

2005

Safety and Freedom: Common Concerns for
Conservatives, Libertarians, and Civil Libertarians
Law and Freedom: The Twenty-Fourth Annual
National Student Federalist Society Symposium on
Law and Public Policy - 2005

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Recommended Citation

29 Harv. J.L. & Pub. Pol'y 73 (2005-2006)

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SAFETY AND FREEDOM: COMMON CONCERNS FOR CONSERVATIVES, LIBERTARIANS, AND CIVIL LIBERTARIANS

NADINE STROSSEN*

I am happy to address this Symposium, and to be a regular speaker at many Federalist Society forums. I always start such presentations by reminding all Federalist Society audiences of your organization's libertarian founding principles, which could come straight from the ACLU's Policy Guide, and which are directly relevant to this panel's topic. Your mission statement's opening words proclaim: "The Federalist Society . . . is founded on the principle[] that the state exists to preserve freedom The Society seeks . . . reordering priorities within the legal system to place a premium on individual liberty" ¹ Also key to this panel's topic, your mission statement declares "that the separation of governmental powers is central to our Constitution" ²

In 1994, I was on a Federalist Society panel with one of your founding gurus, Irving Kristol. As usual, I recited these libertarian tenets of your group, and it sent him into a state of shock. Our discussion was published, so let me read you his exact response:

I am shocked to discover that the Federalist Society seems to have said somewhere that the State exists to preserve freedom. The Federalist Society should call a meeting immedi-

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1. The Federalist Society for Law and Public Policy Studies, *Our Purpose*, <http://www.fed-soc.org/ourpurpose.htm> (last visited Nov. 20, 2005).

2. *Id.*

ately and change that . . . You say that and you get yourself in the kind of trap that Ms. Strossen has now sprung.³

I periodically re-read your brochures and website with trepidation, worrying that you might have heeded Kristol's advice. So far, though, you have not done that. Therefore, you are again "trapped" when it comes to the topic of the present panel. And remember, it is not me who said that, but Irving Kristol!

Even putting aside Kristol's consternation over the libertarian tenets of the Federalist Society, which describes itself as "a group of conservatives and libertarians,"⁴ there would still be much common ground between our two organizations. Many conservatives, as well as libertarians, have agreed with the ACLU on this panel's topic: that too many post-9-11 measures have unjustifiably sacrificed our freedom without sufficiently advancing our security. Therefore, the extraordinarily diverse partners in our Safe *and* Free campaign have included individuals who are allied with both the libertarian and the conservative wings of the Federalist Society.⁵

As the Federalist Society's Twenty-Fourth Annual Student Symposium brochure states, members of this panel were invited to discuss our "legal and policy prescriptions for . . . balancing security concerns . . . with the protection of civil liberties."⁶ Federalist Society leaders regularly profess fidelity to the Constitution's text.⁷ I should think, then, that this text would provide the governing standards for Federalists in assessing how to "balance security concerns . . . with the protection of civil liberties." The Constitution's text has certainly guided civil libertarians' answers to these questions.

Concerning the scope of individual rights in national emergencies, the Constitution contains only one express limitation, on only one right, in only two specified types of national emer-

3. Irving Kristol, *Educating the Urban Poor: The (Only) Legitimate Function of the Public Schools*, 1 MICH. L. & POL'Y REV. 325, 325 (1996).

4. The Federalist Society for Law and Public Policy Studies, *supra* note 1.

5. See ACLU.org, *Conservative Voices Against the USA-PATRIOT Act*, Apr. 15, 2004, <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12632&c=206>.

6. Schedule, Harvard Federalist Society, Twenty-Fourth Annual Federalist Society Student Symposium (Feb. 25–26, 2005) (on file with the Harvard Journal of Law & Public Policy).

7. See Charles Krauthammer, *Return to Justice as Founders Saw It*, CHI. TRIB., June 13, 2005, § 1, at 17.

gencies: its provision empowering Congress to suspend the writ of habeas corpus.⁸ This “Suspension Clause” imposes a heavy burden of justification before Congress may suspend the writ, limiting the suspension power to “Cases of Rebellion or Invasion,” and even in such cases authorizing suspension only “when . . . the public Safety may *require* it.”⁹ Beyond the limited circumstances in which Congress may suspend the writ of habeas corpus, the Constitution provides no textual warrant for any further limits on rights just because the national security may be in peril. In the post-9-11 context, this crucial point was stressed by the staunch Federalist Society stalwart Justice Antonin Scalia in his *Hamdi* dissent.¹⁰ This key point also has been emphasized by influential judicial opinions arising from various national emergencies throughout U.S. history, from the Civil War¹¹ to the Great Depression¹² to the Korean War.¹³

8. U.S. CONST. art. I, § 9, cl. 2.

9. *Id.* (emphasis added).

10. *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’” (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring))).

11. 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 men than that any of its provisions can be suspended during any of the great exigencies of the government.

12. See *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 425 (1934):

[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 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.

13. See *Youngstown*, 343 U.S. at 649–50 (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

In short, apart from the writ of habeas corpus, the Constitution affords the same strong protection to individual rights during national crises as during any other time. For example, the government's power to invade individual privacy and freedom through any type of search and seizure, including any surveillance, should be subject to the Fourth Amendment's key requirements of individualized suspicion and judicial review.¹⁴ Likewise, the government's post-9-11 restrictions on other fundamental rights—including its many restrictions on First Amendment freedoms¹⁵—should be subject to strict judicial scrutiny. This means that the government bears the burden of demonstrating that the restriction is narrowly tailored to promote a purpose of compelling importance.

The government easily can satisfy the "compelling interest" aspect of strict scrutiny by showing that the purpose of any rights-restricting measure is to protect national security. It is, however, harder for the government to satisfy the appropriately heavy burden of demonstrating that the measure is sufficiently narrowly tailored: specifically, that the measure is necessary and that it is the least restrictive alternative. If the government could promote its national security concerns through alternative means that are less restrictive of fundamental rights, then it must do so.¹⁶ This rights-protective approach to civil liberties post-9-11 is consistent not only with the Constitution's text, but also with the Federalist Society's own tenets of maximizing individual freedom and minimizing government power.

In the ACLU's post-9-11 *Safe and Free* campaign, the ACLU and its ideologically diverse partners have analyzed each touted security measure to ensure that it really does maximize security, with the minimal possible cost to liberty. Not only is this the very analysis the Supreme Court uses as a matter of constitutional law—the "strict judicial scrutiny" approach—but

14. See U.S. CONST. amend. IV.

15. See, e.g., ACLU.org, *Freedom Under Fire: Dissent in Post-9/11 America* (Dec. 8, 2003), <http://www.aclu.org/safeandfree/safeandFree.cfm?ID=12581&c=207>. See also Nadine Strossen, *Free Speech in Wartime*, 36 RUTGERS-CAM. L.J. (forthcoming 2005).

16. See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (articulating the least restrictive alternative test). See generally ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 764–68 (2d ed. 2002) (describing the various levels of scrutiny applied by courts to restrictions on fundamental rights).

it also squares with common sense. After all, why should we give up our freedom if we do not gain security in return, or if we could gain as much security without giving up as much freedom?

Applying this sensible constitutional test to the myriad of post-9-11 policies that officials have implemented or proposed, the ACLU and our allies have concluded that many pass scrutiny. For example, of the approximately 160 provisions in the USA-PATRIOT Act,¹⁷ we have criticized only about twenty.¹⁸ Moreover, even concerning those provisions, we have not advocated repeal, but rather, reform. We advocate reforms that would preserve the core of the powers the government asserts it needs to protect our lives, but we also seek to ensure that such powers are subject to judicial review and other constraints to bring them back in line with constitutional values.¹⁹

This constrained and constructive criticism by the ACLU and its allies hardly warrants the charge of “hysteria” that was leveled by John Ashcroft while he was Attorney General.²⁰ If anything, the extreme position is the one that the Bush administration has asserted, refusing to consider any reform to even a single provision in the entire 350-page Act. Rather, the Administration’s adamant, unyielding position has been that the whole law must remain in effect without a single amendment, even to the point of not honoring the sunset provisions scheduled to go into effect at the end of 2005.²¹

17. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter Patriot Act].

18. See, e.g., ACLU.org, The Sun Also Sets: Understanding the Patriot Act “Sunsets,” <http://action.aclu.org/reformthepatriotact/sunsets.html> (last visited Nov. 20, 2005). The ACLU has urged Congress not to reenact the “sunsetting” provisions of the Patriot Act, which are set to expire in December 2005. More generally, the ACLU has advocated that “Congress should use the debate over the sunsets to highlight these [sunset] provisions in particular, but should also take the opportunity to deliberate more broadly on the state of our freedoms in the ‘war on terrorism.’” *Id.*

19. See generally ACLU.org, Keep America Safe and Free Program, <http://www.aclu.org/safeandfree/index.html> (last visited Nov. 20, 2005).

20. See CBS News.com, Ashcroft Slams Critics’ “Hysteria” (Sept. 16, 2003), <http://www.cbsnews.com/stories/2003/09/18/national/main573894.shtml>.

21. See, e.g., President George W. Bush, Address to the FBI Academy (July 11, 2005), available at <http://www.whitehouse.gov/news/releases/2005/07/20050711-1.html> (“I call on Congress to reauthorize the sixteen critical provisions of this act that are scheduled to expire at the end of this year. The terrorist threats will not

This administration has made other extreme assertions of executive authority since 9-11, such as claiming unilateral power to label any U.S. citizen an "enemy combatant."²² The Supreme Court rejected this claim in the *Hamdi* case.²³ The Justices who issued the *Hamdi* ruling are generally supportive of presidential power,²⁴ so it is especially significant that they so resoundingly rejected the administration's claim. In the widely quoted words of Justice Sandra Day O'Connor, hardly a radical civil libertarian, "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."²⁵

Since the *Hamdi* decision, the ACLU has convinced two other judges to strike down post-9-11 measures because they unjustifiably violated individual rights. In the first court case to rule on any of the Patriot Act's sweeping surveillance powers, a federal judge agreed with us that one such power violated fundamental constitutional rights.²⁶ Specifically, the court struck down a 1986 statute, as dramatically expanded by the Patriot Act, which empowers the government to issue "National Security Letters," demanding that Internet communications carriers, as well as other businesses and organizations, secretly turn over customers' names and addresses, length of service and billing records, and information concerning the customers' emails and websurfing without any basis for suspecting the customers of any wrongdoing, without any judicial review, and without any notice to the customers that such information has been sought or seized.²⁷

More recently, another federal judge agreed with the ACLU²⁸ that the First Amendment requires a lifting of the automatic

expire at the end of this year, and neither should the protections of the Patriot Act.").

22. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

23. See *id.* at 508.

24. See, e.g., 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 has shown a disturbing pattern of reflexive deference to presidential power in foreign affairs).

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

26. See *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004), *argued sub nom. Gonzales v. Doe*, No. 05-0570 (2d Cir. Nov. 2, 2005).

27. See Patriot Act, *supra* note 17, at 365-66 (codified at 18 U.S.C. § 2709(b)).

28. See *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D. Conn. 2005), *application for vacatur of stay denied*, 126 S. Ct. 1 (2005), *argued*, No. 05-4896 (2d Cir. Nov. 2, 2005).

and permanent gag that accompanies this Patriot Act-expanded National Security Letter power, barring any recipient of such a letter from disclosing its existence to anyone.²⁹ This latter case has garnered much attention, as the recipient of the National Security Letter is a member of the American Library Association, and there has been special public concern that the Patriot Act's expanded surveillance powers would be used to seize library patrons' records.³⁰ Moreover, the Department of Justice has made special efforts to repudiate this concern, including then-Attorney General Ashcroft's dismissive characterization of it as "hysterical."³¹

Along with some conservative Supreme Court Justices, some conservative Republican members of Congress also have criticized the administration's post-9-11 excesses. One of the strongest critics of the Patriot Act is Congressman Don Young of Alaska, a member of the House Select Committee on Homeland Security. He has stated that the Patriot Act was the "[w]orst act we ever passed Everybody voted for it but it was stupid. It was . . . emotional voting."³²

Another conservative Republican, Congressman Butch Otter of Idaho, has been a leader in Congress to cut back on the Patriot Act's excesses. In 2003, he offered an amendment—the "Otter Amendment"³³—to the annual spending bill for the Departments of Commerce, Justice, and State, to prohibit funding an overreaching Patriot Act provision that allows the government to conduct so-called "sneak and peek" searches.³⁴ These are secret government searches of a home or office with a warrant but without any notice to the occupants until potentially long afterward, when it is too late to protect precious privacy rights. The House of Representatives passed the Otter Amend-

29. See 18 U.S.C. § 2709(c).

30. See, e.g., Alison Leigh Cowan, *At Stake in Court: Using the Patriot Act to Get Library Records*, N.Y. TIMES, Sept. 1, 2005, at B1; Barton Gellman, *The FBI's Secret Scrutiny: In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans*, WASH. POST, Nov. 6, 2005, at A1.

31. See, e.g., Shannon McCaffrey, *Ashcroft Castigates Judges on War Powers*, PITT. POST-GAZETTE, Nov. 13, 2004, at A6.

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

33. See H.R. 2799, 108th Cong. (2003) (H. Amdt. 292 by Idaho Representative C.L. ("Butch") Otter).

34. Patriot Act, *supra* note 17, at 285–86 (codified at 18 U.S.C. § 3103(a)).

ment by an overwhelming vote of 308 to 118, with almost half of all House Republicans voting for it.³⁵

Meanwhile, we have seen similar activity in the Senate, where a bipartisan group of senators has introduced legislation, the Security and Freedom Enhancement (SAFE) Act, which also would cut back the Patriot Act's excesses.³⁶ The SAFE Act's co-sponsors include two conservative Republican Senators: Larry Craig of Idaho and John Sununu of New Hampshire.³⁷ Some Patriot Act provisions were even questioned by the chairman of President Bush's re-election campaign, Mark Racicot, former governor of Montana and former chairman of the Republican National Committee.³⁸

As indicated by all of these conservative Republican critics, the Bush Administration is mistaken when it repeatedly tries to dismiss the criticism of its post-9-11 excesses as a mere partisan attack.³⁹ Worse yet was the accusation by then-Attorney General Ashcroft that those who criticize such civil liberties violations are unpatriotic: He said that we "aid terrorists" and "give ammunition to America's enemies."⁴⁰ This reminds me of a recent 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."⁴¹ In the same vein, another recent *Onion* headline warned: "Revised Patriot Act Will Make it Illegal to Read Patriot Act."⁴² Well, most members of

35. See 149 CONG. REC. H7229, 7289-90 (daily ed. July 22, 2003) (statement of Rep. Otter). The Otter Amendment, however, was never signed into law. It was dropped from a year-end spending bill by a joint conference of House and Senate leaders. See Jesse J. Holland, *Author Vows Another Assault on the Patriot Act*, GRAND RAPIDS PRESS, Dec. 3, 2003, at A6.

36. See Security and Freedom Enhancement Act of 2006, S. 737, 109th Cong. (2005).

37. See *id.*

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

39. See, e.g., Charles Babington, *From GOP, Zero Tolerance for Democratic War Critics*, WASH. POST, May 16, 2004, at A5.

40. Testimony of Attorney General John Ashcroft, Senate Committee on the Judiciary (Dec. 6, 2001), http://www.usdoj.gov/ag/testimony/2001/1206transcript_senatejudiciarycommittee.htm.

41. *The Onion* (July 2, 2003), <http://www.theonion.com/content/node/28954>.

42. *The Onion* (Sept. 17, 2003), <http://www.theonion.com/content/node/32312>.

Congress would not have to worry, since they have admitted that they did not even read the Patriot Act before voting for it!⁴³

In the ACLU's post-9-11 campaign to keep our great country both safe and free, our allies have included conservative citizens' groups, as well as officials: for example, the American Conservative Union, Americans for Tax Reform, the Free Congress Foundation, Phyllis Schlafly's Eagle Forum, and major gunowners' organizations.⁴⁴ Here is how Wayne LaPierre of the National Rifle Association explained to members of the NRA why they should support the ACLU's Safe *and* Free campaign, despite their enthusiastic support for President Bush on gun rights and other issues:

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.⁴⁵

Similarly, we have heard strikingly strong criticisms of post-9-11 executive excesses from the so-called "Religious Right," conservative Christians who campaigned for John Ashcroft's appointment as Attorney General because they agreed with his views on abortion and gay rights. Yet some of these individuals have too decried the new investigative guidelines that then-Attorney General Ashcroft issued after the terrorist attacks, which allow surveillance and infiltration of religious and political groups without requiring any suspicion whatsoever.⁴⁶ For example, the then-President of the Family Research Coun-

43. See generally Declan McCullagh, CNET News.com, *Congress Plans Scrutiny of Patriot Act* (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 Patriot Act).

44. See ACLU.org, *ACLU Joins Conservatives to Restore Freedoms Lost Under Patriot Act; "Patriots to Restore Checks and Balances" Hopes to Shape National Dialogue* (March 22, 2005), <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=17798&c=206>.

45. Wayne LaPierre, *Address to the Conservative Political Action Conference, February 2002, Frightened or Free?*, <http://www.nrahq.org/transcripts/cpac0202.asp> (last visited Nov. 20, 2005).

46. See *The Attorney General's Guidelines for FBI National Security Investigations And Foreign Intelligence Collection* (2003), <http://www.fas.org/irp/agency/doj/fbi/nsiguilines.pdf>.

cil, Ken Connor, said, "It's important that we [religious] conservatives maintain a high degree of vigilance. We need to ask ourselves, 'How would our groups fare under these new rules?'"⁴⁷

The most recent "strange bedfellows" to join the bipartisan, ideologically diverse critics of the executive branch's sweeping post-9-11 powers are major business organizations, including the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Association of Realtors, the Association of Corporate Counsel, and the Financial Services Roundtable. On October 4, 2005, these organizations wrote to Senator Arlen Specter, Chairman of the Senate Judiciary Committee, to call for cutbacks on the 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."⁴⁸ These organizations objected to the 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. As they wrote to Senator Specter:

[W]e are concerned that the 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 and disseminated under investigative powers expanded by the Patriot Act. It is our belief that these new powers lack sufficient checks and balances.⁴⁹

As the abolitionist Wendell Phillips said: "Eternal vigilance is the price of liberty."⁵⁰ I would add that it is also the price of security. "We the People of the United States"⁵¹—to quote the opening words of our Constitution—must continue to monitor our government to ensure that it really is effectively protecting our safety and not unjustifiably curbing our freedom.

I would like to conclude by quoting from one of the most re-

47. Neil A. Lewis, *Ashcroft's Terrorism Policies Dismay Some Conservatives*, N.Y. TIMES, July 24, 2002, at A14.

48. Letter from Association of Corporate Counsel et al. to Arlen Specter, U.S. Senator (Oct. 4, 2005), available at <http://www.ala.org/ala/washoff/WOissues/civilliberties/theusapatriotact/BusgrpLtr04oct05.pdf>.

49. *Id.*

50. RESPECTFULLY QUOTED 205 (Suzy Platt ed., 1989).

51. U.S. CONST. pmbl.

cent court decisions that agreed with the ACLU—and with our many libertarian and conservative allies—that we Americans need not sacrifice our freedom to ensure our security. In November 2004, the U.S. Court of Appeals for the Eleventh Circuit unanimously upheld the ACLU's challenge to efforts by officials in Columbus, Georgia to invade the privacy and free speech rights of participants in a peaceful demonstration against torture and other human rights abuses.⁵² The officials asserted that the so-called War on Terrorism warranted mandatory searches of protestors through the use of a magnetometer.⁵³ The court resoundingly rejected these claims. As it eloquently declared: "We cannot simply suspend or restrict civil liberties until the War on Terror is over, because the War on Terror is unlikely ever to be truly over. September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country."⁵⁴

52. See *Bourgeois v. Peters*, 387 F.3d 1303, 1316 (11th Cir. 2004).

53. See *id.* at 1307.

54. *Id.* at 1312.

