

2003

## Preserving Safety and Freedom Post 9-11 Address

Nadine Strossen  
*New York Law School*

Follow this and additional works at: [http://digitalcommons.nyls.edu/fac\\_articles\\_chapters](http://digitalcommons.nyls.edu/fac_articles_chapters)

---

### Recommended Citation

3 JIJS 1 (2003)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

## **PRESERVING SAFETY AND FREEDOM POST 9-11**

**Address by Nadine Strossen, President of the ACLU  
To the Counter-Terrorism and Civil Liberties Conference,  
CMSU, March 19, 2003\***

I want to commend the conference organizers for entitling it "Counter-Terrorism and Civil Liberties" and I emphasize the "and" not "versus" civil liberties. As the ACLU has proclaimed since September 11, 2001, we can and should be both safe and free. It would be tragic if we let the terrorists terrorize us into abandoning the very values they have attacked. As our Constitution decrees in its opening words, its preamble, "We the People," adopted that Constitution precisely for these mutually reinforcing purposes to "provide for the common defense" and "to secure the blessings of liberty to ourselves and our posterity." I think it so significant that the Constitution uses that word "secure" and a concept of security in referring to liberty. This is not a zero sum game. Cutbacks on our freedoms do not necessarily guarantee gains to our safety and conversely there are measures that can enhance our safety without cutting back on our freedom.

Unfortunately too many measures that are now touted as countering terrorism are in fact the worst of both worlds: they do demonstrably decrease freedom, but they do not demonstrably increase safety. Worse yet, some of these measures may well be counterproductive in terms of national security, so they are being critiqued not only by civil libertarians but also by national security and law enforcement experts. Moreover, the ACLU's allies in fighting the unjustified measures span the entire political and ideological spectrums including prominent elected officials of both major parties and an unprecedentedly broad and diverse coalition of leading citizens groups from the most liberal to the most conservative. I stress that because it underscores that what we are defending are indeed core, traditional, American values that are enshrined in our Constitution. Summed up in plain English these Constitutional principles require only what is just demanded by good old fashioned common sense, namely that we've got to look behind the label of any vaunted security measure to ensure that it really maximizes national security with minimal cost to civil liberty.

For those of you who are students of constitutional law you know that it's just the plain language version of the constitutional strict scrutiny test, right? Does it really maximize such a compelling government interest as national security in a way that is narrowly tailored as least restrictive possible on civil liberties? Under this constitutional and common sense analysis many post 9-11 measures are justified. They do effectively enhance safety with minimal costs to liberty. That's true for instance of some new aviation security measures, which I am very familiar with and fond of many of them, such as fortifying cockpit doors, using sky marshals on flights, and not allowing you to check luggage without getting on the plane yourself.

In contrast, though, too many post 9-11 measures only make us less free without making us more safe. For an excellent overview of these I commend an ACLU report whose title says it all. The title is, "Insatiable Appetite: The Government's Unceasing Demands for New and Unnecessary Powers After September 11<sup>th</sup>." Unfortunately consistent with that title we constantly have to update the report. The Government's appetite for unneeded new powers is

---

\* This transcribed version of Nadine Strossen's speech to the Counter-Terrorism & Civil Liberties Conference, March 19, 2003 is printed here by permission of Ms. Strossen. Ms. Strossen has not reviewed this transcription, all responsibility for the transcription lies with Donald H. Wallace. Copyright Nadine Strossen, 2003.

apparently insatiable. In the past few weeks we've been learning about yet another ominous plan to expand these powers still further in a draft law whose official name is the "Domestic Security Enhancement Act," but which as many of you know, has been nicknamed "Patriot II." In other words the sequel to the first massive post 9-11 law, which was called the "U.S.A Patriot Act."

"Patriot II" to me sounds like the name of a sequel to a horror movie and it is indeed the sequel to a horrible move, if I may say so. And not just me, let me quote many of the other critics of this move. Interestingly enough, the first is somebody who has been the harshest and most persistent critic of government overreaching, in particular executive branch overreaching, since September 11<sup>th</sup>. And that very significantly is William Safire who is a veteran of the Nixon administration. The administration which gave rise to the term "The Imperial Presidency," and yet for Safire who you mostly know as a syndicated columnist for the New York Times, even for him this administration, this executive branch has gone too far. And of the many measures that he has criticized he was first out of the box in criticizing "Patriot II," but he's in very good company. Even such a conservative newspaper as the New York Sun condemned this draconian law as "a catalogue of authoritarianism that runs counter to the basic tenets of modern democracy." To cite just one example, it would expressly authorize secret arrests for the very first time in United States history. That is literally the kind of disappearances that we saw (rather did not see, more correctly) during Argentina's so-called "dirty war."

The Justice Department had been drafting this new law in secret over the past several months but had not released it to the public or even to key members of Congress. After it was leaked last month, experts concurred that the administration likely planned to introduce the law after we were at war with Iraq or in another acute crisis akin to the immediate post 9-11 aftermath in which "Patriot I" was rushed through Congress in record time with almost no hearings or debate. Indeed, when most members of Congress admitted that they did not even have the time to read this massive new law before voting on it. So these measures not only violate basic individual freedoms they also violate core aspects of our democratic structure of government. In particular, the essential checks and balances, congressional deliberation, and oversight of executive branch action.

Just the day before yesterday, on Monday, the ACLU joined with an unusually broad coalition of citizen organizations. We sent a letter to every single member of Congress urging them not be stampeded again. Not to do with Patriot II what they did with Patriot I and not to just rubber stamp it, in effect, in the currently mounting crisis atmosphere with war looming and also with higher and higher terrorism alerts. Our strange bedfellows coalition ranged from such ultra-liberal groups as Common Cause, the National Lawyer's Guild, People for the American Way, to such ultra-conservative groups as the American Conservative Union, Americans for Tax Reform, Gun Owners of America. The coalition also extends to many religious groups including the American Baptist Churches U.S.A, the Presbyterian Church U.S.A, and the Commission on Social Action of Reformed Judaism.

I'd like to read just one key passage from this broad coalition's letter to Congress. And I've named just a few. There are dozens and dozens of organizations and the sign-on list continues. Here's what we all said in part.

"Like all Americans we are deeply concerned by the continuing terrorist threats against our country and like a growing number of Americans of every political persuasion, we are also worried that Patriot II would be the wrong remedy for the ongoing problem. The bill contains a multitude of new and sweeping law enforcement and intelligence gathering powers many of which are not related to terrorism, that would severely dilute or undermine many basic constitutional rights, as well as

disturb our unique system of checks and balances. We encourage you to oppose such legislation or any other legislation unnecessarily expanding the powers the government has already obtained in the U.S.A Patriot Act. Instead we recommend that you ask the administration to provide Congress and the public with more information about its use of the powers already granted in the U.S.A Patriot Act.”

For the ACLU section-by-section analysis of this large and dangerous new measure, as well as details about the many other post 9-11 excesses, please visit our award winning website at [www.aclu.org](http://www.aclu.org). I have in fact gotten many compliments about it from people, journalists, scholars, and activists, all across the political spectrum. Most importantly this site explains how you can add your voice and your skills to our campaign to keep our country both safe and free.

In my limited time, I'd like to list just a few more examples of the government's unjustified post 9-11 power grabs. The ominously but accurately named “Total Information Awareness Program.” I mean this Orwellian name sounds like something that a civil libertarian would have concocted to raise people's fears, but in fact it is the name that the government itself gave to this program, all too accurately: “Total Information Awareness.” Even such a pro-government pundit as John McLaughlin for, in his words, “creating an American Gestapo” has condemned this. Secret military tribunals, which have been denounced even by such a conservative national security hawk as N.Y. Times columnist William Safire who called them “kangaroo courts.” Giving the President what he called “dictatorial power.” We've seen secret arrests, secret evidence, secret trials and secret deportations, which many judges have decried, in the ACLU's successful lawsuits against such procedures, as “odious to a democracy.” New FBI guidelines that allow agents to spy on all of us without even any suspicion of any wrongdoing, just on the basis of our political or religious beliefs which even conservative Republican James Sensenbrenner deplored as “going back to the bad old days when the FBI was spying on people like Martin Luther King.” The TIPS program that came to light last summer, which will turn all of us into spies against each other, was promptly condemned by then-majority leader Dick Armey, the conservative Texas Republican as “reminiscent of Soviet Russia,” and the exercise of unilateral presidential power to imprison an American citizen indefinitely without trial, without charge and without access to counsel. All of this without meaningful judicial review, which even former CIA director James Woolsey condemned as “something we would expect in Afghanistan under the Taliban not in our own beloved country.”

Now with such mounting unwarranted assaults on our rights we are living in unprecedented and dangerous times, dangerous not only to our nation's physical security but equally dangerous to the heart and soul of our nation, our highest ideals of liberty and justice for all. To be sure, these ideals have never been matched by reality. Before September 11, though, we had been making significant progress on many important fronts. For example, there was a growing consensus around the country and again across the ideological spectrum against racial profiling. We even had pledges, commitments to eliminate it from both George W. Bush, during his presidential campaign and John Ashcroft, during hearings on his confirmation to become attorney general. Yet since 9-11 both Bush and Ashcroft and others have constantly targeted certain people. Not because of what they do but because of who they are, namely young Muslim men from certain countries. People in these groups have faced all manner of discriminatory harassing invasions of their freedom and basic human dignity including repeated mass registrations that will take place yet again the day after tomorrow and also including prolonged incarceration. This profiling violates individual rights, of course, since it substitutes discriminatory stereotypes and guilt by association for individualized suspicion.

So it's not surprising that civil libertarians have criticized it on principled grounds, but you might be surprised that counterterrorism experts also have criticized this profiling on pragmatic grounds, on national security grounds. This concern was raised for instance by a group of senior U.S. intelligence specialists in a memo sent to law enforcement agencies worldwide shortly after September 11. The memo warns that looking for someone that fits a demographic profile is just not as useful as looking for someone who acts suspiciously. Indeed the memo even suggested that over-reliance on profiles might be one of the reasons for our government's tragic failure to prevent the September 11 attacks. According to these officials, "any profile based on personal characteristics draws an investigator's attention toward too many innocent people and away from too many dangerous ones." Most recently, U.S. intelligence agencies have expressed mounting concern that future terrorist attacks may well involve Al Qaida members from Asia or Africa expressly to elude the ethnic profiles that they know U.S. personnel have been using. Now while young Muslim and Arabic men have been discriminatorily forced to disproportionately sacrifice their freedoms for our safety all of us are significantly less free than we were on 9-11-01 without corresponding gain to our safety.

The government can now spy on the most personal transactions and communications of each and every one of you --and I mean you literally, no matter who you are--essentially whenever it wants with only the most minimal judicial oversight. And you will never know for instance that the government has your library records or your medical records or your financial records or your web surfing records. Since the Patriot Act bars whoever gives your data to the government from telling you that it has done so.

To add insult to injury all of these assaults on our rights have been strongly criticized by law enforcement and security experts who maintain that they are dangerous diversions from the real problems that caused the 9-11 catastrophe and the real solutions to those problems that could give us some real protection against terrorism. One prime example here is veteran FBI agent Coleen Rowley who has been widely hailed, including by FBI director Robert Mueller and many members of Congress on both sides of the aisle. Thanks to her courageous whistle-blowing letter to FBI director Mueller last spring we know that the cause of the 9-11 disaster was not that the government lacked power to investigate or disrupt potential terrorist threats, rather the problem was that FBI officials did not effectively analyze and act on the massive information they already had under their already enormous powers. If you haven't yet done so I urge you to read Coleen Rowley's historic letter.<sup>1</sup> Time Magazine has posted most of it online calling it the "bomb shell letter" and naming her along with two other corporate whistle blowers as the Person of the Year. The letter underscores that there was no justification for the sweeping new surveillance powers in the U.S.A Patriot Act and other post 9-11 measures.

And, by the way, I should emphasize that that description "sweeping new powers" does not come from me. That was the term that was used by Attorney General John Ashcroft who was the main protagonist in favor of the law. Here's how Time Magazine paraphrased that very important conclusion about the lack of a need for sweeping new powers as it was discussing Coleen Rowley's bombshell letter. In very strong language Time Magazine wrote

"Like no other document to emerge from the firestorm over the mistakes and missed signals that led to September 11, the Rowley memo cast a searing light into the depths of government ineptitude. Not lack of power, mind you, ineptitude. In Washington where the FBI and CIA may be criticized but are allowed to clean up their own messes as they see fit, the memo sent shudders through the establishment because it

---

<sup>1</sup> <http://www.time.com/time/covers/1101020603/memo.html>

came from within. Her letter amounts to a colossal indictment of our chief law enforcement agency. It raises serious doubts about whether the FBI is capable of protecting the public and whether it deserves the public's trust."

Now significantly at the very same moment that Agent Rowley was testifying before Congress last spring, President Bush suddenly held a nationally televised speech in which he first called for the new Department of Homeland Security, thus doing a complete about face. Until then he had staunchly opposed this huge new agency. Iowa's Republican Senator Charles Grassley blasted this move as a deliberate attempt to draw attention away from Agent Rowley's devastating disclosures. After he reviewed Coleen Rowley's letters, Senator Grassley condemned the government's missteps in extremely harsh terms. For example, here's something he said and I know from having read her letter many times that he's paraphrasing something in her letter. But Senator Grassley said, "I don't blame FBI agents in Minnesota for wondering if there were unwitting collaborators of Osama bin Laden sitting around at FBI headquarters." Now that's an extremely strong criticism, but I want to underscore what the source of it is. That does not come from me. That does not come from the ACLU. It doesn't even come from Senator Grassley. That comes from field agents. Veteran, experienced field agents of the FBI itself. In other words, hands-on experts who are fully familiar both with the Bureau and with our counter-intelligence challenges.

Similarly withering critiques were made from the opposite end of the political spectrum by the Pulitzer Prize winning New York Times columnist Maureen Dowd. Now she wrote with her characteristic irony:

"With the most daring reorganization of government in half a century, George W. Bush hopes to protect something he holds dear: himself. After weeks of scalding revelations about ... warnings prefiguring the 9/11 attacks that were ignored by the U.S. government, the president created the Department of Political Security. Or, as the White House calls it for public consumption, the Department of Homeland Security. [In an effort to] knock ... Coleen Rowley off front pages, ... the minimalist Texan who had sneered about the larded federal bureaucracy all through his presidential campaign stepped before the cameras to slather on a little more lard. ... [All that same day] Special Agent Rowley and [FBI Director] Mueller [had been making it clear in Senate] testimony ... that there is no point in creating a huge new department of dysfunction to gather more intelligence on terrorists when counterterrorism agents don't even bother to read, analyze and disseminate the torrent of intelligence they already [have]."<sup>2</sup>

Now I'm stressing these Rowley revelations because the administration has been too successful in its diversionary tactics, burying the bureaucratic blunders and continuing to scapegoat instead civil liberties, personal privacy. Since these tactics ignore the real causes of the catastrophe, they are doubly dangerous, endangering our security as well as our liberty. That very point was made by Coleen Rowley herself in another letter to FBI chief Robert Mueller just last month, a couple of weeks ago. Agent Rowley's recent letter concluded that too many post 9-11 measures have sacrificed both security and liberty merely for "PR"--public relations and political purposes. For instance she cited the emphasis on high profile criminal prosecutions against Zacarias Moussaoui and Richard Reid as opposed to low profile but high impact interrogation of them for

---

<sup>2</sup> Dowd, Maureen (June 9, 2002, Sunday, Late Edition). Dept. of Political Security. The New York Times, (Section 4, p. 15).

counterintelligence purposes, to help protect us against future attacks.

Likewise, she stressed that the vast majority of the 1,000 plus persons “detained,” and that was in quotes because they were in prison, but “detained” was the word that’s used. In the wake of 9-11 the vast majority didn’t even have any information about terrorism let alone any involvement with it. Instead, most of them were charged with violating immigration laws such as overstaying their visas, and mind you, I do not condone any violation of any law whether it’s an immigrant who was out of compliance with immigration regulations or whether it is the Attorney General of the United States who is out of compliance with the U.S. Constitution. I condemn both of them equally, but one has to ask whether the punishment is proportionate to the crime here, or “pre-crime,” since the detained individuals were in prison long before they were even charged even with any visa violation.

As you listen to the pertinent portion of her latest letter, please bear in mind that Coleen Rowley is a respected life-long FBI official, politically conservative and tough on crime and surely not a card-carrying civil libertarian. And I’m sure, I know, from reading her letter that she and I do disagree on many key points; therefore I think it is very striking how much we agree on. From her very different perspective she makes many of the same kinds of critiques of the post 9-11 excesses that the ACLU has been making. She wrote:

“After 9-11 FBI headquarters encouraged more and more detentions for what seemed to be essentially PR purposes. Field offices were required to report daily the number of detentions in order to supply grist for statements on our progress in fighting terrorism. The balance between individual civil liberties and the need for effective investigation is hard to maintain even during so called normal times but from what I have observed particular vigilance may be required to head off undue pressure now to detain or round up the usual suspects--those of Arabic origin.”

These criticisms by Coleen Rowley have been loudly and repeatedly echoed by among others Senator Arlen Specter, Republican from Pennsylvania who has an extensive law enforcement background having served as Philadelphia’s district attorney. These criticisms also were endorsed last week by the conservative columnist Robert Novak, just last week. I do want to emphasize that by repeating these criticisms of somebody within the FBI who is in turn quoting other agents within the FBI, I certainly do not mean to malign the many brave men and women who are literally putting their lives on the line to protect our security. Indeed as you can probably tell, Coleen Rowley herself is a personal heroine of mine. But what I am very concerned about is her concerns that the dedicated agents in the field are being thwarted by bureaucratic considerations, by public relations considerations, and by political considerations that are coming from headquarters and from Washington D.C. political leadership.

I’d like to note now just one more of the many law enforcement and national security experts who have been highly critical of many post 9-11 measures as unjustifiably and unnecessarily infringing on our freedom. I’m referring to Bob Barr, who just ended his term as a member of Congress from Georgia and who is now working for the ACLU’s Safe and Free Campaign as a paid consultant. Barr, a conservative Republican, is a former U.S. attorney and former CIA official, with a solid tough on crime record. But along with many traditional conservatives, he has long been an ally of the ACLU and other privacy experts in wanting to strictly minimize government intrusion into and surveillance over private aspects of our lives. Many people find that counter-intuitive because they have a stereotype of civil libertarians as being liberal. In fact though, civil libertarianism, limiting government’s roles in our lives resonates very much with classical conservatism as much as it does with classical

liberalism. So Barr is somebody that we have in fact long worked with on these privacy issues. The same is true until recently with the House majority leader Dick Armye who is also in the process, now that he left Congress, of consulting with the ACLU on a paid basis on these post 9-11 Safe and Free issues. One thing that was very interesting was that Barr was one of the most outspoken resistors in Congress when John Ashcroft first tried to stampede Congress into passing the U.S.A Patriot Act. He initially tried to get it passed, literally with no debate; he almost succeeded. And one of the people who led the resistance for a long time was Bob Barr, specifically relying on his knowledge as a former U.S. attorney and CIA official. He said right after September 11 and right after Ashcroft initially tried to ram through U.S.A Patriot Act:

“The Department of Justice has sought many of these authorities on numerous other occasions, has been unsuccessful in obtaining them, and now seeks to take advantage of what is obviously an emergency situation.”

And you see the reason for the concern that the same strategy is what was being laid in place with respect to Patriot II. Have that on the shelf; don't introduce it until after we have yet another ratcheted-up panic, an understandable concern in time of war--heaven forbid another terrorist attack--then the same sequence would be expected with respect to Patriot II. So we're now trying to forestall all that.

Overreaching as the U.S. Patriot Act was it was of course only the beginning of the government's arrogation of pervasive, invasive new powers since September 11. There are many other examples that I could mention. Let me just mention one that I think is particularly interesting because of the widespread opposition it engendered, and that was the Attorney General's guidelines for investigation that will allow again infiltration and surveillance of political and religious meetings. The kinds of spying that did go on during the civil rights movement and anti-Vietnam war movement, and led to guidelines that checked that kind of invasion not only in privacy but also of 1<sup>st</sup> Amendment protected activities. Interestingly enough, the many critics of these new guidelines include even leaders of the so-called religious right organizations that have campaigned so hard for John Ashcroft to become Attorney General because they agreed with his positions on issues including abortion and gay rights. But when it comes to these issues they are very concerned. Let me quote, for example, the president of the Family Research Council, Ken Connor. He says, “it is important that we religious conservatives maintain a high degree of vigilance. We need to ask ourselves, how would our groups feel under these new rules?”

And I must say, every time that I'm in Missouri I guess I have to thank the people of this dear state for sharing John Ashcroft with us. The ACLU did a report shortly after the anniversary of 9-11 where we're kind of doing a historical overview of what had happened with government over-reaching since then and we traced it back to World War I which was the time when our organization was founded out of a series of very similar national crises, including terrorist attacks, bombs by anarchists all over the country, leading to the very same kinds of civil liberties violations. There are very uncanny parallels with the Palmer Raids: Mitchell Palmer, John Ashcroft. One thing I had not known about was Mitchell Palmer and John Ashcroft were both men who had been defeated in their attempt to be elected to the United States Senate. And, only after they were defeated in their senate races were they then appointed attorney general. Now, I have to stress that the ACLU is always non-partisan. We never endorse or oppose anybody for any office and believe me, when Janet Reno was attorney general and Bill Clinton was president and we had on their watch what was then the most horrendous terrorist attack on American soil, namely the Oklahoma City

bombing, they reacted predictably very much the same way that Ashcroft and Bush reacted by passing what became the 1996 Anti-Terrorism law that vastly reduced many cherished civil liberties, including habeas corpus. And, interestingly enough, the very broad left/right Republican/Democrat coalition that we immediately were able to re-energize after September 11, had initially been put together after the Oklahoma City bombings and we were working with folks such as Barr and Armev and gun owners' rights organizations and trying to resist what was mostly enacted as the 1996 Anti-Terrorism law and the few portions of it that we managed to stave off were among those that had been put on the shelf and then brought forward as the new Patriot Act.

All over the country I'm happy to say, as I've already indicated, quoting people like Ken Connor from the Family Research Council and many others, many people, not just leaders of organizations, but citizens are speaking up to challenge the government's unjustified over-reaching measures with a very positive impact. We've seen an extremely active and diverse grassroots movement that has spurred local governments all over the country to adopt resolutions, calling for the repeal of the excessive provisions in U.S.A Patriot Act. And, I'm sorry I did not look up whether Warrensburg is one of those communities. Does anybody here know? Not yet? I hope you have a movement going. You know, at last count, which I last looked at last week and it's probably increased since then, last week it was 60 cities have passed these resolutions. In the most diverse kinds of communities those that are stereotypically conservative, those that are quintessentially liberal and the communities, the population of the communities that are represented by the governments that have passed these resolutions are over six million now.

The ACLU is making it a real priority to work with community organizations all over the country to get these passed. For the first time in our history we have put a lot of money and a lot of resources into hiring a squadron of field organizers that work with local community groups all over the country, and we have in addition to the general field organizing efforts, we also have experts who are dealing specifically with the most targeted communities all over the country, namely the Muslim, Arab, and South Asian communities.

In addition to this grassroots organizing and our work in the legislative arena, we've also brought dozens of lawsuits to defend rights that have been threatened in the counter-terrorism campaign, challenging everything from suppression of the right to peaceful protest, to discrimination on the basis of religion, national origin and citizenship, to violation of religious freedom, to denial of access to information about vital government policies. On the whole, the courts are being more supportive of civil liberties than I would have expected, in contrast to past national security crises.

And I'd like to cite in my waning time just one example of government strategy that so far we are encountering extremely successfully in the courts. And that is the unprecedented shroud of secrecy that the government has thrown over every aspect of its post 9-11 investigation, including by the government's own count more than 1,200 individuals who were detained, incarcerated, imprisoned, in secret, some for many months in solitary confinement and apparently incommunicado. Many of them held on secret evidence and then subjected to secret deportation hearings from which everybody is automatically excluded.

As you know, the lawsuits challenging these various forms of government secrecy have been mostly successful and have led to very stirring pronouncements. I think the most famous pronouncement was one that was widely quoted from the 6<sup>th</sup> Circuit Court of Appeals striking down the blanket secrecy over deportation hearings and in a stirring opinion by Judge Damon Keith he said, "Democracy dies behind closed doors." Significantly, it looks as if that is going to be the first issue that goes to the United States Supreme Court to

give it an opportunity to weigh in on this very challenging issue that is the overarching theme of your conference. How can we both counter terrorism and maintain civil liberties? The ACLU filed a brief asking the Supreme Court to consider that issue, just two weeks ago. Given that there is now a split between two circuit courts, I do predict that the Supreme Court will hear that case. We obviously are cautiously optimistic about how we would fare in the United States Supreme Court, which, although it has not been the world's best court for civil liberties, has been generally good on 1<sup>st</sup> Amendment issues, and with justices across the ideological spectrum from Antonin Scalia and Clarence Thomas at one end to Ruth Bader Ginsburg and John Paul Stevens at the other end, all being generally very supportive of the peoples' right to information, especially about public affairs. Even such a pro-government justice as William H. Rehnquist, I think we have a very strong argument to make to him because he, to his credit, has been a very staunch champion of judicial independence, jealously guarding the power of the courts. Some would say the Court has too much power, not to mention a certain case from two years ago now. But that is something that would make somebody like Rehnquist bristle when you see the secrecy orders that are coming only from the executive branch of the government doing an end-run around the usual judicial review and the usual judicial prerogative to say that, in a particular case, the particular evidence is so highly sensitive that a portion of that case should be closed. Taking that power away from the courts might be something that would make even a pro-government conservative such as Rehnquist bristle.

So, I have been cautiously optimistic, but as I was coming here I got reports, including in a conversation with the Washington Post reporter as I was driving here, that Justice Scalia just got two free speech awards, interestingly enough, in Ohio, and he gave a speech that was picked up by the Associated Press in which he very strongly stressed that in times of war and a national security crisis that constitutional rights should be reduced to an absolute minimum and that what we are enjoying now is far more than the minimum, and he pledged himself to ensure that it was only the minimum that was protected. So, that was unfortunately a worrying straw in the wind.

But, I am at the end now and I have to end with something positive. That great philosopher Woody Allen was coming to the end of a talk and he said, "You know, I really want to end with something positive, but I can't think of anything positive to say. Would you settle for two negatives?" I really do have something positive. I am going to end with some stirring words that I found from some Supreme Court opinions over time from past national security crises, which I hope will inspire our current justices in our current crisis. These other cases come from times when we were also struggling to preserve national security and some courageous justices reminded us that our nation was dedicated to securing liberty, again that language from the preamble. At the very same time that it was facing its first and greatest struggle for sheer survival, namely during the Revolutionary War period, was when we dedicated ourselves to securing liberty, not only the national defense. These excerpts come from cases that span more than a century and three diverse national security crises.

First, during the Civil War, the Supreme Court declared:

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 government.<sup>3</sup>

---

<sup>3</sup> *Ex Parte Milligan*, 71 U.S. 2, 121 (1866).

And during the Great Depression, the Court said:

The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency.<sup>4</sup>

And finally, during the Cold War, the Court issued a warning that applies fully to the looming hot war we're all now facing. And I'll end with these words:

It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties -- the freedom of association -- which makes the defense of the Nation worthwhile.<sup>5</sup>

Thank you very much.

---

<sup>4</sup> *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934).

<sup>5</sup> *United States v. Robel*, 389 U.S. 258, 264 (1966).