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# Excepted Remarks of Nadine Strossen In the Aftermath of September 11: Defending Civil Liberties in the Nation's Capital: Other Issues

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## EXCERPTED REMARKS OF NADINE STROSSEN\*

I'm very excited about cultivating the next crop of public interest lawyers. Hopefully, many of you will dedicate your talents and efforts to the ACLU. But whatever you choose to do with your education, I can tell you this: It will be not only for the good of the public, but it will really be for your good, personally.

I can't help evangelizing as somebody who has been practicing law for decades now. So many lawyers are so unhappy, so frustrated, so bored. A couple of years ago, I went to my 20th law school reunion at Harvard Law School. My classmates are people who are at the top of their profession in every conventional way, earning piles of money, heads of major Wall Street law firms, top government officials. Our class is very frank with each other. People don't come to the reunion to brag. They come to visit, commiserate, plan—"Okay so what if we're X years old? You know, in a few more years, what will we do that's even more rewarding?"

At the reunion the question was raised, "How many of you are satisfied with what you are doing?" Of course, my hand shot up, but almost no one else's did. The ones whose hands did go up, interestingly, were the people who were either in public interest law, or teaching, or, in many cases, in government. I would like to emphasize that whatever your passion is, you really owe it to yourself to take the incredible opportunity and power that comes from having a law degree, and apply it not only to serving your clients, which is very important, not only to serving yourself and your family, which is very important, but also to using it to advance your concept of the public good. You have so much power by virtue of your legal education and your law degree, so use it. That is what this law school is encouraging you all to do. So I am as enthusiastic as your own dean.

I'd like to make some remarks about what the ACLU's work has been since that horrendous day of September 11, when we launched our Safe and Free campaign, believing that in this great country, we deserve to be, and can be, both safe and free. What is really exciting is that, especially in the last half year or so, there has been enormous momentum behind our campaign, that has been supported by an incredibly diverse coalition, completely across the political spectrum, completely across the ideological spectrum, all across the country, of concerned individuals who are questioning and resisting the government's own "justified" cutbacks on

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\* Nadine Strossen is Professor of Law at New York Law School and President of the American Civil Liberties Union. These comments are excerpted from Professor Strossen's remarks on November 21, 2003 at a symposium entitled "*In the Aftermath of September 11: Defending Civil Liberties in the Nation's Capital.*" They are reprinted here with Professor Strossen's permission. However, she has not reviewed the written version, and all credit and responsibility for the transcription and editing lie with the University of the District of Columbia David A. Clarke School of Law Law Review.

civil liberties in the name of counter-terrorism, and exercising “eternal vigilance.” The eternal vigilance they speak of comes from the famous Thomas Jefferson quote, “Eternal vigilance is the price of liberty.”

But eternal vigilance is *also* the price of security. Just the fact that we assign this label in our efforts against terrorism is no guarantee that it actually is going to be effective in increasing our safety and security. Too many measures that have that label, in fact, turn out to be just an illusion of security, a politically appealing quick-fix, so that politicians can give their constituents the satisfaction that they are doing something. But the something they are doing may, in fact, achieve nothing more than countering our freedom, without, in fact, countering our terrorism.

I’m going to ask you a riddle: You all know I’ve been doing a lot of traveling lately. The place I just came from, where I was this morning and spoke last night, is the state than can claim to be the most pro-civil liberties, the most truly patriotic, in terms of resisting unjustifiable government over-reaching. Every single member of this state’s congressional delegation, both senators and 100% of its members of the House of Representatives have voted for reform legislation to cut back on the USA Patriot Act’s unjustifiable over-reaching.

Who is going to guess which state? It’s Idaho! One of the most conservative Republican states is solidly opposing the extreme measures of the Patriot Act, because this is not a partisan issue.

We shouldn’t be surprised that so much of the resistance is coming from within the President’s own party, including colleagues of Attorney General John Ashcroft.

This is very important because the administration has been trying to dismiss the increasingly strong resistance as mere partisan sniping.

In fact, there really have been enormous gains. I want to give credit to some of the students here who have worked at the ACLU and others to participate in this extraordinarily successful community resolution movement to resist over-reaching by the federal government. It is a movement that is grounded in state’s rights, as well as individual rights. I know that here in this area, Montgomery County [Maryland] passed one of these resolutions. Across the country, as of Monday, which is the last time I checked, these resolutions had been passed by 212 local governments, towns, counties, villages, cities, and 3 states, in a total of 35 states, representing almost 27 million people.

And I have to tell you, this resonates not only in your local community, but it also has an enormous impact in terms of national politics. Members of Congress are getting very nervous, when they voted for the Patriot Act and they see their constituents battling against it.

I recently was at a hearing, testifying before the Senate Judiciary Committee about the enforcement of the Patriot Act and other security measures. We had four civil liberties people and two government supporters, including the ubiquitous Viet Dinh, who now has gone back to teaching at Georgetown Law School. He is widely described, and he acknowledges, that he is the major author of the USA Patriot Act. He is ubiquitous in large part because the Attorney General refuses to make appearances except before hand-picked audiences of law enforcement officials, military officers and others who would be expected to be more sympathetic to him. I have to tell you that even the Republicans on that Committee were frothing at the mouth with anger and frustration at the United States Attorney General who has enough time to go on a Patriot Act road show, but does not have the time to accept repeated invitations to appear before them in their oversight capacity to answer their questions, on behalf of we the people, about how the Patriot Act's powers are being used.

The Committee asked law enforcement officials and government representatives—which of your powers under the Patriot Act and other post-9/11 measures have you found helpful or necessary in order to increase the effectiveness of your efforts to prevent terrorism in the future? The law enforcement and government representatives replied, citing some provisions.

Then the Committee asked us civil libertarian critics from across the political spectrum—which post-9/11 measures do you criticize as violating civil liberties and as not being necessary for the war on terrorism? And you know what? We were talking about two completely different categories. I think this is a very, very important point to note. We have no problems with the vast majority of the provisions of the Patriot Act. There are many common sense provisions, everything from hiring more translators who can actually speak Arabic, having computers that actually function. These are not controversial provisions.

What was so striking is that what the government is hyping as the effective provisions of the Patriot Act are a completely different set of provisions than the ones that we are challenging. So why can't we have common ground, and come together around the SAFE Act? There is some other reform legislation that could tailor back what we criticize completely separate from what our government says that it needs. So I'm very optimistic.

After great pressure was applied to John Ashcroft and the Department of Justice to get information about how often the government had actually used these new powers under Section 215 to gather secret information from libraries or bookstores, he finally agreed to reveal the number. And he revealed that these powers had *never once* been used. This provides further evidence for the fact that the provisions that we are criticizing as unjustifiable intrusions of privacy are not those actually needed and used by the government.

Now roll back to two days after September 11, that is when the Attorney General started saying to Congress, "You have to pass this law, including Section 215. If you try to tinker with it, and we have one terrorist attack, then blood will be on your hands because we absolutely need this power to defend this country against another terrorist attack."

Two years later, in the most sustained, massive anti-terrorist campaign in the entire history of this country, we have not needed to use that power once. So how can he tell us with a straight face that we would endanger the security of this country if we repealed that power?

I am very optimistic. But I am optimistic in a way that I don't want any of you to feel that we can rest on our laurels. Because despite, or maybe because of all of the criticism and rising opposition, the way that this administration is responding is by constantly pressing for even more powers. Section 215 is an issue because, as I mentioned, a judge really doesn't have meaningful oversight. A government agent simply has to allege that the information is sought for a terrorist investigation and then the judge must issue an order.

There is also another provision in the USA Patriot Act that, for some reason, has been much less publicized, that's even more pernicious. It's called Section 505. It's sometimes referred to as Administrative Subpoenas or National Security Subpoenas. Under this provision, the FBI doesn't even have to go to a court at all. The FBI, completely on its own initiative, can gain access to certain financial records held by our banks and credit unions.

I don't know how many of you follow the news carefully. Yesterday, Congress passed a sweeping new expansion to that power, which most members of Congress hadn't noticed until they arrived to vote yesterday. This provision expands the number and kind of records that the government can get without even going to a judge at all.

There was enormous resistance, although unfortunately the measure did pass. But I think the resistance is very, very significant. The measure was passed as part of the 2004 Intelligence Budget, which apparently is something that usually

sails through with no opposition at all. Yesterday, just because of the one provision expanding surveillance, there was substantial resistance, more than one third of the members of the House voted against it. It was a vote of 264 to 163. Among those who voted against it were 15 conservative Republicans. Again, I wished those opposing the measure had triumphed, but looking at the glass half-full, as I always do—as an activist you have to be an optimist—this is extraordinary resistance to a budget that usually slides through.

As you know, I've been criticizing John Ashcroft. The ACLU is a politically non-partisan organization. Believe me, when Janet Reno was Attorney General, we surely criticized her. And one historical context, I want to point out especially to the students here, is that in fairness, if you look through American history, every single time there has been a national security crisis, no matter who is president, no matter who is attorney general, no matter what their political party or philosophical ideology, they have always acted exactly the same way, completely predictably, increasing power to the maximum. To use the most recent example, the biggest terrorist attack before the 9/11 attacks was, of course, the Oklahoma City bombing, and then-President Bill Clinton and then-Attorney General Janet Reno reacted in much the same way that the current attorney general and president have reacted, namely by immediately proposing and pressuring Congress to pass, with minimal debate and deliberation, a sweeping new law that gave them enormous new powers to combat terrorism. What we got in the Clinton administration, although we fought against it—again with an ideologically diverse coalition—what we got was, "Listen to me on this one."

In 1996, the Clinton/Reno bill gave us between 50 and 60 new federal death penalty crimes. I mention this to underscore the point that I think it oversimplifies the problem if we overly demonize George Bush and John Ashcroft administration. We also must be critical of all of those members of Congress who voted for the Patriot Act, since they did not have to do so.

I happened to be in Washington myself on September 11. The head of the ACLU's Legislative Office, a fabulous woman, Laura Murphy, immediately started calling together the analyzers with whom we had worked in countering the 1996 anti-terrorism law. And as I look back on that now, in retrospect, it's amazing to me that this could have been done so quickly at a time when this city was still in a state of paralysis and chaos. We had spearheaded a coalition of 180 citizen's groups that had a press conference at the National Press Club in Washington D.C., having signed onto *10 Principles in Defense of Liberty* at the time of National Crisis. Now this coalition included groups ranging from People for the American Way to the Eagle Forum. We had Americans for Democratic Action and Gun Owners of American, the American Conservative Union and Common

Cause, racial groups and religious groups. It literally was a cross-section of this country.

At the time that they were having the Press Club conference, I was in New York, and I got a call from the head of the New York bureau of National Public Radio, who was beside herself. She said, "Nadine, I can't believe this. No two of these groups have ever agreed on one principle. How could you ever get 180 of them to agree on 10 principles?" I am happy to tell you that this coalition has hung tight ever since then. This means that when a new proposal comes out from the government that intrudes on individual privacy without significant payoffs in terms of national security, we are able to say this is not just civil libertarians who oppose this. It's also the gun and the religious organizations. So far it has been incredibly effective.

I want to read you just a couple of statements from some of our strange bedfellows. One comes from a Republican member of Congress, who is actually a member of the House Republican leadership. He has denounced the Patriot Act, although he actually voted for it. It's embarrassing to do this, but I think it's laudable. We can say you were acting at a time of understandable panic and crisis, but better late than never. We can still repair the damage. And this example is Alaska Congressman Don Young, a member of the House republican leadership. Back in February, here's what he said about the Patriot Act. He said, "I know everybody voted for it, but it was stupid. It was emotional voting. We didn't study it. It was the worst piece of legislation we ever passed."

I heard again from Dean Shelley Broderick that the UDC School of Law has a Second Amendment group. Its members may be pleased to know that one of our supporters is the National Rifle Association, NRA. Now, the NRA has no better friend in government than John Ashcroft. The Second Amendment seems to be the one constitutional right that Ashcroft deeply believes in. Even so, even having campaigned for him to be appointed as Attorney General, as did the American Family Association, the NRA is *still* criticizing his over-reaching. Here's what they sent to NRA members: "Maybe you think that with President George W. Bush in the White House, everything is safe. You think you can put aside your principles 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."

We often hear the saying that, "Oh, I'd be willing to give up my freedom in order to gain security." But the truth is that we are willing to give up *other people's* freedom in order to gain a sense of security and the delusion of security. I'm sure David [Cole, symposium keynote speaker] talked to you about that.

I think the best statement of the ACLU's underlying philosophy, which applies here so well, is that all rights are indivisible. If anybody's right is violated, then nobody is safe. Therefore, even for selfish reasons, we have to identify with the plight of the young Muslim immigrants from Arab countries who are disproportionately having their rights violated. To me, the most powerful statement of that idea was from an ACLU colleague of mine, civil liberties lawyer Stephen Rohde, author of *American Words of Freedom*. He did a paraphrase of the famous prose poem, *Then They Came for Me*, written in 1937 by the Reverend Martin Niemoeller about Nazi Germany. Stephen Rohde paraphrases this poem by plugging into it a litany of actual violations, actual policies that have occurred post-9/11. So I'd like to end by reading Stephen Rohde's poem.

### Then They Came For Me

First they came for the Muslims, and I didn't speak up because I wasn't a Muslim.

Then they came for the immigrants, detaining them indefinitely solely upon the certification of the Attorney General, and I didn't speak up because I wasn't an immigrant.

Then they came to eavesdrop on suspects consulting with their attorneys, and I didn't speak up because I wasn't a suspect.

Then they came to prosecute non-citizens before secret military commissions, and I didn't speak up because I wasn't a non-citizen.

Then they came to enter homes and offices for unannounced "sneak and peak" searches, and I didn't speak up because I had nothing to hide.

Then they came to reinstate Cointelpro and resume the infiltration and surveillance of domestic religious and political groups, and I didn't speak up because I no longer participated in any groups.

Then they came to arrest American citizens and hold them indefinitely without any charges and without access to lawyers, and I didn't speak up because I would never be arrested.

Then they came to institute TIPS (Terrorism Information and Prevention System) recruiting citizens to spy on other citizens, and I didn't speak up because I was afraid.

Then they came to institute Total Information Awareness, collecting private data on every man, woman and child in America, and I didn't speak up because I couldn't do anything about it.

Then they came for immigrants and students from selective countries luring them under the requirement of "special registration" as a ruse to seize them and detain them, and I didn't speak up because I was not required to register.

Then they came for anyone who objected to government policy because it only aided the terrorists and gave ammunition to America's enemies, and I didn't speak up . . . because I didn't speak up.

Then they came for me, and by that time, no one was left to speak up.

It is up to all of us to speak up now, before it is too late.

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