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Nadine Strossen

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SUSPECTED TERRORISTS ONE AND ALL: Reclaiming Our Civil Liberties in Coalition

Nadine Strossen¹

In post-9/11 America, we are all suspected terrorists subject to the government's pervasive and invasive violations of our cherished freedoms. Under the USA PATRIOT Act,² the government has only to claim that information might be relevant to a terrorism investigation in order to get wholesale records. Such records include student, health, financial, library book-borrowing, web surfing, and email.³ Worse yet, the individuals or entities forced to turn over our records are barred from telling us that they have disclosed our personal, confidential information.⁴ New FBI guidelines⁵ also authorize agents to spy on us solely on the basis of our political and/or religious beliefs. Moreover, the executive's exercise of unilateral power to imprison an American citizen indefinitely, without being charged, having access to counsel or trial, and without meaningful judicial review is yet another example of the government's post-9/11 power-grabs. To add insult to injury, these restrictions on our basic civil liberties have not enhanced national security, which is why I stand before you today: we must act now to forge broad-based coalitions, across all political and ideological spectrums, to defeat the post-9/11 legislation that threatens the very heart of what it means to be an American.

The United States Supreme Court has long recognized that before the government can restrict civil liberties, it must show that the proposed restriction will effectively promote a countervailing concern of compelling importance, such as national security, and that it is narrowly tailored to meet this purpose. In constitutional law rubric, this analysis is known as the "strict scrutiny" test. This test reflects common sense and justifies many post-9/11 measures. For example, some of the new aviation security measures, such as fortifying cockpit doors, utilizing Sky Marshals, and

prohibiting passengers from checking their own luggage effectively enhance our safety with minimal costs to our liberty. The problem is that too many post-9/11 measures unduly restrict civil liberties without enhancing our security. In fact, the Total Information Awareness Program (TIA),⁶ USA PATRIOT Act, USA PATRIOT Act II,⁷ and new FBI guidelines have been strongly criticized by security experts as dangerous diversions from the *real* problems that caused the 9/11 catastrophe and the *real* solutions that could protect against terrorism. A critic of particular note is FBI Agent Colleen Rowley, who sent the courageous whistleblowing letter to FBI Director Robert Mueller.⁸ Agent Rowley, a distinguished member of the legal profession and hailed by Republican and Democratic Congresspersons alike, was a joint recipient of TIME Magazine's prestigious "Persons of the Year" award in 2002.⁹

Thanks to Agent Rowley's letter, we now know that the 9/11 catastrophe did not result from the government's limited power to investigate and disrupt potential terrorist threats, but rather from FBI officials' failure to effectively analyze and act on the massive amount of information already in their possession. As TIME Magazine put it, "the Rowley memo casts a searing light into the depths of government ineptitude . . . amount[ing] to a colossal indictment of our chief law enforcement agency's neglect in the face of the biggest terrorist operation ever mounted on U.S. soil."¹⁰ Agent Rowley's letter shows that it is a mistake to reward the government for inept exercise of its already extensive powers by providing it with even broader powers through legislation like the two PATRIOT Acts.

Ironically, at the very moment Agent Rowley was testifying before Congress, President Bush held a nationally televised speech in which, for the first time, he called for the new Department of Homeland Security.¹¹ Until that moment, Bush had strongly opposed the idea of making this a huge Cabinet-level agency rather than just an executive office within the White House.¹² A withering critique of Bush's actions was made by

Pulitzer Prize winning New York Times columnist Maureen Dowd. She wrote, with her characteristic irony:

With the most daring reorganization of government in half a century, George W. Bush hopes to protect something he holds dear: himself. After weeks of scalding revelations about . . . warnings prefiguring the 9/11 attacks that were ignored by the U.S. government, the president created the Department of Political Security. Or, as the White House calls it for public consumption, the Department of Homeland Security. Mr. Bush's surprise move was a complete 180, designed to knock F.B.I. [Agent] Cassandra Colleen Rowley off front pages . . . the minimalist Texan who had sneered about the larded federal bureaucracy all through his presidential campaign stepped before the cameras to slather on a little more lard. . . . All [that same] day . . . Special Agent Rowley . . . and [FBI Director] Mueller . . . [had] made clear [in their Senate testimony] that there is no point in creating a huge new department of dysfunction to gather more intelligence on terrorists when counterterrorism agents don't even bother to read, analyze and disseminate the torrent of intelligence they already get.¹³

Such diversionary tactics, bureaucratic blunders, and scapegoating endanger our civil liberties, as well as our national security. This very point was made by Agent Rowley herself in a second letter to FBI Director Mueller on February 26, 2003.¹⁴ Agent Rowley stated that too many post-9/11 measures sacrificed both security and liberty for political and public relations purposes. She cited the emphasis on the criminal prosecutions against Zaccarias Moussaoui and Richard Reid, as opposed to their potential interrogation for counter-intelligence purposes.¹⁵ Rowley also stressed that "the vast majority of the one thousand plus persons 'detained' in the wake of 9/11 did not turn out to be terrorists. They were mostly illegal aliens."¹⁶

It is important to remember that this harsh criticism came from a respected, lifelong FBI Agent, who is a "tough on crime" political conservative, and not just another card-carrying civil libertarian. Agent Rowley and the ACLU sound the exact same message about post-9/11

abuses, and she is not our only unlikely ally. As an essential resistance strategy to these abuses, the ACLU has collaborated with a diverse coalition of partners. By effectively disseminating our message to a broader audience, we have unquestionably increased the effectiveness of our campaigns.

Take the ACLU's efforts to quell the PATRIOT II: even the conservative New York Sun condemned this massive, proposed legislation as "a catalog of authoritarianism that runs counter to the basic tenets of modern democracy."¹⁷ Among other things, the Act would have expressly authorized secret arrests for the first time in U.S. history¹⁸—the kind of "disappearances" we saw during Argentina's infamous Dirty War. The Justice Department drafted PATRIOT II in secret for months.¹⁹ After it was leaked, experts concurred that the administration was likely to introduce it after we were at war with Iraq or in another crisis akin to the 9/11 aftermath (during which PATRIOT I was rushed through Congress in record time and with almost no hearings or debate).

In the fight against PATRIOT II, the ACLU forged a broad-based coalition resistance effort with citizen organizations. We sent a letter to every member of Congress urging them not to rush the legislation through in the mounting atmosphere of crisis. This strategy proved incredibly effective, and PATRIOT II was not enacted. The coalition ranged from ultra-liberal groups such as Common Cause, National Lawyers Guild, and People for the American Way, to ultra-conservative groups such as the American Conservative Union, Americans for Tax Reform, and Gun Owners of America. The coalition also extended to diverse religious groups, including the American Baptist Churches USA, the Presbyterian Church USA, and the Commission on Social Action of Reform Judaism. One key passage from the ACLU's letter to Congress, on behalf of this broad coalition, stated:

Like all Americans, we are deeply concerned by the continuing terrorist threats against our country, and like a growing number of

Americans of every political persuasion, we are also worried that [Patriot II]. . . would be the wrong remedy for this ongoing problem. . . . The bill contains a multitude of new and sweeping law enforcement and intelligence gathering powers, many of which are not related to terrorism, that would severely dilute [or] undermine many basic constitutional rights, as well as disturb our unique system of checks and balances. . . . We encourage you to . . . [oppose] such legislation, or any other legislation unnecessarily expanding the powers the government has already obtained in the USA Patriot Act. Instead, we recommend that you ask the administration to provide Congress and the public with more information about its use of the powers already granted in the USA Patriot Act.²⁰

As Justice O'Connor wrote, "It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis."²¹ Indeed, President Bush himself stressed our country's proud constitutional heritage in his very first words to our stricken nation after the terrorist attacks. He hailed the United States as "the brightest beacon for freedom and opportunity in the world," and vowed that "no one will keep that light from shining."²² This is only to say what we already know: we cannot let terrorists scare us into abandoning the very ideals that make our nation great. "We the People," from across all ideological and political spectrums, must stand together to protect "Liberty for All." As Los Angeles Attorney Stephen Rohde's post-9/11 version of the famous 1937 poem by Reverend Martin Niemoller points out, we simply cannot wait until "they come for us."

First they came for the Muslims, and I didn't speak up because I wasn't a Muslim.

Then they came for the immigrants, detaining them indefinitely solely upon the certification of the Attorney General, and I didn't speak up because I wasn't an immigrant.

Then they came to eavesdrop on suspects consulting with their attorneys, and I didn't speak up because I wasn't a suspect.

Then they came to prosecute noncitizens before secret military commissions, and I didn't speak up because I wasn't a noncitizen.

Then they came to enter homes and offices for unannounced "sneak and peek" searches, and I didn't speak up because I had nothing to hide.

Then they came to reinstate COINTELPRO and resume the infiltration and surveillance of domestic religious and political groups, and I didn't speak up because I no longer participate in any groups.

Then they came to arrest American citizens and hold them indefinitely without any charges and without access to lawyers, and I didn't speak up because I would never be arrested.

Then they came to institute TIPS—the "Terrorism Information and Prevention System"—recruiting citizens to spy on other citizens, and I didn't speak up because I was afraid.

Then they came to institute Total Information Awareness, collecting private data on every man, woman, and child in America, and I didn't speak up because I couldn't do anything about it.

Then they came for immigrants and students from selective countries, luring them under the requirement of "special registration" as a ruse to seize and detain them, and I didn't speak up because I was not required to register.

Then they came for anyone who objected to government policy because it only "aided the terrorists" and "gave ammunition to America's enemies," and I didn't speak up . . . because I didn't speak up.

Then they came for me and by that time no one was left to speak up.²³

¹ Nadine Strossen is Professor of Law at New York Law School and President of the American Civil Liberties Union. This transcribed version of Professor Strossen's speech to the National Conference of Law Reviews on March 29, 2003, is reprinted here with the

permission of Professor Strossen. Professor Strossen has not reviewed this transcription, and all responsibility for the transcription and editing lies with the *Seattle Journal for Social Justice*.

² Uniting And Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) ACT of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

³ *Id.* §§ 201, 215.

⁴ *Id.* § 215.

⁵ The Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations (May 30, 2001), at http://www.usdoj.gov/olp/general_crimes2.pdf (last visited Oct. 17, 2003).

⁶ Terrorism Information Awareness Program (formerly Total Information Awareness Program), part of the Defense Advanced Research Agencies Information Awareness Project (DARPA). The Homeland Security Act created it, but Congress recently denied it funding. See 149 CONG. REC. H8500 (daily ed. Sept. 24, 2003) (joint explanatory statement of conference committee); Carl Hulse, *Congress Shuts Pentagon Unit Over Privacy*, N.Y. TIMES, Sept. 25, 2003, at A20.

⁷ Domestic Security Enhancement Act of 2003, available at http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf (draft of Jan. 9, 2003) (last visited Oct. 17, 2003).

⁸ Romesh Ratnesar & Michael Weisskopf, *How the FBI Blew The Case*, TIME, June 3, 2002, at 24.

⁹ Richard Lacayo & Amanda Ripley, *Persons Of The Year: Colleen Rowley, Cynthia Cooper, Sherron Watkins*, TIME, Dec. 30, 2002, at 32.

¹⁰ Ratnesar & Weisskopf, *supra* note 8.

¹¹ President George W. Bush, Address to the Nation (June 6, 2002), at <http://www.whitehouse.gov/news/releases/2002/06/20020606-8.html>.

¹² *Bush Wants Broad 'Homeland Security' Overhaul*, CNN.com, (June 7, 2002), at <http://www.cnn.com/2002/ALLPOLITICS/06/06/bush.security/>.

¹³ Maureen Dowd, *Dept. of Political Security*, N.Y. TIMES, June 9, 2002, at D15.

¹⁴ Letter from Colleen Rowley, Special Agent Minneapolis, FBI, (Feb. 26, 2003), available at <http://startribune.com/stories/484/3738192.html>.

¹⁵ *Id.* at ¶ 3.

¹⁶ *Id.* at ¶ 6.

¹⁷ Errol Louis, Editorial, *Ashcroft and the Constitution*, N.Y. SUN, Feb. 10, 2003, at 6.

¹⁸ Domestic Security Enhancement Act, *supra* note 7.

¹⁹ Charles Lewis & Adam Mayle, Justice Dept. Drafts Sweeping Expansion of Anti-terrorism Act, at <http://www.publicintegrity.org> (last visited Oct. 17, 2003).

²⁰ For the ACLU's section-by-section analysis of this ominous new measure, as well as details about the many other post-9/11 government abuses, see <http://www.aclu.org>.

²¹ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 686 (1995).

²² President George W. Bush, Address to the Nation (Sept. 11, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html>.

²³ Stephen Rohde, *They Came for the Muslims, and I Didn't Speak Up*, L.A. DAILY J., Nov. 20, 2002, at 6.