

2008

Terrorism, the Constitution, and Individual Liberties Lecture 20

Nadine Strossen
New York Law School

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters

Recommended Citation

Strossen Frank G. Raichle Lecture Series on Law in American Society 321 (2008)

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.

Terrorism, the Constitution, and Individual Liberties

*Nadine Strossen**

Richard E. Winter '42 Student Center

25 September 2008

*. Nadine Strossen is the national president of the American Civil Liberties Union (ACLU) and a professor of law at New York Law School, where she teaches constitutional law, international human rights and freedom of speech. Strossen has served as president of the ACLU since 1991 and is the first woman to head the nation's largest and oldest civil liberties organization. In addition to presiding over the 83-member ACLU Board, Strossen is a full-time professor of law. She has more than 250 published works, which have appeared in many scholarly and general interest publications. Her book *Defending Pornography: Free Speech, Sex and the Fight for Woman's Right* was named the *The New York Times* as a Notable Book of 1995. He co-authored book *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights and Civil Liberties* was named an outstanding book by the Gustavus Myers Center for the Study of Human Rights in North America. Strossen is also frequently called upon by the national media and has appeared on virtually every national news program. Strossen graduated Phi Beta Kappa from Harvard College and magna cum laude from Harvard Law School, where she was editor of the *Harvard Law Review*. Prior to becoming a law professor, she practiced law for nine years in Minneapolis and New York City.

Thank you, Dr. Galie, for that gracious introduction and thanks to the audience for your warm welcome. I am honored to participate in this important lecture series not only because I am following in the footsteps of so many leaders of our legal profession, but also because I am so impressed by the lecture's namesake, Frank Raichle, and the great program you have created here to inspire college students to carry on in his great tradition practicing law in order to promote justice. Mr. Raichle shared the ACLU's commitment to defending the legal rights of everyone, regardless of who they are, regardless of what they believe, and regardless of how unpopular they or their beliefs might be.

The Raichle Center's impressive brochure quotes Frank Raichle's longtime law partner Ralph Halpern as saying this, "Frank took unpopular cases from a society standpoint. His theory was that everybody is entitled to the best lawyer they can obtain, otherwise the system breaks down."

This theory of Frank Raichle's is completely consistent with the ACLU's signature general mission to defend all fundamental freedoms for all people, and this theory of Mr. Raichle's is specifically consistent with all of the ACLU's work in the area I was asked to address tonight, "Terrorism, the Constitution, and Civil Liberties."

I noted from the Raichle Center's brochure that Frank Raichle chose to support and work with Canisius College because he respected its values as a Jesuit institution, and indeed, I saw on your website's home page that Canisius "aims to promote the contemporary Jesuit mission of ... the promotion of justice."

Again, I see a strong bond with the ACLU's neutral commitment to liberty and justice for all. In fact, until recently, the longstanding Vice President of the ACLU's National Advisory Council was a Jesuit priest, Father Robert Drinan, who was a professor at Georgetown Law School as well as a human rights activist, who sadly died last year.

On a lighter note, I want to tell you about an exchange I had with Justice Antonin Scalia, who also has spoken in this lecture series. He and I are good friends, not despite our strong disagreements on many important issues but, actually, because of those disagreements! Given our differing viewpoints, we have often been asked to debate each other on TV and in live programs all over the world. And through those contacts, we've developed mutual respect and friendship. However, Justice Scalia always enjoys making little digs, all in good humor, to be sure!

Early on in our relationship, when I was trying hard to find some common ground, I proudly told him that the Vice President of the ACLU's National Advisory Council was a Catholic priest. Since Justice Scalia is Catholic and has a son who is a Catholic priest, I thought that fact would be a positive bond. So when I told him about our top ACLU leader who is a priest, he did react positively. But then, when I gave him more information about Father Drinan, Justice Scalia's reaction was, "Oh, he's a Jesuit!" I chose to take that as a back-handed compliment to Jesuits!

Coincidentally, today is a very auspicious date for my lecture topic about the Constitution and civil liberties. September 25 is the anniversary of the date when Congress approved the Bill of Rights back in 1787. The Bill of Rights, of course, consists of the first ten amendments to the Constitution, which expressly guarantee fundamental freedoms. And if you already knew that, then you are in a quite small elite in U.S. society. Surveys consistently show that very few people in this country know what the Bill of Rights is. For example, one such survey was conducted not too long ago by the American Bar Association, the major lawyers' organization. It showed that, of all adults, only one-third had any idea what the Bill of Rights is. And when they were told what it is, more than half said, "Oh, let's get rid of that"!

So when people ask me why the ACLU is so misunderstood or controversial and even unpopular in some quarters, I always say that is because our main client is the Bill of Rights, which itself is misunderstood, controversial and unpopular!

That said, the ACLU has received enormous support for our post-9/11 work, including from all across the political spectrum. Immediately after the terrorist attacks in 2001, we launched what we call our "Safe and Free Campaign." We chose that name to underscore a very important point contrary to some political rhetoric. Namely, we want to stress that national security and civil liberties are not inherently antagonistic goals. To the contrary, they are mutually reinforcing.

That concept was stressed by none other than the Director of the U.S. Department of Homeland Security, Michael Chertoff, during his confirmation hearings. He said, "[W]e cannot live in liberty without security, but we would not want to live in security without liberty."

Unfortunately, too many post-9/11 measures that the government touts as advancing security in fact are the worst of both worlds: They do make us less free, but they do not make us more safe. Prime examples

include the government's use of such illegal and discredited techniques as torture and secret black-hole prisons.

As leading military and intelligence officials have said, such abusive methods actually undermine our country's position in the "War on Terror." That is because we are losing the moral authority and credibility that is essential for what is, fundamentally, a war of ideas and values. Let me cite just two of these experts now, Charles Krulak, a Marine Corps Commandant, and Joseph Hoar, a Commander in Chief of U.S. Central Command. They recently wrote:

This war will be won or lost not on the battlefield, but in the minds of potential supporters who have not yet thrown in their lot with the enemy. If we forfeit our values by signaling that they are negotiable in situations of grave or imminent danger, we drive those undecideds into the arms of the enemy. This way lies defeat, and we are well down the road to it.

Among other policies, these two military leaders strongly denounced secret CIA interrogation programs that use, and I quote them, "torture techniques, euphemistically called 'water boarding,' 'sensory deprivation,' and 'stress positions,' conduct we used to call 'war crimes.'"

Just one year after the 9/11 attacks, the ACLU issued a report with a sadly prophetic title: "Insatiable Appetite: The Government's Demand for Unnecessary Powers after September 11." Indeed, in the six years since we issued that report, the government has continued to demand even more powers, claiming that they are needed to keep us safe. By now, though, the Administration lacks credibility, given its consistent pattern of abusing power and misleading the public.

Since 9/11, the Administration has made many claims in an effort to support its expanding powers, which we now know to be false, including that it was not eavesdropping on U.S. citizens without warrants, that it was not holding people against their will and without evidence in Guantanamo, and that it was not kidnapping or torturing people. We should learn from this record and not simply accept the Administration's ongoing assertions about the even more extensive powers it claims to need to fight terrorism.

Last summer, the ACLU held its nationwide membership conference in Washington, D.C. Our Executive Director, Anthony Romero, gave a terrific opening address, and I especially loved one of his lines, after he had described some of George W. Bush's abuses of power. Anthony then denounced Bush as: "that son of a ... Bush!"

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. We never endorse or oppose officials as such; rather, we criticize or praise each official's position on particular issues. Throughout history, Presidents have consistently earned criticism for unjustifiably invading freedoms in the name of national security. That has been true regardless of who the President was or what his political party was.

So, I keep telling my liberal friends they should not disproportionately demonize President Bush and former Attorneys General John Ashcroft or Alberto Gonzales since their 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 U.S. soil was the 1995 Oklahoma City bombing. And the then-President and Attorney General Bill Clinton and Janet Reno reacted much the same way that George Bush and John Ashcroft did after 9/11. Clinton and Reno pressured Congress to pass a so-called anti-terrorism law that in fact extended far beyond terrorism and undermined vital freedoms even for people who are not even suspected of any crime at all.

The ACLU strongly criticized the Clinton Administration for these violations, and we also brought many court challenges against them, just as we have been doing under the Bush Administration for its civil liberties violations.

In short, one of the reasons why the ACLU always has been staunchly non-partisan is that civil liberties violations cross party lines. And the same is true for civil liberties support. Many members of Congress, both Republicans and Democrats, have deplored the many Executive Branch actions that have violated the constitutional checks and balances, and individual rights. And we've also seen strong bipartisan critiques of overreaching Congressional measures, including the USA-PATRIOT Act.

One of the strongest Congressional critics of the Patriot Act is actually a member of the House Republican Leadership, Alaska Congressman Don Young. Listen to his extremely harsh condemnation of that law:

Everybody voted for it, but it was stupid, it was ... “emotional voting.” We didn’t ... study it ... [I]t’s the worst piece of legislation we’ve ever passed.

The ACLU’s “Safe and Free” allies have included conservative citizens’ groups, as well as officials everything from Phyllis Schlafly’s Eagle Forum to the National Rifle Association, the NRA. Here’s how NRA leader Wayne La Pierre powerfully 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. 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.

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. Yet, they still have decried the new investigative guidelines he issued after the terrorist attacks, which allow surveillance and infiltration of religious and political groups without any suspicion whatsoever. For example, the head 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 ... How would our groups fare under these new rules?”

So the Bush Administration is dead wrong when it keeps trying to dismiss the criticism of its post-9/11 excesses as mere partisan attacks.

Worse yet was the accusation by then-Attorney General Ashcroft that those of us who criticize civil liberties violations are unpatriotic. Specifically, he said that we “only aid terrorists” and “give ammunition to America’s enemies.” I say “we” advisedly, since John Ashcroft made that accusation when he testified before the Senate Judiciary Committee several years ago and Yours Truly had testified right before him!

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.” In the same vein, another

Onion headline warned “Revised Patriot Act Will Make it Illegal to Read [Original] Patriot Act.” Well, most members of Congress would not have to worry, since they have admitted that they did not even read the Patriot Act before voting for it!

The Bush Administration’s abuses of power post-9/11 have been condemned by experts. One example is the Cato Institute, a major Washington, D.C. think tank, which has been closely aligned with many prominent conservatives and Republicans. Cato recently published an excellent report summarizing the Bush Administration’s open-ended concept of its own powers. It is called “Power Surge.” Given Cato’s close ties to the Bush Administration, its harsh criticism of the Administration’s abuse of power is especially noteworthy.

The report focuses on many of the post-9/11 issues that have been of great concern to civil libertarians, too, and it also goes beyond that to discuss other important policy areas in which the Bush Administration follows the same pattern.

Here’s how the Cato report sums up that pattern, “a ceaseless push for power, unchecked by either the courts or Congress ... in short, a disdain for constitutional limits. That pattern should disturb people from across the political spectrum.”

Specifically concerning these power abuses in the “War on Terror,” the Cato report notes that “Administration officials have repeatedly advanced the claim that the president’s powers include the power to decide, unilaterally, the question of war or peace.”

Yet, the U.S. Constitution carefully divides war-making powers between the Congress and the President, consistent with the overall system of checks and balances and it gives Congress alone the essential power to declare war. Here is how the Cato report summarizes “[t]he administration’s legal position”: “When we’re at war, anything goes, and the president gets to decide when we’re at war.”

The Bush Administration maintains that its exercise of unilateral Executive Branch powers, and its restrictions on individual rights, are somehow justified in the War on Terror. But these claims are doubly flawed on both factual and legal grounds. As a matter of fact, many national security experts maintain that many of the overreaching, rights-repressing post-9/11 measures are the worst of both worlds: they do scapegoat civil liberties but they do not actually advance national security. Conversely, many measures that will actually advance national security are completely consistent with civil liberties.

I have already cited military authorities complaining that our brutal treatment of suspected terrorists undermines our War on Terrorism. 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 measures. Namely, that government may not invade anyone's freedom or privacy without individualized suspicion, a particular reason to believe that that particular person poses a threat. In contrast, the Fourth Amendment bars dragnet surveillance measures that sweep in broad groups of people.

Of course, this individualized suspicion requirement protects individual liberty; specifically, it protects each of us from government surveillance based on group stereotyping and guilt by association. But this individualized suspicion requirement also promotes national security. Specifically, 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 threats.

Precisely for this reason, the many post-9/11 measures involving mass surveillance have been opposed by experts in national security and counter-intelligence, as well as by civil libertarians. 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 or "NSA," which the *New York Times* revealed in 2005 and which a federal judge struck down in a landmark lawsuit entitled "ACLU v. NSA," I am proud to say! That program has been sweeping in countless e-mails and phone calls of American citizens who are not even suspected of any illegal activity, let alone terrorism. Therefore, the program's harshest critics include FBI agents. They complain about the huge amount of time they have been wasting in tracking down the thousands of completely innocent Americans whose communications have been caught in this NSA fishing expedition.

This same dual flaw infects the even more sweeping secret surveillance program that the ACLU is also challenging across the country, the Administration's efforts to collect all data about all phone and online communications from all of the U.S. telephone companies about all of their customers. This bombshell was revealed by *USA TODAY* two years ago. The government tells us that it uses 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. However, this whole data-mining approach has been denounced as "junk science" by prominent experts.

For example, this point was stressed by Jonathan David Farley, who is not only a mathematics professor at Harvard, but also a Science Fellow at Stanford University's Center for International Security. As Professor Farley wrote:

[T]he [NSA]'s entire spying program [is] based on a false assumption: that you can work out who might be a terrorist based on calling patterns.... [B]ut guilt by association is not just bad law, it's [also] bad mathematics.

These increasingly disturbing revelations about increasingly pervasive forms of secret, unauthorized domestic surveillance are not likely to be over. During Congressional hearings, Administration officials have refused to rule out that they have been carrying out still further domestic spying programs that we still don't know about.

I saw an excellent cartoon that captures this downward spiral, starting with 2004, when civil libertarians were objecting to the drastically reduced warrant requirements for electronic surveillance under the Patriot Act then going on to 2005, when the *New York Times* broke the story about the completely warrantless NSA electronic surveillance and then on to 2006, when *USA Today* broke the story about the telephone companies' wholesale turnover of customer data to the NSA.

The cartoon strip shows a man watching TV, listening to an Administration official. 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." In 2005, the official says, "OK, We are spying on calls without getting warrants, but it's only a few terrorist suspects. Trust us." 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." And, in the very last frame, the bemused viewer listens to the official's familiar punch line, "Trust us."!!!

This puts me in mind of that old saying: Fool me once; shame on you. Fool me twice; shame on me!

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 many critics

have put it, “The government is trying to find a needle in the haystack by adding more hay to the stack!”

I can sum up my points about all 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 “Patriot Act”:

“1. The pre-emptive strike on American freedoms to prevent the terrorists from destroying them first.”

“2. The elimination of one of the reasons why they hate us.”

In the same vein, here is how the *Nation*’s dictionary defines “9/11”: “Tragedy used to justify any Administration policy....”

Now let me summarize the bottom-line constitutional law point. Our Constitution does not contain any blanket exception for national security emergencies, of the sort that President Bush is reading into it. The ACLU has brought many lawsuits to challenge many post-9/11 civil liberties violations and many judges, across the ideological spectrum, have ruled in our favor.

The Administration’s overreaching even has earned four extraordinary rebuffs from the U.S. Supreme Court. In the four cases it has decided on point, the most recent one was just this past June. Most of the current Justices are conservative Republicans who were appointed by conservative Republican presidents. And most of these Justices have very broad views of Presidential power. So it is really noteworthy that even they have rejected the Administration’s claims of unilateral, unchecked power in the War on Terror.

That underscores how extreme these claims are. Among other things, the Court has rejected the Administration’s claimed power to imprison anyone, even an American citizen, forever, without access to a lawyer or a court. Likewise, the Supreme Court also has rejected the Administration’s claimed power to try non-citizens before military commissions that violate even the most minimal, fundamental fairness principles in the Geneva Conventions and our own Constitution, thus endangering members of our own military when they are captured by our enemies.

Most recently, just three months ago, the Supreme Court rejected the Administration’s claim that prisoners being held at Guantanamo have no right to seek the historic writ of habeas corpus, which gives prisoners the procedural right to go to court to challenge the legality of their imprisonment. In other words, this is not a right to be released,

but it is a right to have a judge determine whether there is factual and legal justification for the imprisonment, rather than just leaving this completely up to the Executive Branch of government. The framers considered this habeas right to be so fundamental that it is one of the few rights they expressly guaranteed in the original Constitution before the Bill of Rights was added.

Notably, the Supreme Court's powerful opinion upholding habeas rights for Guantanamo prisoners was written by Justice Anthony Kennedy, a conservative Republican who was appointed by a conservative Republican President, Ronald Reagan. Moreover, here at Canisius College, I should also note that Justice Kennedy is a Catholic. Again, I am stressing my overall theme that commitment to constitutional rights cuts across all other lines embracing people of many diverse political and religious beliefs. Let me share with you Justice Kennedy's eloquent conclusion to this recent opinion, which strongly echoes the ACLU's own Safe and Free mantra. He wrote:

[Our] laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

In 2004, the Supreme Court issued another decision that also strongly condemned the Administration's post-9/11 overreaching. The Court said that the Administration was trying to "condense power into a single branch of government," and the Court declared that "[a] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

Despite this emphatic 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 both other branches of our national government. Consider the Senate testimony of then-Attorney General Gonzales two years ago, when he was defending the NSA's domestic spying program that the *New York Times* revealed in December 2005. This program involved the super-secret National Security Agency, or NSA whose mission had been to investigate foreign terrorism suspects. Under this program, though, the NSA was in fact spying on telephone and Internet communications of completely

innocent American citizens who were not even suspected of any illegal conduct at all, let alone terrorism. When then-Attorney General Gonzales was testifying in defense of this spying program in the Senate, he refused to recognize that there was anything the President could not do in the name of national security.

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. In Bruce Fein's words:

The theory invoked by the president [in an attempt] to justify [this 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 around like a loaded weapon, ready to be used by [any President] who claims an urgent need.

Indeed, the Bush Administration has insisted on its power to pursue some of the very policies that Bruce Fein deplored, including even torture despite international and U.S. law that absolutely outlaws it, in any circumstances.

For details about the many specific post-9/11 issues and cases, I urge you to visit the ACLU's website, at aclu.org. It is a treasure trove of information, including all the pertinent statutes, court rulings, and lawyers' briefs. During the discussion period, I am looking forward to responding to your questions and comments about any specific aspect of this work.

In the remainder of my opening remarks, I will lay out the general constitutional law principles that govern civil liberties in a time of national security crisis, and also touch on some specific examples. I am wearing both my hats, as constitutional law professor and civil liberties activist. That is because the Constitution provides the same protection for individual rights as what we civil libertarians advocate, including in times of national security or other crises. That is precisely the point that the Supreme Court recently reaffirmed in the cases I mentioned a moment ago.

Now let me outline the basic constitutional parameters that should govern our analysis of all the specific post-9/11 issues. When it comes to the scope of individual rights in national emergencies, the U.S. Constitution contains only one express limitation, on only one right, in only

two specified types of national emergencies. I am referring to the Constitution's so-called "Suspension Clause," which empowers Congress to suspend the writ of habeas corpus. Again, that is the historic right to challenge any detention by the government. The Constitution's "Suspension Clause" imposes a heavy burden of justification before Congress may suspend habeas corpus. It limits the suspension power to "Cases of Rebellion or Invasion," and even in such cases the Constitution permits suspension only "when . . . the public Safety may require it."

Although Congress did try to suspend the writ of habeas corpus for Guantanamo prisoners, the Supreme Court held that suspension was unconstitutional in the recent ruling I have already described. And Congress has not even tried to suspend the writ of habeas corpus beyond the Guantanamo context.

Aside from 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, our Constitution is distinguishable from the constitutions of many other countries and also from regional and international human rights treaties. In short, the Framers of the U.S. Constitution deliberately rejected a general provision of more government power or fewer individual rights in any national security or other emergency.

This crucial point was stressed, specifically in the post-9/11 context, by U.S. Supreme Court Justice Antonin Scalia, in his opinion in the *Hamdi* case. Of all the Court's post-9/11 opinions, Scalia's opinion in that case most strongly condemned the Administration's claims of executive power, and most strongly supported individual constitutional rights. Notably, that opinion was joined by Justice John Paul Stevens. I say "notably," since Stevens is the Court's most outspoken liberal, whereas Scalia is its most outspoken conservative. Therefore, these "strange bedfellows" underscore the significant theme I have already stressed, that the neutral defense of constitutional rights and civil liberties does not correspond to any political or ideological lines.

So, again, the key point that the Scalia/Stevens opinion in *Hamdi* stressed is that our Constitution's limits on executive power and its guarantees of individual rights apply fully in national security crises. This key point also has been stressed by important Supreme Court opinions arising from various national emergencies throughout U.S. history, from the Civil War to the Great Depression to the Korean War.

Let me quote just one of these powerful precedents, in which the Court has consistently rejected Executive Branch claims of inherent emergency powers. In 1934, the Court declared, “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.”

In short, 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 post-9/11 restrictions on fundamental rights include many restrictions on First Amendment freedoms of speech, press, and association. These restrictive measures are still presumptively unconstitutional, even during a national emergency.

The Supreme Court resoundingly reaffirmed this core constitutional principle in the famous “Pentagon Papers Case” in 1971, while the U.S. was engaged in the Vietnam War. The Nixon Administration claimed that publication of the Pentagon Papers, the government’s secret study of U.S. involvement in Vietnam, would endanger many American lives, as well as national security. Yet the Court rejected this claim, because the government did not satisfy its heavy constitutional burden of proof under the so-called “strict scrutiny” standard. 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.

The government can easily satisfy the “compelling purpose” aspect 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: proving that the measure is necessary or, as the Supreme Court often phrases it, proving 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.

Accordingly, in the ACLU’s post-9/11 Safe and Free Campaign, we and our diverse allies have analyzed each touted security measure to ensure that it really does maximize security, with the minimal feasible cost to liberty. Not only is this the very same analysis that the 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 freedom if we do not gain security in return, or, if we could gain as much security without giving up as much freedom?

In short, then, the general constitutional standard for assessing rights restrictions—including during times of war and other national emergencies—is this general constitutional standard. It 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.

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 allies. For example, of the 160 provisions in the USA-PATRIOT Act, we have criticized only about a dozen. Moreover, even as to those dozen, 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 subject them to judicial review, congressional oversight, and other constraints to bring them back in line with constitutional checks and balances.

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. If anything, the extreme position is the one that the Bush Administration has taken, refusing to consider any real reform to even a single provision in the entire 350-page Act. The extraordinarily diverse critics of the Patriot Act's overreaching have included prominent Republican officials and conservative citizens' groups, as I've already indicated, and also experts with enormous experience in national security, counter-intelligence, and law enforcement as well as leaders of the business community, including the U.S. Chamber of Commerce, the National Association of Manufacturers, the National Association of Realtors, and an organization that is very pertinent to the Raichle Pre-Law Program, namely, the Association of Corporate Counsel.

Let me share just a portion of the letter that these business leaders and their lawyers wrote to the Senate, calling for a cutback on the Patriot Act's overreaching surveillance provisions. They wrote:

[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—[all this] 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 protected....”

The NSA domestic spying programs, the Patriot Act, and other post-9/11 measures were enacted in a rush, right after the terrorist attacks in an understandable desire to do something to avert another terrorist attack. But you cannot possibly know what will in fact help prevent another 9/11 if you do not know what led to that original catastrophe. And that kind of analysis was not undertaken until much later for example, by the Bipartisan 9/11 Commission, which reported in 2004, and by the Intelligence Committees of both Houses of Congress, which reported in 2003.

All these studies have concurred that the disaster was caused not by lack of government power to engage in surveillance, and gather information about potential terrorists, but rather by the government’s failure to effectively analyze and act on the vast amounts of information it already had, thanks to its already vast surveillance powers. Likewise, security experts have pinpointed many strategies to prevent future attacks, and these, too, have nothing to do with increasing the government’s surveillance powers or decreasing individuals’ civil liberties. Rather, they have to do with such matters as upgrading the government’s computer systems, hiring more personnel with pertinent language skills, and breaking down the bureaucratic turf barriers to information sharing among agencies.

In sum, scapegoating civil liberties as the purported cause of the problem is, again, doubly flawed. It not only undermines the very same traditional American values that the terrorists themselves were attacking, but it also diverts us from the steps that would actually protect us from terrorism and that are completely consistent with civil liberties. To be sure, the government has taken some important steps of this type which do increase safety without decreasing freedom, such as fortifying cockpit doors and increasing sky marshals on airplanes and increasing protection of our northern border, which was the crossing point for so many 9/11 terrorists.

However, security experts maintain that far too little progress has been made. On the one hand, the government continues to scapegoat the freedoms of everyone in this country. On the other hand, though, security experts say that it is not doing enough to detect and deter

terrorist attacks. That disturbing conclusion has been repeatedly stressed by the Bipartisan 9/11 Commission.

The Commission's initial report made 41 concrete recommendations about specific steps the government should take to fix the major problems that had fueled the 9/11 attacks. More than a year and a half later, the Commission issued a follow-up report, including a report card with letter grades, on the government's progress toward those 41 anti-terror steps. This was not a report card that any of you students would want to get! The government earned a dozen D's in such critical areas as reforming intelligence oversight, assessing infrastructure vulnerabilities, and sharing information among government agencies. Worse yet, the government earned five outright F's. The Commission's Chairman, Tom Kean—a Republican—said the following, on behalf of the bipartisan group:

Many obvious steps that the American people assume have been completed, have not been.... Some of these failures are shocking. For example ... it is scandalous that police and firefighters in large cities still cannot communicate reliably in a major crisis. It is scandalous that we still allocate scarce homeland security dollars on the basis of pork barrel spending, not risk....

I'd like to close with two quotes that well summarize my overall theme about why we must preserve our freedom, not only because it is intrinsically invaluable to each of us, as individuals, but also because it is an essential underpinning of our national security and our national identity.

The first is from General David Petraeus, when he was the U.S. Commander in Iraq. As he recently told our troops there, "This fight [against terrorism] depends on securing the population, which must understand that we—not our enemies—occupy the moral high ground."

And, finally, I'll end on a positive note by quoting one of the ACLU's many post-9/11 legal victories, in which many diverse judges have resoundingly rejected government claims that civil liberties must be curtailed to effectively wage the War on Terrorism. As the federal appellate court in Atlanta 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."

Thank you very much.