the only female member of the bipartisan 9/11 Commission. *The 9/11 Commission*, ONLINE NEWSHOUR WITH JIM LEHRER, Mar. 24, 2004, available at http://www.pbs.org/newshour/bb/terrorism/jan-june04/911commission_3-24.html. Ms. Gorelick received lots of press because some administration officials tried to blame her, when she had been in the Clinton Justice Department, for what they saw as legal obstacles to sharing of terrorism-related intelligence information between the FBI and CIA. *Id.*; see also Adam Nagourney & Eric Lichtblau, *Evaluating the 9/11 Hearings' Winners and*

journalists¹⁵³—have been women. Consider, for example, the critical roles

Losers, N.Y. TIMES, Apr. 18, 2004, at 1.23. The blame that was placed on Ms. Gorelick's editorials in the *New York Times* and other leading publications. See generally *id.*

151. Coleen Rowley, who as Chief Legal Advisor for the FBI, wrote a paper detailing how the FBI mishandled intelligence pre-9/11 and subsequently testified in front of the 9/11 Commission. Press Release, ACLU, Famous FBI Whistleblower to Speak (Apr. 7, 2005), <http://aclu-ia.org/news.asp?ID=17>. Sibel Edmonds founded the National Security Whistleblowers Coalition. Nat'l Security Whistleblowers Coalition—Staff, http://www.nswbc.org/nswbc_staff.htm (last visited May 15, 2007). Jesselyn Radack worked for the FBI and was fired because of whistleblowing. Jesselyn Radack, My Story, <http://www.patriotictruthteller.net/mystory.html> (last visited May 15, 2007). Ms. Radack wrote a book titled *The Canary in the Coal Mine: Blowing the Whistle in the Case of "American Taliban" John Walker Lindh*. *Id.* The book is about her experience, actions, and her point of view. *Id.*

152. Justice Sandra Day O'Connor, was "the first woman named to the [United States] Supreme Court." National Women's Hall of Fame, Women of the Hall: Sandra Day O'Connor, <http://www.greatwomen.org/women.php?action=viewone&id=115> (last visited May 15, 2007). Judge Anna Diggs Taylor "became the first black woman judge to be appointed to the United States District Court for the Eastern District of Michigan." Michigan Supreme Court Historical Society, Anna Diggs Taylor, <http://www.micourthistory.org/resources/women-and-law/taylor.php> (last visited May 15, 2007). Colleen Kollar-Kotelly was appointed to serve as a judge for the United States Foreign Intelligence Surveillance Court. United States District Court for the District of Columbia: Judge Colleen Kollar-Kotelly, <http://www.dcd.uscourts.gov/kotelly-bio.html> (last visited Mar. 25, 2007). Judge Shira A. Scheindlin, a judge in the United States District Court for the Southern District of New York, issued an important decision concerning the material witness statute in the case concerning Osama Awadallah, a Jordanian-born student who was charged with making false statements at a grand jury proceeding. Press Release, ACLU, Government Cannot Use Material Witness Statute to Detain People, ACLU Tells Appeals Court (Nov. 22, 2002), http://www.aclu.org/safefree/general/17113prs20021122.html?s_src=RSS. Judge Denise Page Hood, a judge in the United States District Court for the Eastern District of Michigan, ruled on the ACLU's challenge regarding Section 215 of the USA PATRIOT Act. Press Release, ACLU, PATRIOT Act Fears Are Stifling Free Speech, ACLU Says in Challenge to Law (Nov. 3, 2003), <http://www.aclu.org/safefree/patriot/18418prs20031103.html>. The lead plaintiff in the ACLU's lawsuit was the Muslim Community Association of Ann Arbor. *Id.* Sixth, there was Judge Gladys Kessler, judge in the United States District Court for the District of Columbia, who ruled on the 9/11 *Committee on National Security Systems v. Department of Justice* criminal case, which "ordered the Justice Department to produce the names of all detainees and their lawyers within 15 days." Human Rights First, September 11th, 2001 and the Courts, http://www.humanrightsfirst.org/us_law/loss/cases/court_cases.htm (last visited May 15, 2007). Finally, Judge Gladys Kessler, sitting on the same court, "issued a blunt indictment of the Bush administration's legal handling of prisoners at the Guantanamo Bay Naval Base in Cuba." Carol D. Leoning, *A Judge's Sharp Opinion*, WASH. POST, Dec. 4, 2006, at A17.

153. Dana Priest received a Pulitzer Prize for breaking the story about the secret CIA prisons. *Dana Priest: 2006 Pulitzer Prize Winner in Category of Beat Reporting*, WASHINGTONPOST.COM, Jan. 2, 2005, <http://www.washingtonpost.com/wp-dyn/content/linkset/2006/04/17/LI2006041700530.html>. Leslie Cauley broke the story about the NSA's domestic spying. Cauley, *supra* note 36. Paisley Dodds received the Hugh M. Hefner First Amendment Award in 2006 for her coverage of Guantanamo Bay. U. Chi. Law

that have been played by women from judges such as Justice Sandra Day O'Connor and Judge Anna Diggs Taylor—whose key roles I have already noted, to courageous FBI whistleblower, Coleen Rowley—whom *Time Magazine* hailed as a “Person of the Year” in 2002,¹⁵⁴ to the members of the Raging Grannies—women of a certain age who have been ACLU clients in important cases all over the country helping us to challenge the government’s post-9/11 surveillance of citizens who are simply exercising their First Amendment rights of peaceful protest.¹⁵⁵ Given the longstanding, ongoing stereotypes and discrimination that women have faced in many areas, and given the glass ceilings that women have faced in the national security arena in particular,¹⁵⁶ we should be cognizant of these many women who have played key roles in keeping us safe and free.

As I just noted, the Pentagon and other government agencies have been spying on citizens all over the country who are simply exercising First Amendment rights, but who are treated like terrorists just because they dare to dissent from certain government policies. To underscore that point, let me cite one current example from right here in Fort Lauderdale. The ACLU recently obtained government documents through one of their lawsuits, detailing massive surveillance of a peaceful protest that had been planned by the Broward Anti-War Coalition during the Fort Lauderdale Air & Sea Show.¹⁵⁷ The many government agencies that collected information about

School, Playboy Foundation Announces Winners of 2006 Hugh M. Hefner First Amendment Awards, (May 11, 2006), <http://www.law.uchicago.edu/stone-award.html>. Lucy Dalglish was executive director of the Reporters Committee for Freedom of the Press. Reporters Committee for Freedom of the Press, The Reporters Committee for Freedom of the Press: A Short History, <http://www.rcfp.org/about.html> (last visited May 15, 2007). Ms. Dalglish advocated for embattled reporters post-9/11. *Id.*

154. Richard Lacayo & Amanda Ripley, *Persons of the Year*, TIME, Dec. 30, 2002, at 32; see also *Edmonds v. Dep’t of Justice*, 323 F. Supp. 2d 65, 67 (D.D.C. 2004). “Sibel Edmonds [is] a Turkish-American woman [who] was hired as [an FBI] translator . . . shortly after the terrorist attacks of September 11, 2001 because of her knowledge of Middle Eastern languages,” and was subsequently “fired in retaliation for reporting security breaches and possible espionage within the Bureau.” Press Release, ACLU, *Sibel Edmonds v. Department of Justice: A Patriot Silenced, Fighting to Keep America Safe* (Sept. 26, 2005), <http://www.aclu.org/scotus/2005/19950prs20050926.html>; see also David Rose, *An Inconvenient Patriot*, VANITY FAIR, Sept. 2005, at 264.

155. See Anemona Hartocollis, *With ‘Grannies’ in the Dock, a Sitting Judge Will Squirm*, N.Y. TIMES, Apr. 27, 2006, at B1.

156. See Jo Kadlecsek, *Chipping at a Political Glass Ceiling*, COLUM. U. REC., Mar. 26, 2004, at 5, available at http://www.columbia.edu/cu/record/archives/vol29/vol29_iss12/Pg.5-2912.pdf.

157. Press Release, ACLU, *Pentagon Documents Uncovered by ACLU Shed New Light on Surveillance of Florida Peace Activists* (Oct. 12, 2006), http://www.aclufl.org/news_events/?action=viewRelease&emailAlertID=2169.

this event include: the Department of Defense, the Joint Terrorism Task Force, the United States Army Recruiting Command, and the Miami-Dade Police Department.¹⁵⁸ Moreover, the collected information has been stored in a military anti-terrorism database.¹⁵⁹ According to the government's records, the dangerous activities planned by this allegedly terrorist Broward Anti-War group include "guerrilla theater and other forms of subversive propaganda."¹⁶⁰ Sadly, our government appears to be confusing guerrilla theater with guerrilla war!

Now, let me briefly expand on a couple of the post-9/11 issues specifically affecting women. I will start with the most visible one, arising from the religious attire that some Muslim women choose to wear, thus being visibly identified as members of a group that has borne a disproportionate brunt of unjustified post-9/11 measures.

VII. POST-9/11 DISCRIMINATION AGAINST WOMEN WHO ARE VISIBLY IDENTIFIABLE AS MUSLIM THROUGH THEIR RELIGIOUS ATTIRE

Let me provide some background context for this issue. Prior to 9/11, the ACLU and many diverse allies had made enormous headway in our "Campaign Against Racial Profiling,"¹⁶¹ to the extent that even President George W. Bush¹⁶² and his first Attorney General, John Ashcroft,¹⁶³ had promised to halt such policies as arresting people for "'Driving While Black.'"¹⁶⁴ However, after 9/11 we suddenly saw widespread support for

158. *Id.*

159. *Id.*

160. *Id.*

161. See ACLU, Racial Profiling: Old and New, <http://www.aclu.org/racialjustice/racial-profiling/index.html> (last visited May 15, 2007); see Press Release, ACLU, ACLU Wins National Public Relations Award for Campaign to End Racial Profiling (June 9, 2000), <http://www.aclu.org/racialjustice/racialprofiling/15948prs20000609.html> [hereinafter ACLU Press Release, ACLU Wins National Public Relations Award].

162. Press Release, ACLU, ACLU Applauds Introduction of 'End Racial Profiling Act' as ACLU Releases Report on Racial Profiling (Feb. 26, 2004), <http://www.aclu.org/safefree/general/17018prs20040226.html>. "On February 27, 2001, President Bush told a joint session of Congress that racial profiling 'is wrong and we will end it in America.'" *Id.*

163. Press Release, ACLU, ACLU Applauds Ashcroft Move on Racial Profiling: Calls on Attorney General to Examine Other Racial Justice Issues (Mar. 1, 2001), <http://www.aclu.org/racialjustice/racialprofiling/15833prs20010301.html>. "In a letter sent to the chairman and ranking member of the Senate Judiciary Committee, Ashcroft called on Congress to consider racial profiling legislation within six months. If Congress does not act, Ashcroft said, he would instruct the Justice Department to begin its own study of available data." *Id.*

164. ACLU Press Release, ACLU Wins National Public Relations Award, *supra* note 161.

this very same demographic profiling, although targeting different people.¹⁶⁵ Again, the government has been targeting too many people, based not on what they have done, but only on who they are. The very hardest hit have been young, Muslim immigrant men from the Middle East or South Asia.¹⁶⁶ Based on profiling, they have been subjected to unjustified surveillance, interrogation, detention, incarceration, and deportation.¹⁶⁷

This post-9/11 profiling—along with all demographic profiling—violates individual rights, since it substitutes discriminatory stereotypes and guilt by association for individualized suspicion.¹⁶⁸ Therefore, it is not surprising that civil libertarians have criticized it on principled grounds.¹⁶⁹ You might be surprised, though, to learn that counter-terrorism experts also have criticized such profiling on pragmatic grounds, from a national security perspective.¹⁷⁰ This concern was raised, for instance, by a group of senior United States intelligence specialists, in a memorandum sent to law enforcement agencies worldwide, shortly after 9/11.¹⁷¹ The memo warned that looking for someone who fits a demographic profile is just not as useful as looking for someone who acts suspiciously.¹⁷² Indeed, the memo even suggests that over-reliance on profiles might be one of the reasons for our government's tragic failure to prevent the 9/11 attacks.¹⁷³ More recently, U.S. intelligence agencies have expressed mounting concern that future terrorist attacks may well involve Al Qaeda members from Asia or Africa, expressly to elude the ethnic profiles that U.S. personnel have been using.¹⁷⁴ In short, this

165. See, e.g., Henry Weinstein et al., *Racial Profiling Seems Inevitable in Terror Climate*, SEATTLE TIMES, Sept. 25, 2001, at A9; Jeff Jacoby, *Frisking the Innocent*, BOSTON GLOBE, June 20, 2002, at A15.

166. See *id.*

167. Council on American-Islamic Relations (CAIR), *The Status of Muslim Civil Rights in the United States 2002: Stereotypes & Civil Liberties: Executive Summary*, <http://www.cair-net.org/asp/execsum2002.asp> (last visited May 15, 2007). See generally LAWYER COMMITTEE FOR HUMAN RIGHTS, *Immigrants, Refugees, and Minorities, in ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES* 30–106 (2003).

168. See generally ACLU, *SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11* (2004), available at <http://www.aclu.org/FilesPDFs/racial%20profiling%20report.pdf>.

169. See generally *id.*

170. See *id.* at 3–4.

171. *Id.* at 3.

172. *Id.*

173. See generally Bill Dedman, *Memo Warns Against Use of Profiling as Defense*, BOSTON GLOBE, Oct. 12, 2001, at A27. See generally Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195 (2003).

174. *Protecting Dr. King's Legacy: Justice and Liberty in the Wake of September 11th: Forum on National Security and the Constitution Before Congressman John Conyers* (Jan. 24,

demographic profiling is one of many post-9/11 measures that suffer from the dual flaw I noted earlier: it does decrease liberty, but it does not increase security.

Muslim men certainly have endured extreme profiling tactics, including the sweeping post-9/11 arrests and incommunicado incarcerations that were strongly denounced even by the Justice Department's own Inspector General.¹⁷⁵ Through such measures, Muslim men certainly have suffered serious discriminatory rights violations post-9/11.¹⁷⁶ However, Muslim women are more readily identifiable, as adherents of Islam, when they choose to wear traditional religious attire, such as the headscarf or hijab. Hence, post-9/11, throughout the United States, there have been dramatic increases in reported incidents of discrimination and harassment, not only against Muslims in general, but also against Muslim women in particular. The *New York Times* described this pattern in a recent article.¹⁷⁷ It said:

Before Sept. 11, Muslim women who wore head scarves in the United States were often viewed as vaguely exotic. The terrorist attacks abruptly changed that, transforming the head scarf, for many people, into a symbol of something dangerous, and marking the women who wear them as among the most obvious targets

2002) (testimony of Nadine Strossen, President, ACLU), available at <http://www.aclu.org/natsec/emergpowers/12473leg20020124.html#6>.

175. GLENN A. FINE, U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 70 (Apr. 2003), available at <http://www.fas.org/irp/agency/doj/oig/detainees.pdf> ("[w]e criticize the indiscriminate and haphazard manner in which the labels of 'high interest,' 'of interest,' or 'of undetermined interest' were applied to many aliens who had no connection to terrorism."). See generally GLENN A. FINE, U.S. DEP'T OF JUSTICE, ANALYSIS OF THE SECOND RESPONSE BY THE DEP'T OF JUSTICE TO RECOMMENDATIONS IN THE OFFICE OF THE INSPECTOR GENERAL'S JUNE 2003 REPORT ON THE TREATMENT OF SEPTEMBER 11 DETAINEES (Jan. 2004), available at <http://www.usdoj.gov/oig/special/0401/final.pdf>; Press Release, ACLU, ACLU Files Complaint with United Nations in Geneva Seeking Justice for Immigrants Detained and Deported After 9/11 (Jan. 27, 2004), <http://www.aclu.org/safefree/general/16908prs20040127.html>.

176. See, e.g., Stuart Taylor, Jr., *Congress Should Investigate Ashcroft's Detentions*, 34 NAT'L J. 1536 (2002).

Despite the unprecedented secrecy imposed by Attorney General John Ashcroft, evidence has mounted that [since 9/11] his Justice Department has put hundreds of harmless Muslim men from abroad behind bars for far too long, treated many of them worse than convicted criminals, and arguably violated their constitutional rights—all without finding enough evidence to charge a single one . . . with a terrorist crime.

Id.

177. Neil MacFarquhar, *A Simple Scarf, But Meaning Much More Than Faith*, N.Y. TIMES, Sept. 8, 2006, at A22.

Muslim . . . women . . . who wear head scarves . . . say they face widespread discrimination in their careers and in their daily lives.¹⁷⁸

Since 9/11, the ACLU has defended many visibly self-identified Muslim women, who wear headscarves or other religious attire, against various adverse actions. For example, the ACLU of Nebraska recently successfully settled a lawsuit against the city of Omaha, which barred Muslim women from going to city swimming pools just because of their religious attire.¹⁷⁹ The ACLU's client, Lubna Hussein, wanted to go to a pool to watch her small daughters while they swam.¹⁸⁰ She did not want to swim herself.¹⁸¹ Nonetheless, the city barred her from going to the pool unless she wore a bathing suit, even though that would violate her religious belief of uncovering her body in such a public place.¹⁸² When the city agreed to change its policy in response to the ACLU's lawsuit, Lubna Hussein's reaction underscored that what was at stake was not only the welfare of her own daughters but also her own equal status, and that of other Muslim women, as full members of the community. As she said, "I am so pleased at this change in policy My little girls have been waiting for a chance to try out the water slides and they'll finally get the opportunity [now]. We're happy to feel like part of the community again."¹⁸³

The ACLU has also represented American Muslim women who have been forced to remove their hijabs in front of male security personnel at airports and other facilities without any basis for suspecting them of carrying contraband, even though this violates their core religious beliefs.¹⁸⁴ This has happened even when these women have begged to go to private rooms to be searched by female security personnel.¹⁸⁵ One of the clients in this category is Samar Kaukab, who was subjected to this degrading treatment, violating her religious freedom, at Chicago's O'Hare Airport shortly after the 9/11

178. *Id.*

179. See Press Release, ACLU, City of Omaha and ACLU of Nebraska Announce Settlement in Lawsuit over Muslim Women Barred from Public Pool (Feb. 18, 2005), <http://www.aclu.org/religion/discrim/16248prs20050218.html>.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. Press Release, ACLU, ACLU of Illinois Challenges Ethnic and Religious Bias in Strip Search of Muslim Woman at O'Hare International Airport (Jan. 16, 2002), <http://www.aclu.org/racialjustice/racialprofiling/15783prs20020116.html> [hereinafter ACLU Press Release, ACLU of Illinois Challenges Ethnic and Religious Bias].

185. *Id.*

attacks.¹⁸⁶ Samar Kaukab was a twenty-two-year-old American citizen, living in Ohio.¹⁸⁷ Ironically, Ms. Kaukab was passing through the airport en route home from a conference of the VISTA program, Volunteers in Service to America.¹⁸⁸ I say this was ironic, since the treatment she experienced was counter to the core American values of fairness and equality. As she said: “I felt as though the security personnel had singled me out because I didn’t belong, wasn’t trusted and wouldn’t be welcomed in my own country.”¹⁸⁹

Another example is Cynthia Rhouni, who was forced to remove her headscarf in front of male prison officials and male prisoners as a precondition for entering the Columbia Correctional Institution in Madison, Wisconsin, where she was taking her son to visit his father, an inmate there.¹⁹⁰ “Ms. Rhouni explained that she wears the headscarf for religious reasons and offered to remove it in the presence of a female guard,” who could ascertain that she was not using it to conceal any weapons or contraband.¹⁹¹ When prison officials still refused to accommodate Ms. Rhouni’s request, she removed her headscarf because she believed it was necessary for her son, who was having problems in school, to see his father.¹⁹² She felt humiliated and guilty because she had to enter the prison visiting area, in the presence of the male prisoners and guards, without the headscarf.¹⁹³ As she said: “I felt naked. I felt I disgraced my family and my religion.”¹⁹⁴ She sought religious counseling to come to terms with this forced violation of her beliefs.¹⁹⁵ A day after the ACLU filed a lawsuit on Ms. Rhouni’s behalf, the Wisconsin Corrections Secretary announced that he was ordering the Department’s staff to change its policies to respect the religious freedom of visitors such as Ms. Rhouni.¹⁹⁶ Her attorney said that Ms. Rhouni was “very, very pleased” to

186. *Id.*

187. *Id.*

188. *Id.*

189. ACLU Press Release, ACLU of Illinois Challenges Ethnic and Religious Bias, *supra* note 184 (quoting Samar Kaukab).

190. Press Release, ACLU, Muslim Woman Sues Prison for Forcing Her to Remove Headscarf in Front of Male Guards and Prisoners (May 25, 2005), http://www.aclu-wi.org/wisconsin/religious_liberty/20050525rhounipressrelease.shtml [hereinafter ACLU Press Release, Muslim Woman Sues Prison]; see *Muslim Woman Sues Over Head Scarf Ban*, CHI. TRIB., May 26, 2005, at 20.

191. ACLU Press Release, Muslim Woman Sues Prison, *supra* note 190.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. Kevin Murphy, *Headscarves OK at Prisons*, MADISON CAP. TIMES, May 27, 2005, at 4A.

learn of this announcement, and “a little proud of herself for making a stand and having it make an impact so quickly.”¹⁹⁷

While I could cite many other examples of this pervasive problem,¹⁹⁸ I will confine myself to two more involving women from your own state of Florida. One is Dena al-Atassi, a student at the University of Central Florida, where she chairs the Florida chapter of the Muslim Students Association.¹⁹⁹ She was featured in a recent *New York Times* article about post-9/11 discrimination faced by American Muslim women.²⁰⁰ Ms. Atassi was born to a Syrian father and an American mother.²⁰¹ While she was a teenager, she spent three years in Syria.²⁰² According to the article, she thought “that veiled women showed a self-confidence lacking among American women, who seemed . . . to be trying to transform themselves into a Barbie-doll ideal.”²⁰³ In her words: “I would meet women who were not attractive by Western standards . . . and when I told them, ‘You look beautiful,’ they would say, ‘I know, thank God.’ They really believe it. The veil facilitates inner strength, a greater feeling of self-esteem.”²⁰⁴

At age sixteen, Ms. Atassi decided to begin wearing a head scarf, along with a floor-length trench coat.²⁰⁵ About a year later, she was passing through an airport for the first time after the 9/11 attacks.²⁰⁶ “[S]ecurity screeners singled her out, questioned her, and made her remove her coat.”²⁰⁷ “Feeling violated, . . . she tore off her scarf in a bathroom and wept.”²⁰⁸ She said: “I had gained such a strong relationship with God that I didn’t want to

197. *Id.*

198. See Dan Herbeck, *Muslim-Americans Held at Border Lose Suit*, BUFF. NEWS, Dec. 23, 2005, at D1; see also *Tabbaa v. Chertoff*, No. 05-CV-5825, 2005 WL 3531828 at *1 (W.D.N.Y. Dec. 22, 2005). New York Civil Liberties Union brought a lawsuit on behalf of some young American Muslim women, as well as their families, who were detained for more than six hours, frisked, photographed, and fingerprinted when returning to the United States from Canada, just because they had attended an Islamic conference in Toronto. *Id.* They were prevented from contacting attorneys, family members, or the news media to tell them about this unwarranted detention; border patrol agents even confiscated their cell phones. Press Release, ACLU, *Homeland Security Violates Civil Rights of Muslim American Citizens* (Apr. 20, 2005), <http://www.aclu.org/safefree/general/17512prs20050420.html>.

199. See MacFarquhar, *supra* note 177.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. MacFarquhar, *supra* note 177.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

do anything to distance myself from him, and I felt like I was doing just that.”²⁰⁹

The second Florida Muslim woman I want to mention is Sultaana Freeman, of Winter Park. The ACLU represented her in challenging the state’s post-9/11 requirement that she had to remove her face veil, a niqab, to get a driver’s license.²¹⁰ Ms. Freeman, a U.S. citizen who is a stay-at-home mother of two young children, has explained her decision to wear the niqab as follows: “The niqab is part of who I am Embracing the niqab was a very personal choice, and I thank Allah for the protection it has afforded me in life, as a woman of faith.”²¹¹ Shortly after Mrs. Freeman moved to Florida from Illinois in February 2001, she had no problem getting a Florida driver’s license with a photograph in which she wore her niqab.²¹² She had previously had an Illinois driver’s license with the face veil, since Illinois is one of at least fifteen states whose driver’s license requirements explicitly exempt people with religious objections to photographs.²¹³ Likewise, courts in other states have held that drivers’ licenses must be issued to people with religious objections to the usual photographic requirements.²¹⁴ For example, some Christians believe that photographs violate the Second Commandment’s prohibition on graven images,²¹⁵ and some Native Americans believe that photographs steal their souls.²¹⁶

It was only after the 9/11 attacks that the Florida Department of Highway Safety sent Mrs. Freeman a letter telling her that she needed a full-facial

209. MacFarquhar, *supra* note 177.

210. *Freeman v. Dep’t of Highway Safety & Motor Vehicles*, 924 So. 2d 48 (Fla. 5th Dist. Ct. App. 2006).

211. Press Release, ACLU, ACLU Asks Florida Court to Reinstate Suspended Driver’s License of Muslim Woman Forced to Remove Her Face Veil (May 27, 2003), <http://www.aclu.org/religion/gen/16218prs20030527.html> [hereinafter ACLU Press Release, ACLU Asks Florida Court to Reinstate Suspended Driver’s License].

212. *Id.*

213. *Id.*

214. See Appellant’s Initial Brief at 3, *Freeman*, 924 So. 2d at 48 (No. 02-2828).

215. See Ontario Consultants on Religious Tolerance, The Ten Commandments, Implications of the Second Commandment, http://www.religioustolerance.org/chr_10cj.htm (last visited May 15, 2007); Craig W. Booth, *Second Commandment Issues—Art, Plays, Movies of Jesus (Make No Graven Images, or, Make No Idols?)*, THEFAITHFULWORD.ORG (2004), <http://www.thefaithfulword.org/secondcommandment.html>; see also Ali Eteraz, Christian Women Refuses License Pic Versus Muslim Woman Doing Same (Oct. 19, 2006), <http://eteraz.wordpress.com/2006/10/19/christian-women-refuses-license-pic-versus-muslim-woman-doing-same>.

216. See, e.g., William Bobos, *The Bleeding Edge Premiere Column: The Art of Stealing Souls*, WEDDING PHOTOGRAPHY DIRECTORY, <http://www.weddingphotographydirectory.com/wedding-photo/for-wedding-photographers/bleeding-edge-column/art-of-stealing-souls.aspx> (last visited May 15, 2007).

photograph on her driver's license.²¹⁷ When she declined, her license was revoked.²¹⁸ This was done despite the fact that she offered to submit her fingerprints, and other identifying documents, such as her birth certificate and Social Security card.²¹⁹

Florida also persisted in demanding a full-facial photograph from Mrs. Freeman, despite the fact that it had issued 800,000 temporary licenses or permits in the past five years, without any photographs at all, to individuals in various categories.²²⁰ For example, Florida issues driving permits without any photographs to convicted drunk drivers who have had their licenses revoked, to people who failed their eye exams, and to those who failed their written license exams.²²¹ These facts make it clear that Mrs. Freeman's license was revoked not because she was a security threat or unsafe driver, but only because of discriminatory stereotypes.

VIII. THE INCREASED VULNERABILITY OF IMMIGRANT WOMEN WORKERS TO ECONOMIC EXPLOITATION AND SEXUAL ABUSE RESULTING FROM THE STEPPED-UP POST-9/11 ANIMUS AGAINST IMMIGRANTS IN GENERAL

In my limited remaining time, let me comment briefly on one more of the post-9/11 issues especially affecting women: the increased vulnerability of immigrant women workers to economic exploitation and sexual abuse resulting from the stepped-up animus against immigrants in general. This is a long American tradition,²²² going back to the very first national security crisis, when we feared French influences and passed the now-discredited Alien and Sedition Act.²²³ This anti-immigrant tradition also infused the World War I era "Red Scare" atmosphere that fueled the law under which Anita Whitney was convicted, leading to Justice Brandeis's eloquent dissent that I quoted earlier.²²⁴

In that same tradition, since 9/11, immigrant women workers have been more vulnerable than ever. Protecting their rights has been a major focus of

217. Appellant's Initial Brief at 5, *Freeman*, 924 So. 2d at 48 (No. 02-2828).

218. *Id.* at 5, 7.

219. *Id.* at 11-12, 32 n.27.

220. *Id.* at 10.

221. ACLU Press Release, ACLU Asks Florida Court to Reinstate Suspended Driver's License, *supra* note 211.

222. See generally DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* (2003).

223. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) ("Although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.").

224. See *supra* text accompanying notes 15-23.

the ACLU's Women's Rights Project.²²⁵ This is one of several areas where the ACLU has been able to make innovative use of the burgeoning new international human rights guarantees and forums,²²⁶ for example, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families,²²⁷ which went into effect in 2003, and the U.N. Special Rapporteur on Migrant Workers.

In addition to invoking these international human rights remedies, the ACLU's many other strategies for seeking broader protections for immigrant women workers include lawsuits on behalf of individual women against particular employers.²²⁸ These lawsuits seek not only to secure justice for the specific women who are plaintiffs in the cases, but also to send the general message that employers cannot exploit their immigrant women workers with impunity.²²⁹ Most recently, in the fall of 2006, a jury in New York awarded substantial compensatory and punitive damages to three Latina immigrant workers who were assaulted and sexually harassed by a Manhattan employer.²³⁰ Likewise, a couple months before that, the ACLU Women's Rights Project settled a federal lawsuit against a restaurant in New Jersey by Chinese waitresses who had been subjected to physical and emotional abuse and who had been paid only \$120 per month for nearly 300 hours of work,²³¹ which comes to only forty cents per hour.

The ACLU's Women's Rights Project highlighted this work on behalf of immigrant women workers in its latest annual report, which was dedicated to Justice Ruth Bader Ginsburg in honor of her twenty-fifth anniversary as a federal judge.²³² Justice Ginsburg has strongly encouraged this work.²³³ In

225. See generally HUBBARD, *supra* note 137.

226. See generally ACLU Human Rights Project, <http://www.aclu.org/intlhumanrights/index.html> (last visited May 15, 2007).

227. See generally INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES (1990), *available at* <http://www.ohchr.org/english/law/pdf/cmw.pdf>.

228. See, e.g., Press Release, ACLU, Jury Sides with Women Workers, ACLU in Harassment Case (Sept. 29, 2006), <http://www.aclu.org/womensrights/employ/26966prs20060929.html> [hereinafter ACLU Press Release, Jury Sides with Women Workers]; Press Release, ACLU, New Jersey Chinese Restaurant Settles Waitress Exploitation Lawsuit Brought by ACLU (May 2, 2006) <http://www.aclu.org/womensrights/employ/25392prs20060502.html> [hereinafter ACLU Press Release, New Jersey Chinese Restaurant Settles Waitress Exploitation Lawsuit].

229. See, e.g., *id.*

230. ACLU Press Release, Jury Sides with Women Workers, *supra* note 228.

231. ACLU Press Release, New Jersey Chinese Restaurant Settles Waitress Exploitation Lawsuit, *supra* note 228.

232. See HUBBARD, *supra* note 137, at v.

233. See *id.*

her gracious thank-you note to her successor, the Project's current Director, Justice Ginsburg said that our immigrant working women clients are "the most vulnerable . . . women . . . too long forgotten [and] ignored."²³⁴

IX. CONCLUSION

I would like to conclude with two pertinent statements from two United States Supreme Court Justices. In the spirit of the Goodwin Lectures, I will quote the first two women to have graced the United States Supreme Court bench throughout its history, Justice Sandra Day O'Connor and Justice Ruth Bader Ginsburg.

The very first United States Supreme Court Justice to speak publicly after the 9/11 attacks was Justice O'Connor.²³⁵ Making an appearance at New York University Law School that had been scheduled before the terrorist attacks, she stressed the special role that all of us in the legal profession must play in our new post-9/11 world.²³⁶ In words that seemed prescient at the time, and that have proven to be so in the intervening years, she said that we lawyers "will help define how to maintain a fair and a just society with a strong rule of law at a time when many are more concerned with safety and . . . vengeance."²³⁷

More recently, Justice Ginsburg was being honored for her towering contributions to women's rights.²³⁸ After her opening remarks, someone in the audience asked her if people's rights are endangered by the domestic war on terrorism.²³⁹ In response, she stressed that "an active public" had made the difference in ensuring women's rights.²⁴⁰ In other words, she was saying the reduction in gender discrimination, to which she signally contributed through her pioneering litigation as the Founding Director of the ACLU's Women's Rights Project, ultimately depended on engagement by "We the People," to quote the Constitution's first three words.²⁴¹ As in all law reform movements, many initiatives come from the citizenry, including legislative

234. *Id.* at vii.

235. Linda Greenhouse, *In New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001, at B5.

236. *See id.*

237. *Id.*

238. Gina Holland, *Ginsburg: Don't Be Apathetic About Loss of Freedom*, CAPITOL HILL BLUE, Jan. 30, 2004, http://www.capitolhillblue.com/news/publish/What_Price_Freedom_22/Ginsburg_Don_t_Be_Apathetic_About_Loss_of_Freedom_3986_printer.shtml.

239. *Id.*

240. *Id.*

241. *Id.*; see also U.S. CONST. pmbl.

reforms and constitutional amendments.²⁴² Moreover, even litigation victories are only meaningful if engaged members of the public are aware of, and exercise, their newly recognized rights.²⁴³

Justice Ginsburg then drew an analogy between this aspect of the women's rights movement and the current context of post-9/11 civil liberties.²⁴⁴ In her words: "On important issues, like the balance between liberty and security, if the public doesn't care, then the security side is going to outweigh the other."²⁴⁵ But "[t]hat would change," she said, "if people come forward and say we are proud to live in the USA, a land that has been more free, and we want to keep it that way."²⁴⁶

In short, to combine the wisdom of our first two female Justices, we members of the legal profession all have a special opportunity—and responsibility—to come forward, as both lawyers and citizens, to uphold the rule of law that has kept our great country both safe and free.

242. See generally ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 564 (Harvard Univ. Press 1954) (1941).

243. See *id.* at 564 ("In the long run, the public gets just as much freedom of speech as it really wants.").

244. See Holland, *supra* note 238.

245. *Id.*

246. *Id.*