

2004

Presentation by Nadine Strossen Conference Transcripts

Nadine Strossen
New York Law School

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

Recommended Citation

36 Rutgers L.J. 927 (2004-2005)

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.

PRESENTATION BY NADINE STROSSEN*

I am delighted to participate in this important conference about this very important book, which provides extremely helpful information and perspectives for those of us who are fighting to maintain free speech and other civil liberties in the current so-called “War on Terror.” In fact, a couple of years ago (on November 15, 2002), Geof Stone and I were co-panelists defending civil liberties post-9/11 in a plenary debate at the Federalist Society’s annual Lawyers’ Conference. Our protagonists were Michael Chertoff, who was then a chief architect and advocate of the Administration’s most controversial post-9/11 policies, and Bill Barr, the former U.S. Attorney General under Presidents Reagan and Bush I, who initially came up with the idea of military tribunals for individuals the President unilaterally deemed “enemy combatants.” In my humble opinion, the historic perspective that Geof provided, based on his book then in progress, combined with my focus on specific post-9/11 policies, which the ACLU has been in the forefront of challenging, was very powerful.

The bottom-line historical lesson that Geof teaches in *Perilous Times* is that we need more skepticism about government policies in any war or war-like context, and stauncher support for civil liberties, not only for the sake of our liberties, but also for the sake of national security.¹ This is exactly the point that the ACLU has been making ever since the September 11th attacks, when we immediately launched what we call our “Safe and Free” campaign, stressing that these two concerns are mutually reinforcing, rather than antagonistic.² I therefore disagree with my dear friend, Floyd Abrams, when

* Professor of Law, New York Law School; President, American Civil Liberties Union. This is an edited and footnoted transcript of the presentation given by Professor Strossen at the Free Speech in Wartime Conference – Morning Panel: Free Speech in Wartime – Theoretical and Practical Perspectives on January 17, 2005 at Rutgers School of Law–Camden. Professor Strossen thanks the editors of the *Rutgers Law Journal* for having drafted almost all of the footnotes for this piece; the credit and the responsibility for the footnotes belongs largely to them.

1. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 532, 535-57 (2004); see also ACLU, *Sanctioned Bias: Racial Profiling Since 9/11* (Feb. 2004), available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=15102&c=207> (last visited Mar. 20, 2005).

2. See Laura W. Murphy, *Statement on Launch of ACLU Safe and Free Campaign*, available at <http://www.aclu.org/safeandfree/safeandfree.cfm?ID=10938&c=206> (Oct. 16, 2002).

he suggests that we must choose between security and liberty both in general, and in terms of specific tactics.³ For example, in response to Professor Carolyn Marvin's question following his presentation, Mr. Abrams endorsed ethnic profiling as a supposed security measure.⁴ Yet the consensus of national security and law enforcement experts is that demographic profiling is ineffective at best, counterproductive at worst, and not only draws investigators' attention toward many innocent individuals, but also draws their attention away from too many suspicious individuals.⁵ Instead, the intelligence and law enforcement experts advocate singling out individuals for surveillance and other measures based on how they act, not who they are;⁶ in short, the individualized suspicion requirement is not only consistent with core constitutional rights, but also promotes national security concerns.

The ACLU has been making these same points repeatedly, ever since it was formed during the World War I era, explicitly in response to free speech and other violations of that period. One aspect of *Perilous Times* that I especially enjoyed was the many references to the ACLU and its leaders, noting not only the role they played in defending dissenters during twentieth-century wars,⁷ but also that these efforts in turn repeatedly subjected the organization, and its leaders and members, to investigation and condemnation.⁸ I am especially grateful for the praise and "pep talk" Geof provided in his closing chapter:

Organizations like the Free Speech League in World War I and the ACLU today ensure that perspectives that might otherwise be disregarded are well presented in legal and political discourse. They articulate often unpopular positions to judges, legislators, and others so that *they* can make better-informed and more thoughtful decisions. Particularly in times of national

3. See Symposium, *Address by Floyd Abrams: Freedom in Especially Perilous Times*, 36 RUTGERS L.J. 909 (2005).

4. *Id.*

5. See Bill Dedman, *Memo Warns Against Use of Profiling as Defense*, BOSTON GLOBE, Oct. 12, 2001, at A27. See generally Deborah A. Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195 (2003).

6. See STONE, *supra* note 1, at 10-11; see also Dedman, *supra* note 5.

7. See STONE, *supra* note 1, at 183, 241, 251, 298, 320 n.*, 421, 520.

8. *Id.* at 183, 246, 251, 332, 492, 493.

emergency, when many others are silenced by fear, such organizations deserve and need the nation's support.⁹

In my opening remarks today, I would like to draw on the ACLU's experience in fighting for civil liberties post-9/11, focusing on free speech, especially since *Perilous Times* discusses those specific issues only quite briefly. I will make four major points, all of which track general themes in *Perilous Times*, and I will link those themes specifically to our current post-9/11 America.

The four pertinent themes from *Perilous Times* are:

- 1) In wartime, the U.S. government has historically used four basic strategies to silence dissenters: direct suppression, public harassment and humiliation, surveillance and disruption, and limiting access to information.¹⁰
- 2) We have made substantial progress in countering these speech-restricting strategies through legal protections.¹¹
- 3) We have also made substantial progress in developing a culture that likewise resists these speech-restricting strategies.¹²
- 4) No matter how much progress we have made in both the courts of law and the court of public opinion, it is always vulnerable to rollback.¹³

Let me now outline how each of these general themes holds true in the specific post-9/11 context. I will start by listing my conclusions, and then I will amplify a bit on them.

First, since 9/11, the government has been vigorously pursuing measures that fall into all four categories of speech-suppressing strategies that it has used in past wars – everything from direct suppression of dissenters'

9. *Id.* at 538 n.*.

10. *Id.* at 528-29, 549.

11. *Id.* at 532, 548-50.

12. *Id.* at 532, 536-37.

13. *Id.* at 551.

speech¹⁴ to suppression of government information.¹⁵ For this reason, I disagree with Elena Kagan's assertion that the government has not stifled free speech in the current War on Terror.¹⁶

Second, thanks to strong constitutional free speech protections, the ACLU and our allies have had a great track record in the courts, winning almost all of our many challenges to the government's post-9/11 speech-restricting measures.¹⁷

Third, thanks to the widespread entrenchment of speech-protective values throughout our culture, there has been an unprecedented grassroots resistance to post-9/11 government overreaching,¹⁸ which embraces individuals and civic organizations across the ideological spectrum and around the country.¹⁹ This movement, in turn, has influenced members of Congress, on both sides of the aisle, to resist many Administration calls for further measures that would undermine civil liberties, including free speech.²⁰

Fourth, despite the legal and cultural resistance to government measures threatening speech,²¹ the government continues to press such measures²² – thus, in turn, calling for continued and renewed resistance in both our law

14. See NANCY CHANG, *SILENCING POLITICAL DISSENT* 103-24 (2002) (describing instances of suppression in the context of freedom of association); see also ACLU, *Freedom Under Fire: Dissent in Post-9/11 America* (May 2003) [hereinafter *Freedom Under Fire*], available at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=12581&c=207> (last visited Mar. 20, 2005).

15. See CHANG, *supra* note 14, at 124-34; *Freedom Under Fire*, *supra* note 14; see also Gregory T. Nojeim, *Threats to Civil Liberties Post-September 11: Secrecy, Erosion of Privacy, Danger of Unchecked Government*, available at <http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=9857&c=24> (Dec. 14, 2001).

16. See Elena Kagan, Presentation at the Rutgers School of Law–Camden: Free Speech in Wartime Conference – Morning Panel: Free Speech in Wartime – Theoretical and Practical Perspectives (Jan. 17, 2005) (transcript on file with the Rutgers Law Journal) [hereinafter Kagan, Presentation].

17. See *Freedom Under Fire*, *supra* note 14.

18. ACLU, *Independence Day 2003: Main Street America Fights the Federal Government's Insatiable Appetite for New Powers in the Post 9/11 Era*, available at <http://www.aclu.org/Files/OpenFile.cfm?id=13059> (last visited Apr. 2, 2005).

19. *Id.*

20. See Robert Sedler, *Free Speech Strengthens Democracy*, *DETROIT NEWS*, Nov. 16, 2003, at 17A.

21. See STONE, *supra* note 1, at 537.

22. See *id.* at 538-42.

and our culture. In this vein, I welcome Elena Kagan's call for institutional reform.²³

Now I will expand a bit on these major points, starting with the government's vigorous pursuit of all four types of speech-suppressing strategies chronicled in *Perilous Times*. Although the post-9/11 measures²⁴ are in some cases less blatant than their past counterparts, that also makes them more insidious and harder to challenge. The ACLU issued a report in May 2003, entitled "Freedom Under Fire: Dissent in Post-9/11 America,"²⁵ which described many of these measures that had been implemented relatively soon after the terrorist attacks. The government's subsequent speech-suppressing measures, and the countermeasures we have been pursuing in response to all of these measures, are detailed on the ACLU's website.²⁶ For now, I only have time to list just a few examples of the many current speech-stifling measures in each category:

First, in the category of direct suppression:

- Mass arrests of people who are peacefully demonstrating against Administration policies, including the war in Iraq;²⁷
- Bans on displaying signs or other expressions critical of Administration policies in the vicinity of Administration officials and other key audiences, including convention delegates and TV cameras;²⁸ and
- Outlawing and prosecuting online expression and other expressive activities through overly broad and vague definitions of "material support" for terrorism.²⁹

23. See Kagan, Presentation, *supra* note 16.

24. See STONE, *supra* note 1, at 550-54.

25. Freedom Under Fire, *supra* note 14.

26. See generally ACLU, Keep America Safe and Free, at <http://www.aclu.org/SafeandFree/SafeandFreeMain.cfm> (last visited Mar. 20, 2005).

27. See Iraq: People Come First, WIRE, May 2003, at 10-11, at [http://web.amnesty.org/library/pdf/nws210042003english/\\$file/nws2100403.pdf](http://web.amnesty.org/library/pdf/nws210042003english/$file/nws2100403.pdf) (last visited Mar. 20, 2005).

28. Freedom Under Fire, *supra* note 14.

29. See Kevin Sack, *Chasing Terrorists or Fears?*, L.A. TIMES, Oct. 24, 2004, at A1.

Second, in the category of public harassment and humiliation:

- Attorney General John Ashcroft and other Administration “spokesfolks” sent the signal early on that, quoting then-White House Press Secretary Ari Fleischer, we should all “watch what [we] say.”³⁰
- John Ashcroft most notoriously denounced his civil libertarian critics by saying, in December, 2001, that we “only aid terrorists” and “give ammunition to America’s enemies.”³¹

I took this last accusation quite personally, since Attorney General Ashcroft made it during hearings before the Senate Judiciary Committee, at which I had testified shortly before him.³² However, this was mild medicine compared to the parallel situation my ACLU predecessors faced in 1918. As *Perilous Times* recounts,³³ the War Department not only accused them of defending traitors, and warned Americans that contributing to the ACLU would hinder the war efforts, but it also threatened my predecessors with prosecution under the Espionage Act, raided their offices, and denied them mailing privileges – including, most ironically, by barring them from mailing a pamphlet on the freedom of speech!³⁴

Perilous Times also documents another historical incident, which directly foreshadowed Attorney General Ashcroft’s 2001 verbal attack. The

30. See Bill Carter & Felicity Barringer, *A Nation Challenged: Speech and Expression; In Patriotic Time, Dissent Is Muted*, N.Y. TIMES, Sept. 28, 2001, at A1.

31. In his testimony before the Senate Judiciary Committee on December 6, 2001, Attorney General Ashcroft stated:

We need honest, reasoned debate, not fear-mongering. To those who pit Americans against immigrants and citizens against noncitizens, to those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America’s enemies and pause to America’s friends. They encourage people of good will to remain silent in the face of evil.

A Nation Challenged; Excerpts from Attorney General’s Testimony Before Senate Judiciary Committee, N.Y. TIMES, Dec. 7, 2001, at B6.

32. DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the House Comm. on the Judiciary, 107th Cong. (2001) (testimony of Nadine Strossen, President, American Civil Liberties Union), available at http://judiciary.senate.gov/testimony.cfm?id=128&wit_id=83 (last visited Apr. 2, 2005).

33. See STONE, *supra* note 1, at 183.

34. *Id.*

book notes that in 1970, President Richard Nixon “coached his aides to accuse his critics of ‘giving aid and comfort to the enemy,’ emphasizing that they should use that precise phrase.”³⁵

The third category of speech-suppressive strategies that *Perilous Times* describes is surveillance and disruption. Here the current examples are legion. Highlights or, more appropriately, *lowlights* include:

- Sections 215 and 505 of the Patriot Act, which empower the government to secretly seize “any tangible thing,” including records of our library, bookstore, and internet communications, with little or no judicial review; and which expressly allow such secret surveillance to be based, at least in part, on activity that is protected by the First Amendment.³⁶
- New FBI guidelines, which allow surveillance and infiltration of religious and political gatherings, even with no suspicion of any illegal activity.³⁷
- Local police officials, working with federal officials in Joint Anti-Terrorism Taskforces, targeting individuals and organizations for surveillance and harassment based only on their political or religious expressions and associations.³⁸
- Individuals being placed on secret “no fly lists” and other types of “watch lists” for these same reasons.³⁹ Since this often leads to public actions, such as pulling people out of passenger lines and subjecting them to repeated and intrusive searches and

35. *Id.* at 465.

36. See USA PATRIOT Act, Pub. L. No. 107-56, §§ 215, 505, 115 Stat. 272, 287-88 (2001); see also David Mehegan, *Reading Over Your Shoulder: The Push Is On to Shelve Part of the Patriot Act*, BOSTON GLOBE, Mar. 9, 2004, at E5; Brad Smith, *President Wades Into Fight Over Patriot Act in Speech*, TAMPA TRIB., Jan. 22, 2004, at Nat. 10.

37. See STONE, *supra* note 1, at 555; see also Susan Schmidt & Dan Eggen, *FBI Given More Latitude; New Surveillance Rules Remove Evidence Hurdle*, WASH. POST, May 30, 2002, at A1.

38. See Dan Eggen, *In Portland, Reflections of the New FBI; Emphasis Changes From Investigations to Anti-Terrorism*, WASH. POST, Sept. 4, 2002, at A19.

39. See Alan Gathright, *ACLU seeks answers on “No-Fly” lists*, S.F. CHRON., Dec. 13, 2002, at A25.

interrogations,⁴⁰ these measures also fall into the second category – public harassment and humiliation.

- One final example of disruptive measures are new laws and regulations, which require foundations and other funders of government watchdog groups, as well as universities, to impose onerous and odious conditions on their grants, ranging from checking present and future employees against government watchlists, to certifying compliance with broad, vague limits on advocacy. These measures apply not only to work that is funded by that particular grantor, but also to all other work by the recipient institution.⁴¹

Examples of current restrictive strategies also abound in the fourth category that *Perilous Times* delineates: limiting citizen access to information. Even before September 11th, historians had accused the Bush II Administration of extraordinary, excessive secrecy.⁴² And since 9/11, the Administration has thrown an unprecedented shroud of secrecy over every aspect of its “War on Terror,” denying even the most basic information not only to the public and the press, but also to Congress.⁴³ Even conservative Republicans in Congress have bitterly complained about the Administration’s stonewalling, which has frustrated Congress’s lawmaking and oversight responsibilities.⁴⁴

Along with many diverse allies, the ACLU has had to seek information about key aspects of the government’s post-9/11 policies, not only by filing multiple requests under the Federal Freedom of Information Act and state counterparts, but also by pursuing those filings through lawsuits, since the Attorney General has expressly encouraged all government agents to resist all such requests.⁴⁵ The fact that the ACLU has ultimately won so many of

40. *Id.*; see also Bob Egelko, “No-fly” lists still not explained, judge says; Last chance for feds to justify secrecy, S.F. CHRON., June 16, 2004, at A6.

41. See Am. Ass’n for the Advancement of Sci., Science and National Security in the Post-9/11 Environment, at <http://www.aaas.org/spp/post911/> (last visited Mar. 20, 2005).

42. See STONE, *supra* note 1, at 557.

43. *Id.* at 556-59.

44. *Id.* at 553.

45. See, e.g., ACLU v. United States Dep’t of Justice, 265 F. Supp. 2d 20 (D.D.C. 2003).

these cases⁴⁶ underscores the unjustified extent of the Administration's secrecy policies.

The government's denial to the public of critical information also takes the form of gag orders on anyone who is forced to turn over documents about any of us – citizen or noncitizen alike – under sections 215 and 505 of the Patriot Act.⁴⁷ In fact, in September, Federal Judge Victor Marrero ruled that this provision in section 505 constitutes an unconstitutional prior restraint on free speech, since it denies valuable information not only to the target of the search, but also to the public and to lawmakers.⁴⁸ Indeed, the government interpreted the section 505 gag order so strictly that when ACLU lawyers filed their constitutional challenge to this section, they were actually forced to file it under seal.⁴⁹ Incredibly, they were not even allowed to tell anyone else in the ACLU about the filing of this lawsuit – including Yours Truly! – until more than three weeks later, when the government finally agreed that they could disclose a few basic facts.⁵⁰

As *Perilous Times* points out in its concluding chapter, “[t]o withstand the perils of war fever, a nation needs not only *legal* protection of civil liberties but a *culture* of civil liberties.”⁵¹ My second and third major points are that we have indeed secured high degrees of both, as evidenced by the surprisingly strong resistance of both courts and the public to the Administration's post-9/11 overreaches.

As I have previously noted, the courts have ruled in favor of the ACLU and other civil libertarian allies in almost all of our legal challenges to government policies that suppress free speech.⁵² The only exceptions involve not measures that suppress dissenters' own expression, but rather measures that deny access to government information.⁵³ Moreover, even in this area we have won almost all of the cases.

46. See, e.g., *ACLU v. Dep't of Def.*, 339 F. Supp. 2d 501 (S.D.N.Y. 2004).

47. See USA PATRIOT Act, Pub. L. No. 107-56, §§ 215, 505, 115 Stat. 272, 287-88 (2001).

48. See *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 475 (S.D.N.Y. 2004).

49. *Id.* at 475 n.3.

50. *Id.* at 526 (discussing the scope of the seal and the effect of the published opinion on the seal). For a copy of the court order, see the ACLU website at <http://aclu.org/files/openfile.cfm?id=15713>.

51. STONE, *supra* note 1, at 537.

52. See, e.g., *Ashcroft*, 334 F. Supp. 2d 471 and text accompanying note 48.

53. See, e.g., *ACLU v. United States Dep't of Justice*, 265 F. Supp. 2d 20 (D.D.C. 2003).

A recent example of our successful free speech challenges occurred in October 2004, when a three-judge panel from the Eleventh Circuit of the U.S. Court of Appeals in Atlanta, Georgia, unanimously upheld the ACLU's challenge to efforts by Columbus, Georgia officials to invade the privacy and free speech rights of participants demonstrating against the Western Hemisphere Institute for Security Cooperation⁵⁴ – an organization that trains Latin American military and government officials, some of whom, the demonstrators believed, engage in human rights abuses. The officials asserted that the War on Terrorism warranted the curtailment of civil liberties in general, including, in particular, the rights of these peaceful protestors.⁵⁵ The court, however, 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.”⁵⁶

Although the Supreme Court has not yet ruled on a post-9/11 case involving the First Amendment, the Court's libertarian language in *Hamdi v. Rumsfeld*⁵⁷ has been quoted by lower court judges in subsequent free speech cases as affirming the need for close judicial scrutiny of asserted national security justifications for any measure restricting any civil right, including free speech.⁵⁸ Even before *Hamdi*, the ACLU and our allies had sought Supreme Court review in the two “freedom of information” cases that we lost in the lower courts,⁵⁹ thus reflecting the judgment of expert lawyers that

54. See *Bourgeois v. Peters*, 387 F.3d 1303, 1306 (11th Cir. 2004). The institute was formerly called “School of the Americas.”

55. *Id.* at 1311.

56. *Id.* at 1312.

57. 124 S. Ct. 2633 (2004).

58. See, e.g., *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 477 (S.D.N.Y. 2004) (“We have long . . . made clear that a state of war is not a blank check for the President when it comes to the rights of the nation's citizens.”) (quoting *Hamdi*, 124 S. Ct. at 2650); *United States v. Al-Arian*, 329 F. Supp. 2d 1294, 1297 (M.D. Fla. 2004) (stating in “our most challenging and uncertain moments . . . we must preserve our commitment at home to the principles for which we fight abroad”) (quoting *Hamdi*, 124 S. Ct. at 2647-48).

59. *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003); *Ctr. for Nat'l Sec. Studies v. United States Dep't of Justice*, 217 F. Supp. 2d 58 (D.D.C. 2002), *cert. denied*, 540 U.S. 1104 (2004).

the Supreme Court would likely overturn those decisions, giving greater protection to the public's right to receive government information.⁶⁰

Turning to the court of public opinion, we have witnessed a grassroots movement unprecedented in its activity and diversity, engaging individuals and civic groups from all across the political spectrum and all across the country.⁶¹ This movement has led to the adoption of hundreds of community resolutions calling for a cutback on measures such as the Patriot Act's secret surveillance provisions.⁶² It also has led to bipartisan reform bills in Congress.⁶³ Moreover, while Congress rushed to pass the Patriot Act itself in record time, with almost no hearings or debate, Congress has repeatedly resisted subsequent pressures by the Administration to expand its powers even further.⁶⁴ Notably, this resistance has come from both sides of the aisle. And, of special significance, members of Congress have said that they will not give more power to the Administration, unless it provides information as to how it is using the new powers it already has under the Patriot Act. In other words, Congress is imposing a cost on the Administration for its withholding of information, which is another mechanism for combating government secrecy.

My fourth point is that no matter how many battles we win, the government always comes back with another strategy. As noted by the ACLU's principal founder, Roger Baldwin, who earned a number of references in *Perilous Times*, "[n]o fight for civil liberties ever stays won."⁶⁵ To cite one example in the post-9/11 free speech arena – when the ACLU won a court order requiring the government to provide information about post-9/11 detainees it was secretly holding in New Jersey prisons,⁶⁶ by

60. The Supreme Court eventually denied writs of certiorari for both cases. See *Ctr. for Nat'l Sec. Studies*, 540 U.S. 1104 (2004); *N. Jersey Media Group, Inc.*, 538 U.S. 1056 (2003).

61. See Jennifer M. Hannigan, Comment, *Playing Patriot Games: National Security Challenges Civil Liberties*, 41 HOUS. L. REV. 1371, 1391 (2004).

62. See *id.*

63. See Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act*, 72 GEO. WASH. L. REV. 1145, 1158 (2004).

64. See, e.g., Drew Clark, *Momentum Builds on Hill for Revamping USA PATRIOT Act*, CONGRESS DAILY, Aug. 4, 2003, at 5.

65. See Lindsey Gruson, *Some Second Thoughts on Moments of Silence in the Schools*, N.Y. TIMES, Mar. 4, 1984, § 4, at 6.

66. See *ACLU v. County of Hudson*, No. A-4100-00T5, 2002 N.J. Super. LEXIS 201, at *2 (N.J. Super. Ct. App. Div. 2002) (granting an emergency stay of the original order requiring disclosure).

relying on a liberal New Jersey freedom of information law⁶⁷ – the Administration promptly issued new federal regulations mandating secrecy for all federal detainees being held in state prisons,⁶⁸ thus preempting the inconsistent state law and judicial ruling.⁶⁹ Therefore, we in turn had to resort to other strategies to obtain information about these secret detainees, which we are still pursuing, including through a petition to the United Nations Working Group on Arbitrary Detentions.⁷⁰

Just as the rest of my remarks have tracked major themes in *Perilous Times*, my conclusion will do likewise. The last words in Stone's book are: "And, so, we shall see."⁷¹ As was wisely observed by Zechariah Chafee, the great free speech scholar and ACLU leader: "In the long run, in this country people will have as much freedom of speech as they want."⁷² In short, in our democracy, "We the People" ultimately determine our own free speech policies and laws, including constitutional law. To meld Chafee's words with those of his worthy scholarly successor, Geoffrey Stone, "We *shall* see what we *want* to see." So, thank you, Geof, for helping us to see clearly such an enlightening and inspiring vision of free speech!

67. See N.J. STAT. ANN. § 30:8-16 (West 2002).

68. See 8 C.F.R. § 236.6 (2004).

69. See *ACLU v. County of Hudson*, 799 A.2d 629, 638, 655 (N.J. Super. Ct. App. Div. 2002); see also Susan N. Herman, *David G. Trager Public Policy Symposium: Our New Federalism? National Authority and Local Autonomy in the War on Terror*, 69 BROOK. L. REV. 1201, 1222-23 (2004).

70. ACLU, *America's Disappeared: Seeking International Justice for Immigrants Detained After September 11* (Jan. 2004), available at <http://www.aclu.org/Files/OpenFile.cfm?id=14799>; see also American Civil Liberties Union, *Petition to the United Nations Working Group on Arbitrary Detention*, Submitted on behalf of certain immigrants detained by the United States in connection with its investigation into the events of September 11, 2001 (submitted Jan. 27, 2004), available at <http://www.aclu.org/Files/OpenFile.cfm?id=14801>.

71. STONE, *supra* note 1, at 557.

72. ZECARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 500 (4th ed. 1948).