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Welcome Remarks Left out in the Cold - The Chilling of Speech, Association, and the Press in Post-9/11 America September 20-21, 2007: Foreword

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FOREWORD

WELCOME REMARKS

NADINE STROSSEN*

Many thanks to Dean Claudio Grossman and the *Washington College of Law* for your generous support and assistance for this very important conference. I do not want to list a lot of names, but I do want to recognize a few people, especially Jennifer Dabson, Director of Events, and at the *American University Law Review*, in particular, Stephen LeBlanc, Jasmine Watson, and Megan Romigh. Many thanks to all of you and all of your colleagues. And last, but far from least, I would like to thank my great colleagues at the American Civil Liberties Union's ("ACLU") Legislative Office here in Washington, D.C., in particular, Caroline Fredrickson, the director of our Washington Legislative Office, and Jim Tucker, our First Amendment policy counsel. I am so proud of all the work that Caroline and Jim and all of our other colleagues at the ACLU's Legislative Office have been doing to spotlight and rectify the First Amendment violations that have accelerated dramatically under the so-called "War on Terror," but which also long predated the War on Terror. Likewise, ACLU litigators all over the country have been exceptionally busy since 9/11. I am very happy that a number of them are here today. They have been working to enforce the First Amendment itself, as well as statutes that implement the values reflected in the First Amendment, including the Freedom of Information Act and state public information laws.

As with everything, the state of the First Amendment, post-9/11, is a glass half-full or a glass half-empty. As an activist, I have to be an optimist, and it is the other way around too; as an optimist, I have to

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be an activist. Looking at the glass half-full, I am really heartened by the many legal victories we have managed to win that have resulted in enforcing the First Amendment and the Freedom of Information Act. I am especially heartened that we have been able to win those victories from judges across the ideological spectrum, including a couple of key victories during the past few weeks.

On the other hand, it is dismaying that we have to fight so hard to enforce what should be such core constitutional principles that one would hope government officials would respect them voluntarily. After all, every such official takes an oath or an affirmation to uphold the Constitution. Yet to the contrary, we civil libertarians and our clients who have dared to dissent from official policy have been accused of being unpatriotic or even worse, including some notorious comments by then Attorney General John Ashcroft shortly after the 9/11 attacks. This whole suppressive spirit, which went on far too long—and I am putting it in the past tense because things have gotten better—was well-captured by a headline in one of my very favorite publications, *The Onion*. (Laughter) It is my second favorite publication, after the *American University Law Review*, I hasten to add. (Laughter) This *Onion* headline read, “Bush Asks Congress for \$30 Billion to Help Fight War on Criticism.”¹ (Laughter)

Having criticized George W. Bush and his first Attorney General, I must underscore that the ACLU has always been staunchly non-partisan. That is because violations of civil liberties, including violations of free speech, cut across all party and ideological lines, and the same is true of support for civil liberties and the First Amendment. To this very day, as we heard from Congressman Bobby Scott this morning, too many members of Congress on both sides of the aisle have been too complacent about and complicit in this Administration’s abuses, including First Amendment abuses. I loved Bobby Scott’s line about how Congress has not been a check and balance against the Administration’s overreaching, but rather more like a cheerleader. Correspondingly though, on the positive side, we have been working constructively with members of Congress on both sides of the aisle to rectify violations of First Amendment rights, and I think it is very fitting that we are hearing today from one Democratic and one Republican member of Congress, who are both key allies on these issues.

1. *Bush Asks Congress for \$30 Billion to Help Fight War on Criticism*, ONION, July 2, 2003, at 1, available at <http://www.theonion.com/content/node/28954>.

Going forward in the legislative work that we hope will be galvanized by this conference, it is essential for us to understand that we are dealing with a universal and permanent challenge. That challenge is the inherently strong temptation and tendency of government officials to restrain not only dissent, but also access to government information. So, as the old saying goes, eternal vigilance is the price of liberty; and that is true no matter who holds the reins of power, which person, or which party. We First Amendment advocates are always going to have to work very hard to monitor, advocate, lobby, and litigate. In other words, we exercise our own First Amendment freedoms in order to promote those freedoms for everyone else.

That timeless truth was vividly underscored for me while I was preparing for this conference by reading the proceedings of the 1984 conference on which this one is building. As the invitation to this current conference noted, and I am quoting: "In 1984, the ACLU held a 'Free Trade in Ideas' conference that brought together leading free speech commentators to discuss barriers to the right of Americans to receive information from abroad."² That conference took place almost a quarter century ago, but the issues and the ideas that it addressed are still completely timely today, which demonstrates the enduring nature of our challenges. Looking at that situation through the lens of a glass half-full, this means that our current conference and the *Law Review* symposium that results from it will also stand the test of time and continue to have value long into the future.

There were many prescient and perennially pertinent insights that came from the 1984 conference. I would like to share with you just a few observations from one of the speakers, Hodding Carter III. He had been a respected journalist in the South before joining the administration of another southerner named Carter—no relation! Hodding Carter was the Assistant Secretary of State for Public Affairs under President Jimmy Carter. The ACLU's 1984 conference focused on the enormous First Amendment infractions by the administration that was then in power, the Reagan Administration. However, Hodding Carter was also very self-critical about the too many and too similar violations that had been committed by the prior administration, in which he had served. It was particularly useful that Hodding Carter explained the universal nature of these violations,

2. Left Out in the Cold? The Chilling of Speech, Association, and the Press in Post-9/11 America, <http://www.aclu.org/symposium/index.html> (last visited Apr. 25, 2008).

which is why, I caution you, we must all continue to maintain our vigilance no matter what happens in next year's elections. So, please heed these enduringly important remarks from Hodding Carter:

For those who believe that information about public policy—and dissent from it—properly belongs to the people, there is no such thing as a benevolent government. Some are better than others, but all are obsessed with the urge to shield the public from a full understanding of what is being done in its name.

....

... [I]deology has little to do with most government attempts to fine-tune the First Amendment or subvert the Freedom of Information Act or classify every piece of paper that comes across their desk.

The reasons are far more banal than sinister, more expedient than ideological. Ask the former government official, like me, who argued passionately for some form of status control ten years or five years ago to repeat his justifications today, and more than likely, he will sheepishly admit they don't hold up.

What's actually involved is not national security but power, which in most societies is inextricably linked to information. The bureaucrat who can classify information has power. The government official who can set the time and terms for the release of information has power. The politician, who knows the truth about the workings of the government program at home, or a policy abroad, is more powerful than one who does not. The American people adequately informed about what their government is doing and what others think of it, are more powerful than when they are not. And as the security state grows ever larger it sees danger to its power, at home and abroad in every story and every opinion that calls into question what it is doing.³

Hodding Carter ends this point with a call to action, to which we should all respond to now. He wrote, "Government will do what governments do. The real question is what those who know better will do in response."⁴

So that is the question for us, and I very much look forward to the answers that we will be framing together during the course of this conference. I think that what will emerge from this will be far more important than a symposium issue of the *American University Law Review*, noteworthy as that is. I hope that there will be real legislative reform so that our First Amendment rights can be revitalized for the

3. Transcript of *Free Trade in Ideas* at 16, 20–21, ACLU Conference, Sept. 17, 1984.

4. *Id.* at 21.

benefit of everyone in this country, even those few benighted folks who do not regularly read the *American University Law Review*. (Laughter).
