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NADINE STROSSEN AND THE ACLU

Norman Dorsen*

I.

My purpose in this article is to shed light on what Nadine Strossen does in her day—and night—job as president of the American Civil Liberties Union (“ACLU”). To do this I will first discuss the ACLU itself, its structure, and its processes. Some of what I discuss may be familiar to the audience of this symposium, which knows the ACLU both from its ubiquitousness in American life and, in some cases, through their work with (and perhaps against) the organization at the national or affiliate level. As Nadine’s immediate predecessor as ACLU president, I shall try to indicate how she justifies the description of activist as well as scholar.

First, a personal comment. When one leaves a demanding post after many years of service, there is always a risk that your successor will disappoint you by depreciating, or even reversing, your decisions and priorities. To take a famous example, until the end of his life Chief Justice Earl Warren was unreconciled to Warren Burger as his replacement. And I have seen law school deans chew the rug, at least figuratively, when their successors undid much of their hard work. It can also happen at the ACLU—indeed, it has on one occasion, as I shall note shortly. Conversely, there is a special satisfaction and joy to be followed in office by a friend held in high esteem with whom one shares much, personally and intellectually. Such has been my happy lot with Nadine since she succeeded me in 1991, and I thank her for this and other things, including her physical support in carrying my luggage through an airport in Manila one time when I had injured my elbow.

II.

There have been very few ACLU presidents since January 1920, when the organization was formed. Nadine is only the sixth, the youngest to take office, and the only woman. (The first two chairmen were ministers, while the last four have been lawyers; I leave to others the judgment of whether that signifies progress.) When I assumed the position in late 1976, the title was “chairman”; the change in nomenclature early in my tenure was not only a modest blow against sexism, but also a nod to the English language since “chairperson” was rejected. More substantively, the change

* Stokes Professor of Law and counselor to the president, New York University. President of the ACLU 1976–1991. Some material in this article has been taken from Norman Dorsen, *The American Civil Liberties Union: An Institutional Analysis*, 1984 Tul. Law. 6 (1984).

reflected the fact that the duties of the position had grown over the years, and the more activist label of “president” was therefore appropriate.

The ACLU was founded as the first organization in the United States, and perhaps anywhere, which, with breathtaking temerity, assigned itself the mandate to safeguard all of the Nation’s civil liberties, not merely those of a particular group. Belying this grandiose ambition, the ACLU was tiny in its early years. The annual reports listed the name of every dues paying member (there was a \$1 minimum), and the budget never came close to six figures. By contrast, the ACLU now has almost 600,000 members, an annual budget of about \$80 million,¹ and more than 400 staff members all over the country. When you add to this the affiliate and chapter boards of directors, committees at all levels, and a small army of volunteers, thousands of people are actively working in the ACLU’s orbit. The large membership is a vast source of ACLU strength, even apart from the money it brings. It means that the ACLU has a continuing presence in every state and most communities, and it can thus plausibly boast that it is not an alien force or a guerilla army—or worse, a bunch of Eastern elitists—imposing foreign values behind enemy lines, but rather an indigenous organization of neighbors, relatives, and friends.

The enormous growth of the ACLU has obvious advantages and is a testament to its internal health. But, it also inevitably opens the door to tensions, as individuals at all levels zealously defend their interests or their turf, all acting, as they see it, in the best interests of the organization. These tensions are heightened for reasons that reflect the nature of the ACLU as a distinctive—I am tempted to say unique—institution in American life.

Let me try to explain. In the first place, the ACLU is shockingly pluralistic and democratic, with numerous centers of influence or power at the national office (“National”), and at the state (“affiliate”) and local levels (“chapter”). Seriously contested elections are held at every level, often accompanied by vigorous campaigning based on ideological, personal, and other qualifications. Indeed, when Nadine was elected to the presidency, the vote was extremely close—thirty-seven to thirty-three.

The ACLU Board of Directors includes one member from each state affiliate, plus thirty at-large members elected through a complex system by other National board members and the board members of the state affiliates. An eleven member executive committee of National’s board is elected by members of the board, with no fewer than seven candidates, and often more, vying for five positions in staggered two-year terms. There is a biennial conference at which hundreds of ACLU leaders from around the country meet, and their votes on substantive policy can require National’s board to reexamine an earlier decision.

There is bound to be friction in these circumstances. Put another way, the ACLU is a federal system in which National must compete with the affiliates on many matters, but consists of people chosen, in large part, by the affiliates. In this respect, I am reminded of Herbert Wechsler’s well-known article in which he justified a strong central government in the United States, on the ground that Congress was composed of

1. The ACLU accepts no government funds. In addition, during my twenty-six years on the board of directors, I never heard reference to a person’s wealth as a qualification for membership.

representatives who owed their positions to state and local political parties and thus could be counted on not to invade state authority lightly.²

Many would say that this has proved to be an idealized portrait of governance in the United States, and many ACLU affiliates would likewise say that National sometimes extends its writ beyond appropriate bounds. At the same time, some at National feel that affiliates too often meddle in distinctly national issues.

A second source of internal tensions concerns the appropriate division of money between National and the affiliates that is raised from dues, large individual gifts, and foundation grants. The question today is how to divide a large and growing pie, but in the late 1970s the ACLU was running a severe deficit. It was not fun in those days to allocate the small amount of discretionary dollars.

Whether it is feast or famine, the questions remain: If an individual joins the ACLU, do the member's dues go to the state affiliate or to National, or to both, and if the latter, in what proportion? Is it relevant that a new member indicates an interest in issues that are identified with the local community or with National's agenda? Or, say, if a major personal gift or a foundation grant is received for women's rights, should the state's or National's women's rights project receive the money, and if it is divided, in what proportion? Of course, sometimes this is made clear by a donor, but not always, and in any event donors are often not knowledgeable about the ACLU structure; they think they are giving money simply to "the ACLU," while in fact the ACLU is composed of many overlapping entities. Bear in mind that each state affiliate has its own board of directors, a paid staff, a budget that must be met, and local priorities, which may differ from those of other affiliates or from National. Today, happily, most sources of financial conflict have been worked out by treaty, although not all of them.

A third element in the internal give and take stems from a key ACLU principle: the principle of consistency. An early ACLU leader, whose name is lost to history, put the idea into free verse many years ago: "Thus, for the hundreds of religious sects, there is one freedom of worship. For the thousands of groups that gather, there is one freedom of assembly. For all the millions of people who express opinions, there is one freedom of speech." And the same could be said about the right of privacy, of security of property, of fair criminal procedures, and on and on.

But this principle of consistency is often not easy to apply. Different circumstances do, or at least arguably should, lead to different results. Is it within the freedom of worship for a religious organization to hold meetings or services in a public building, or to erect a plaque with the Ten Commandments on public property, or are these instead violations of the Establishment Clause? Is it within the freedom of assembly to demonstrate peaceably at a defense plant, or on a military base, or adjacent to the United States Supreme Court building? Is it within the freedom of speech to advocate a crime, to lie during a political campaign, to falsely advertise a commercial product, or to intentionally reveal a military secret?

2. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954).

If consistency means treating like cases alike, the ACLU—like the courts—is obligated to decide regularly whether a similar case is, in fact, a *like case*. Even closer to the bone, is it inconsistent for one ACLU affiliate to differ with another affiliate or with National in the application of freedom of speech; privacy, and the rest, or is it, rather, a healthy manifestation of the fact that there are many close questions, that mores in different parts of the country vary, that refinement of principle, even a new principle, often emerges after a dissident unit boldly goes its own way? In this respect, it is of interest that the ACLU Constitution mandates “general unity rather than absolute uniformity”³ throughout the organization.⁴ Sounds good, but how far does it go? Could an affiliate remain with the ACLU if it advocates the overruling of *Roe v. Wade*,⁵ or the jettisoning of the exclusionary rule in criminal trials,⁶ or opposition to the rights of gay people? And, who decides such a question, and how?

Another element in the ACLU mix is its political nonpartisanship. The ACLU does not endorse or oppose candidates for political office, and neither do top leaders of the organization, many of whom do not even make financial contributions to candidates (personally, I was happy to save a little money over the years).⁷ The principal occasion when the ACLU opposed a nominee was in 1987 when President Reagan put forward Robert Bork for the Supreme Court. The Bork affair was almost as long a story within the ACLU as it was within the United States Senate (and as controversial). Earlier, the ACLU Board voted to oppose the confirmation of William H. Rehnquist when President Nixon nominated him in 1971, but the ACLU did not work against the nomination as it did, vigorously, against Bork. Subsequently, the board did not oppose the nominations of either Clarence Thomas or John Roberts, but it did oppose the nomination of Samuel Alito.⁸

Turning now to an even more basic issue, what exactly is a civil liberty question? And, how does the ACLU decide? This is critical. After all, it was not handed down from Mount Sinai that a group of people calling themselves “the board of directors of the American Civil Liberties Union” would proclaim the definitive word on what rights Americans should possess, often at the expense of decisions by elected legislatures and executive officials. The ACLU must have a credible and systematic approach to its task, or the entire edifice is in danger of collapsing.

I do not want to appear unduly modest about the ACLU’s wisdom in this area. I am reminded of a story about three baseball umpires who were asked how they called

3. ACLU Const. § 6(A) (copy on file with author and *Tulsa Law Review*).

4. *Id.*

5. 410 U.S. 113 (1973).

6. See *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

7. The ACLU’s nonpartisanship may be contrasted with the policies of the National Council for Civil Liberties (“NCCL”) (now Liberty) in the United Kingdom. The NCCL was not nearly as strict as the ACLU on this matter, at least in its early years, and this limited its appeal to moderates and conservatives sympathetic to civil liberties. See Larry Gostin, *Editor’s Notes: The Conflicting Views of Two National Civil Liberties Organizations*, in *Civil Liberties in Conflict* 117 (Larry Gostin ed., Routledge 1988).

8. See ACLU, *ACLU Urges Senate to Vote No on Alito Cloture Vote, Says Nominee Too Far Outside American Mainstream*, <http://www.aclu.org/scotus/2005/23968prs20060130.html> (Jan. 30, 2006). For a discussion of the process of appointing Supreme Court Justices in the United States, see Norman Dorsen, *The Selection of U.S. Supreme Court Justices*, 4 Intl. J. Const. L. 652 (2006).

pitches from behind the plate. The first umpire said, "Balls is balls and strikes is strikes, and I calls 'em as I sees 'em." The second umpire put it this way: "Balls is balls and strikes is strikes, and I calls 'em as they are." But, the third umpire—the one from whom the ACLU takes its cue—had a different approach. He said, "Balls is balls, and strikes is strikes, and until I calls 'em they ain't nothing." This is the way the ACLU feels. While the ACLU recognizes that it is capable of mistakes, it proceeds despite what others, including the Supreme Court, have said; the Supreme Court also can be wrong. Until we say something is a civil liberty, it "ain't nothing." And, by the same token, when we say something is a civil liberty, it does not matter what others may think. That is it, at least as far as we are concerned. And, if we lose in the courts, our appeal is to the court of public opinion and to history, where we have won some victories over the years.

III.

This is the general nature of the institution of which Nadine assumed the presidency on February 1, 1991. What does she do and what has she done? First, she chairs all meetings of the eighty-three-member board and eleven-member executive committee. Lest you think this is pro forma, that it is a simple matter to keep order, complete the agenda, and instill a sense of fairness in a disparate group that is often ideologically divided, sometimes idiosyncratic and customarily uninhibited, I suggest you reconsider. It is extraordinarily difficult.

Let me describe the typical process when a substantive issue is presented to the board for decision. A motion is made. Ordinarily one or more amendments are proposed, then a substitute motion. The substitute motion might, or might not, procedurally trump the pending amendments depending on whether it is really a substitute motion or is a disguised amendment of its own. There is debate on all these matters, and the chair must keep clear what motion is on the floor at a given moment and limit discussion to what is germane to it. There are time limits for speakers, and an overall time limit, but there are sometimes motions to extend time for a given period. These in turn may be debated. Board members pay close attention to the process. Sometimes (in fact, often) there are points of order raised to challenge germaneness, arguably duplicating motions, the lapse of time, or something else. The chair must decide whether points of order are merely improper arguments on the merits of the substantive issue. Sometimes, only after much clarification, the chair must rule on the point of order, a decision that is appealable to the full body. Whether or not the chair is overruled (happily, this occurs rarely), it is back to the main menu. In addition, the chair often must rule on whether a particular motion requires a two-thirds vote or the usual majority vote. This is also appealable to the body. Nadine must be familiar with Robert's Rules and the ACLU's own modifications to those rules, which I drafted in 1977, but undoubtedly have been amended many times since then. Sometimes votes are close, and a recount is requested, sometimes more than once, and there are provisions for a secret ballot in certain circumstances. This is not a genteel or easy process in a contentious body, and the chair must make its rulings promptly. Nadine's work in chairing meetings is vital in keeping the organization moving and united.

Another deceptively modest duty of presidents is the appointment of committees. Think of a law school dean's decisions on committee appointments, which often are controversial, and then multiply it by a high factor to approximate the difficulty of committee choices at the ACLU. Add to the usual difficulties in making appointments the need to maintain some balance, not only with an appropriate mix of men, women, gays, and racial minorities, but also geographically, ideologically, board members versus others, and other factors. ACLU committees often determine the organization's direction, institutionally and substantively, through fact finding and recommendations, because the board of directors rarely rejects a committee's proposals in its entirety, although it is common for important changes of detail and emphasis to be made on the floor. I understand that the role of certain committees has declined since my day, but I assume that the president's appointments remain important and are still scrutinized with care.

There are other sorts of conflict, for instance between board and staff, where the men and women on the front lines of an emerging civil liberties issue may think a policy of the board of directors is unrealistic or wrong. Staff members may lobby for their position and, if they lose, often induce their allies on the board to press for a policy change at the next meeting, with mixed results.

There is also tension, at times, between the board of directors and the executive committee, sometimes over whether a matter is appropriate for executive committee resolution (arguably at the expense of board authority) and sometimes on the merits of an issue. It is not uncommon for the board to reverse the executive committee, and although every executive committee action is appealable to the board, frequently there is not enough time to do this on a fast-moving issue before the board's next quarterly meeting. The president, in such cases, must soothe board members and persuade them that the sky will not fall even if the executive committee has erred, but on occasion she will urge the executive committee to reverse course.

Some of the toughest struggles are over personnel, which will not surprise academics accustomed to faculty battles over appointments and tenure. In the ACLU, a large and far-flung organization whose decisions significantly affect public policy, the stakes are high. For example, during the 1960s the executive committee had to decide whether to replace an executive director, in the 1980s there was a hair's-breadth decision over whether the executive director's nominee would be confirmed as ACLU legislative director, and only a few years ago there was the usual controversy surrounding the election of a new executive director. The executive committee played a pivotal role in each instance, and on the first two occasions it received criticism from both supporters and opponents of the person in question. In all these matters, the president is centrally involved in guiding the debate and addressing the concerns of individuals and units within the ACLU.

A particularly sensitive issue that was common until the last few years, an issue in which the president plays a key role, is what to do about "troubled affiliates"—the euphemism for a state organization that, for a variety of possible reasons, is not functioning adequately, or is beset with internal controversy. The trouble rarely is over a policy position. More frequently, especially before the ACLU became more financially

secure, an affiliate was at, or close to, bankruptcy, or there were apparently irreconcilable differences within an affiliate board of directors or between a board and its executive director. Arduous, careful, and even bitter negotiations have occurred on some of these matters, in which the president has to exercise judgment, firmness, and sensitivity. I still get a chill when I think of my own extended ventures into Ohio and Arizona—one of which worked and one did not—and I have no doubt that Nadine could tell her own tales of this kind.

The two main reasons for the decline of the troubled affiliate problem are, first, the stronger financial condition of the organization, and second, the new National unit on affiliate support, which Nadine has strongly supported. This office includes specialists in finances, management, and fund-raising, and it cooperates with affiliates to prevent difficulties, or at least arrest them at an early stage.⁹ At the same time, affiliate staffs have become larger, with no fewer than three professional employees in each affiliate. Nadine regularly stays in touch with staff members at both National and the affiliates to facilitate their work and to respond to new issues that arise.

There are other sorts of conflict that call for presidential leadership. Recently, there were a series of disputes at the ACLU in the wake of *New York Times* articles that quoted a few board members who had complained about some actions by the staff.¹⁰ Nadine presided over board and executive committee debate, while also addressing the sensitive issues in many public forums.¹¹

I have mentioned how good it has been to have Nadine as my successor, and I suggested that it was not always thus. In 1940, when the Reverend John Haynes Holmes succeeded Reverend Harry Ward (the founding chairman of the ACLU in 1920), the precipitating event was the board of directors' decision to expel Elizabeth Gurley Flynn, a known Communist (who the board knew was a Communist when she was elected), and its concomitant decision to require all ACLU Board members and staff to affirm that they did not support totalitarian organizations, which meant the Communist Party, although "Nazis and fascists" were thrown in to provide apparent political balance. Burt Neuborne has ably and provocatively discussed this important incident in this symposium.¹² I will merely add that while Ward was open to communist membership

9. See ACLU, Geri E. Rozanski, *Director of Affiliate Support*, <http://www.aclu.org/about/staff/13335res20050314.html> (Mar. 14, 2005).

10. Stephanie Strom, *A.C.L.U. May Block Criticism by Its Board*, 155 N.Y. Times A20 (May 24, 2006); Stephanie Strom, *Rift at A.C.L.U., On Fund-Raising and Leadership*, 155 N.Y. Times A1 (Dec. 8, 2005); Stephanie Strom, *Concerns Arise at A.C.L.U. Over Document Shredding*, 154 N.Y. Times A24 (June 5, 2005); Stephanie Strom, *A.C.L.U.'s Search for Data on Donors Stirs Privacy Fears*, 154 N.Y. Times A1 (Dec. 18, 2004); Stephanie Strom, *A.C.L.U. Rejects Foundation Grants over Terror Language*, 154 N.Y. Times A17 (Oct. 19, 2004). The issues raised in the recent debates about the ACLU are beyond the purview of this article.

11. Internal controversy in the ACLU is nothing new, either on substantive or institutional matters. One article discusses the free speech and sexual harassment issues, saying that the ACLU "is no stranger to controversy [and] has come under fire once again over some of its policies." Mark Hansen, *Hate Crimes, Harassment Split ACLU*, 79 ABA J. 17 (July 1993). The article quotes critical comments by the legal director of the ACLU Washington office and the executive director of the Florida affiliate.

12. For an acute historical perspective, see Gara LaMarche, *Uncivil Liberties: What the Turbulent History of the ACLU Can Teach Progressive Organizations Today*, Democracy (Winter 2007) (reviewing Judy Kutulas, *The American Civil Liberties Union and the Making of Modern Liberalism, 1930–1960* (UNC 2006)). Three recent articles about the conflict within the ACLU have appeared: David France, *Freedom to Backstab*, New York 41 (Feb. 19, 2007); Wendy Kaminer, *The American Civil Liberties Union*, Wall St. J. A19

on the board, Holmes took a wholly different tack on this matter as well as on related issues throughout his tenure, much to Ward's dismay.¹³

IV.

Until this point, while I have alluded to the ACLU's substantive policies, I have not concentrated on them, and in particular on the president's role in regard to them.

Nadine was well grounded in policy development prior to her presidency. She had served seven years on the board, including periods when she chaired important committees. Later, as one of the ACLU's general counsel, she helped to decide (along with the staff legal director) whether an issue fell within established ACLU policy or had to be referred to the board or executive committee for resolution. Years ago, the general counsel were formally consulted and voted on whether to file a brief *amicus curiae* in Supreme Court cases, and they were informally advised on policy questions in cases handled directly by ACLU staff. These days there is a much larger and specialized staff, and all issues of this kind are presumptively within staff discretion, with the legal director consulting general counsel as the occasion seems to require. Whatever the case (or legislative matter), the president can, and should, question staff decisions at appropriate times since many of them are matters of close judgment. In addition, the president by procedural decisions, or more rarely by intervention in debate, can influence decisions of the board and executive committee as they develop new policy or amend existing ones.

The president can also directly advance ACLU policy or nudge it in a new direction. This symposium is a testimonial to Nadine's scholarship, which relates to many ACLU issues—among others, free speech, separation of church and state, searches and seizures, the rights of women, including reproductive freedom, and the use of international human rights norms in domestic civil liberties cases, a relatively new effort by the ACLU.¹⁴ At least as important as her scholarship to the evolution of ACLU policy, and its acceptance by ACLU units as well as the public, has been Nadine's indefatigable speech-making at universities, at conferences and debates, on TV and radio, and just about every forum imaginable, including the ACLU affiliates themselves, the core audience. I used to think I was busy on the "lecture circuit," as it is somewhat misleadingly described, but I was nowhere compared to Nadine. Her appearances have given an intelligent and lively face to the tough issues that the ACLU addresses. Only someone who habitually relies on about four or five hours of sleep a night, and who can

(May 23, 2007); Scott Sherman, *ACLU v. ACLU*, *The Nation* 11 (Feb. 5, 2007). A group of former leaders of the ACLU—Aryeh Neier, Burt Neuborne, John Shattuck, Morton Halperin, and Laura Murphy—joined a letter in support of the organization and its leaders. See Norman Dorsen et al., *Standing By the A.C.L.U.*, 154 N.Y. Times A22 (Sept. 29, 2006). See also Burt Neuborne, *Of Pragmatism and Principle: A Second Look at the Expulsion of Elizabeth Gurley Flynn from the ACLU's Board of Directors*, 41 *Tulsa L. Rev.* 799 (2006).

13. For a detailed account of the ACLU's divisions on this matter, including Harry Ward's resignation as chairman, see Samuel Walker, *In Defense of American Liberties: A History of the ACLU* 118–32 (2d ed., S. Ill. U. Press 1999).

14. For a discussion by Strossen of a range of civil liberty issues, in the context of the ACLU legal program, see Nadine Strossen, *Reflections on the Essential Role of Legal Scholarship in Advancing Causes of Citizens Groups*, 49 N.Y.L. Sch. L. Rev. 505 (2004).

bear the physical and mental strain of constant motion hither and yon, could do this sort of thing.

In her speeches and debates Nadine obviously does not contradict ACLU policy, but sometimes she goes beyond the letter of a policy or breaks new ground, if only in a tentative way. Given her Herculean schedule, it is impossible to avoid this without being banal in her talks or pausing incessantly to research whether current ACLU policy is X, or Y, or Z, or no policy. In her appearances, Nadine's combines both professionalism and passion, qualities not easy to yolk, as discussed in a recent article in *Dædalus* magazine.¹⁵

As suggested above, the president can play a key role in resolving conflict over the application of existing policy. Still unmentioned are the internal divisions over whether the board should adopt a new policy or amend a policy. These debates often engender much heat, and a few notable examples among hundreds deserve mention.

In the 1960s and 1970s there were long debates over whether the death penalty, without more, presented a civil liberties issue, over whether the conduct of the Vietnam War was consistent with the United States Constitution in the absence of a congressional declaration of war, and whether civil liberties principles protect the right of gun-owners to "bear arms" under the Second Amendment. With considerable dissent, the board eventually held that the death penalty per se did raise a civil liberties issue, that the war was unconstitutional (on separation of powers and other grounds), and that there was no civil liberties right to bear arms. Indeed, on the last issue the board initially went so far as to take the communitarian position that gun *control* was the protected civil liberty, but a few years later, amidst controversy, it moved to a position of neutrality on the matter.

Sometimes, unfortunately, board debate has occurred only *after* the staff has initiated litigation on an issue, including some cases in which I was heavily involved. The first was *In re Gault*,¹⁶ where the Supreme Court first held that juveniles in delinquency cases had a variety of due process rights.¹⁷ Others were *Roe v. Wade*, where we took positions that went beyond the policy previously enunciated by the board, and two cases in which we persuaded the Supreme Court that commercial enterprises possessed substantial rights under the search and seizure provisions of the Fourth Amendment.¹⁸

It might have been possible to extrapolate the specific policies in these cases from more general ACLU policies: due process principles in *In re Gault*, sexual privacy principles following *Griswold v. Connecticut*¹⁹ in *Roe v. Wade*, and a different sort of privacy principle in *Camara v. Municipal Court of San Francisco*²⁰ and *See v. City of Seattle*,²¹ the commercial search and seizure cases. But these were disputable

15. William Damon et al., *Passion & Mastery in Balance: Toward Good Work in the Professions*, 134 *Dædalus* 27 (2005).

16. 387 U.S. 1 (1967).

17. *Id.* at 4.

18. The cases were *See v. City of Seattle*, 387 U.S. 541 (1967), and *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967).

19. 381 U.S. 479 (1965).

20. 387 U.S. 523, 525 (1967).

21. 387 U.S. 541, 541 (1967).

extensions, and the board should have made the policy decisions before the litigation occurred. Indeed, in the debate following the Supreme Court decisions, several board members implicitly criticized the staff and general counsel for going too far on their own. The ACLU's institutional safeguards may well have been breached in these cases, all of which antedated my presidency and Nadine's. But given the fast-moving pace of constitutional litigation from the mid-1960s to the mid-1970s it could plausibly be maintained that the ACLU did the right thing (even if in the wrong way procedurally) in litigating these important civil liberties cases at the time they arose, rather than awaiting formal board authorization.

Resolution of policy issues has been complicated by a major development in the ACLU that began in the early 1970s. In order to focus resources on the civil liberties problems of particular groups—e.g., women, prisoners, immigrants, gay people—a series of nine semi-independent projects were created through the efforts of then-executive director Aryeh Neier that concentrated on these issues, under the general authority of the executive director and legal director. New projects have been developed over the years. The result has been a major boon to the effectiveness of the organization since it permits National to address knowledgeably a far wider range of issues. But sometimes National's policies, as represented by lawyers for the projects, do not squarely come within existing policy or do not dovetail with the policies approved by the board of directors of the affiliate where a case is located. While these situations usually are worked out without great difficulty, sometimes creative solutions are necessary.

When there are questions of this kind, the president, more than anyone else, should assure that ACLU policies are established by the board of directors, or at least the executive committee, before National's staff acts or, if a case is truly national in its nature, an affiliate does not jump ahead of National. But it is often not easy to tell whether a case is "national in its nature" unless a federal statute or executive action is plainly involved. Thus, all the cases I mention above tested state law under the U.S. Constitution, and state affiliates were heavily involved along with National.

A dramatic example of an affiliate acting in direct conflict with National arose a while back in Maryland. A radio station had broadcast inflammatory information about a man who had been charged with a ghastly murder.²² At the trial, the court held that the defendant was denied due process because the jury had been prejudiced by the radio broadcasts, and the court further held the radio station in criminal contempt for obstructing the administration of justice.²³ The Maryland Court of Appeals reversed the contempt conviction, holding that the radio station's speech was protected by the First Amendment,²⁴ and Maryland sought review in the U.S. Supreme Court.²⁵ To the consternation of some, and the amusement of many, National and its Maryland affiliate filed briefs on opposite sides. The Supreme Court eventually denied the petition for

22. *Balt. Radio Show, Inc. v. State*, 67 A.2d 497, 500 (Md. 1949), *cert. denied*, *Md. v. Balt. Radio Show, Inc.*, 338 U.S. 912 (1950).

23. *Id.*

24. *Id.* at 511.

25. *Balt. Radio Show*, 338 U.S. 912.

certiorari,²⁶ but ACLU insiders regarded that as a distinctly secondary matter.

A similar case arose in California in 1976, and it had the novel quality of pitting a state affiliate against one of its local chapters (chapters have a roughly similar relationship to state affiliates as the latter have to National). This case arose at a marine base in California where there was an active unit of the Ku Klux Klan, which had its own “office” with racist posters, literature, and other paraphernalia.²⁷ One day black marines rushed the office and beat up several white marines.²⁸ The marine commandant court-martialed the black marines, and transferred the white marines to another camp out of state.²⁹ The local ACLU chapter, apparently without full consultation with the state affiliate, publicly announced it would represent the white marines in challenging their transfer to a new military base on the ground that Klan membership was constitutionally protected free association even within the military.³⁰ It was not a strong argument, although not frivolous. The problem some saw was that the representation was one sided because the court-martial of the black marines had due process problems.³¹ The affiliate board met several times on the controversy, in a rancorous atmosphere, and eventually decided to support both groups of marines.³²

The entire affair, understandably, was a field day for the media. Fully apart from whether the ultimate decision, in a high profile controversy, to represent both groups in their civil liberties claims was correct, much embarrassment could have been avoided with adequate consultation. This was an institutional failing. Top officers of ACLU units, as well as National—especially the president—are accountable for the way in which decisions are made, and they must create an atmosphere which encourages collegial discussion. It is sometimes not easy to do this on issues that evoke strong emotions, and human error will occur.

In the past there were also occasional inter-affiliate tensions related to policy. Thus, when a new case has contacts with more than one jurisdiction, the question naturally arises of which affiliate’s lawyers will run the litigation. These tensions may include a financial dimension. Some states are rich, some are poor, and many of the toughest civil liberties issues arise in poor states, such as those in the “deep south” or in the “mountain states” where white supremacy groups often flourish. National can help financially, but there are also demands for “transfer payments” from the wealthier to poorer affiliates. The president must mediate these disputes, which are rarer now that clear financial rules have been instituted, and, as mentioned above, National and affiliate staffs are larger and more professional. Above all, there is a lot more money available now for both National and the affiliates.

26. *Id.* at 912, 917.

27. Walker, *supra* n. 13, at 332; *see also On Defending the Ku Klux Klan*, 126 N.Y. Times L30 (Apr. 18, 1977).

28. Walker, *supra* n. 13, at 332; *see also On Defending the Ku Klux Klan*, *supra* n. 27.

29. Walker, *supra* n. 13, at 332; *see also On Defending the Ku Klux Klan*, *supra* n. 27.

30. *See* Walker, *supra* n. 13, at 332.

31. *See id.*

32. *See id.* Walker also discusses another First Amendment issue involving the Klan where there was internal division in the ACLU. *Id.* at 332–33.

There is an entirely different sort of institutional conflict that many would say is more important than the others. It concerns *how* the ACLU tries to advance civil liberties rather than *what* civil liberties it protects.

For a long time a deep division existed in the ACLU over the important question of whether ACLU lawyers should primarily file amicus briefs on specific civil liberties issues, or whether the ACLU should directly represent individuals or groups as its clients. The amicus route requires fewer resources, removes the ACLU from the immediate hurly-burly of complicated cases, and permits it to express civil liberties principles in a "pure" way without having to address unrelated matters. But that approach also disables ACLU lawyers from active participation in trials, where the record is created, usually prevents them from determining litigation tactics, and, except in rare cases, disqualifies them from participating in oral argument on appeal. In the 1970s the board voted to authorize aggressive direct representation, and I doubt whether this policy will be modified any time soon because it has plainly helped to advance the ACLU agenda, including the complex litigation that accompanies civil liberties challenges to embedded institutional practices in schools, prisons, and elsewhere.

I have spoken much of internal conflict and tension. But such disputes do not accompany every high profile ACLU issue, including cases where we disappointed some of our usual allies. For example, in an unusually high-profile case, the board of directors in the mid-1970s voted without dissent to defend a peaceful march of an American Nazi group in Skokie, Illinois.³³ And there was little or no internal disagreement in two cases in which we took a position contrary to the NAACP Legal Defense Fund. One of these involved the question of whether a segregationist governor of Mississippi had the right to a jury trial when a federal judge imprisoned him for contempt of court,³⁴ and the other involved a town ordinance prohibiting multiple "for sale" and "sold" signs in order "to stem . . . the flight of white homeowners from a racially integrated community."³⁵ In the former case, the ACLU was unsuccessful in its support of the right to jury trial,³⁶ but it succeeded in the latter case in its support of the free speech right to advertise one's property for sale.³⁷ I received a nasty letter on each case from the NAACP Legal Defense Fund, and it is well known that many left-liberal and Jewish groups were outraged by our representation of the American Nazis in the *Skokie* case.³⁸

In this connection, one must recall that the ACLU, as an institution, and the president, as its senior representative, is continually bombarded with criticism of every

33. There has been much written about this episode. For a comprehensive discussion by the ACLU executive director at the time, see Aryeh Neier, *Defending My Enemy: American Nazis, the Skokie Case, and the Risks of Freedom* (E.P. Dutton 1979); see also Walker, *supra* n. 13, at 323-31; Norman Dorsen, *Is There a Right to Offensive Speech? The Case of the Nazis in Skokie*, in *Civil Liberties in Conflict*, *supra* n. 7, at 122. For a thoughtful statement of the opposing position, see Donald Alexander Downs, *Nazis in Skokie: Freedom, Community, and the First Amendment* (U. Notre Dame Press 1985).

34. *U.S. v. Barnett*, 376 U.S. 681, 682-87 (1964).

35. *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 86 (1977).

36. *Barnett*, 376 U.S. at 682-82.

37. *Linmark*, 431 U.S. at 86-87.

38. See generally *Collin v. Smith*, 447 F. Supp. 675 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978). The press coverage was enormous and, with the possible exception of the *Scopes* "Monkey Trial" in the mid-1920s, unprecedented.

kind and from every direction—liberal and conservative, libertarian and anarchistic, religious and secular, and many others. Sometimes the complaints are intellectually impressive and moderately phrased; others are strident, even vulgar or threatening. More than once I received a ranting middle of the night telephone call that neither I, nor my family, appreciated. It is Nadine's job to sort out these criticisms and deal with them appropriately. Especially when the complaint comes from members, the press, or traditional allies of the ACLU, the president must patiently explain the ACLU's position and sometimes meet with the critics. It may not help, but it must be done.

V.

I have been concentrating on issues relating to litigation. But there are two other important areas I will briefly mention where an ACLU president must be active.³⁹ The first is legislation, which takes up an increasing percentage of ACLU financial resources and energy. Nadine has worked closely with the ACLU's legislative office in Washington, D.C., often testifying herself on major bills,⁴⁰ and she has stayed in close touch with state affiliates when they face tricky legislation problems.

Some of these involve, like litigation, issues of competing civil liberties and potentially conflicting lines of authority. But there are also distinctive aspects to legislative lobbying. On a given bill, a key question is often whether to take a stance reflecting the ACLU's best judgment of what can be accomplished even if it is less than perfect, or instead to maintain an ideal civil liberties position against pragmatic considerations. The first course allows the ACLU to influence the actual outcome, often to short-term advantage, but at the price of foregoing vigorous criticism of that outcome when it does not fully comport with ACLU policy, a course that would permit a clear public understanding of the civil liberties principle involved. The second option, while unambiguous in principle, tends to forfeit influence on the outcome, and therefore may lead to more civil liberties violations in the future. There seems to be no one answer to this dilemma, but rather each case must be considered individually in light of the civil liberties interests at stake and the practical consequences of competing courses of action.

A good illustration is the so-called wiretapping bill,⁴¹ a measure introduced after the Watergate episode that was depicted as a reform. One version was a bill to require the FBI, before conducting electronic surveillance of persons suspected of being a threat to national security, to obtain a judicial ruling that the target had some connection with, or was controlled by, a foreign power. By ACLU lights, this was not a reform but a virtual invitation to surveillance under a porous standard for judicial approval.

39. Nadine also spends much time raising money for both National and affiliates, and communication within the ACLU on this and other issues has improved all around with the rise of websites and the Internet.

40. See e.g. Sen. Forum on Natl. Sec. & the Const., *Protecting Dr. King's Legacy: Justice and Liberty in the Wake of September 11*, 107th Cong., Sess. 2 (Jan. 24, 2002) (testimony of Nadine Strossen) (available at <http://www.aclu.org/natsec/emergpowers/12473leg20020124.html>); Sen. Jud. Comm., *Dept. of Just. Oversight: The Massive, Secretive Detention and Dagnet Questioning of People based on National Origin in the Wake of September 11*, 107th Cong., Sess. 1 (Dec. 4, 2001) (testimony of Nadine Strossen) (available at <http://www.aclu.org/safefree/totalinformationawarenessmovie/16778leg20011202.html>).

41. *Foreign Intelligence Surveillance Act of 1978*, 50 U.S.C. §§ 1801–1829 (2000).

Nevertheless, the law was against this position; judicial decisions generally did not require prior approval for “foreign intelligence” surveillance.

In order to make the bill a clear improvement over current case law, an amendment was offered in the Congress to limit surveillance to circumstances where the government has solid information that the individuals being investigated are engaged in criminal conduct. If enacted, that amendment would sharply reduce the wiretapping. The ACLU should support the amendment, right? But how could it, since ACLU policy flatly opposed all electronic surveillance? We eventually decided to endorse the proposed change, making it clear that our first preference was to end all wiretapping. The bill eventually passed, with the amendment, and the ACLU received the anticipated criticism from those who claimed we compromised our principles.⁴² Nevertheless, I continue to believe that our choice was correct given the realities of the problem.

Similar dilemmas arise today under the Patriot Act⁴³ and other legislation. Then and now, while the ACLU staff is on the frontline in addressing such strategic issues, the president is often involved both to offer a broad institutional perspective and to provide some assurance that whatever decision the staff makes does not breach policies of the board of directors.

The second area where an ACLU president must be active concerns public education, where I have already suggested that Nadine has no peer. Her annual report on her conferences, speeches, debates, interviews, and the like is awe-inspiring, and her columns in many ACLU newsletters regularly inform members about current civil liberties issues.⁴⁴ Among other things, these efforts have helped sustain the impressive growth in ACLU membership, including an increasing number of young people, and the first national membership meetings since the earliest days of the organization.

VI.

I have addressed many issues in this article, and they share some common elements. But there is one presidential task that is *sui generis*—presiding over the selection of a new executive director. As with presidents, there have been only six ACLU executive directors over eighty-six years, starting with the principal founder, Roger Baldwin. Appointment of a new executive director is a major institutional event.

42. See 18 U.S.C. §§ 2511(2)(e)–(f) (2000) (adopting an exception to the law prohibiting wiretapping contained in section 101 of the *Foreign Intelligence Surveillance Act of 1978*). In another instance, the ACLU had to decide whether to support a narrowing amendment to the Protection of Identities Act that would have added an intent requirement to a law prohibiting press publication of names of undercover agents, when ACLU policy opposed all such prohibitions, with or without an intent requirement. See *Act for the Protection of Identities of certain United States undercover intelligence officers, agents, informants, and sources*, 50 U.S.C. § 421 (1982).

43. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272 (2001). In the aftermath of 9/11 President George W. Bush has approved domestic wiretapping, in cases he has regarded as involving national security, without seeking approval of the special court established to adjudicate such actions. ACLU, *What should we do when the U.S. President lies to us and breaks the law?* 155 N.Y. Times A23 (Dec. 29, 2005) (advertisement). This presidential initiative has led to a major public controversy over the extent of presidential powers. See generally Frederick A. O. Schwarz & Aziz Z. Huq, *Unchecked and Unbalanced: Presidential Power in a Time of Terror* 124–42 (New Press 2007).

44. See e.g. Memo. from Nadine Strossen to ACLU Colleagues, *Year-end Report; Plans for next Year* (Dec. 17, 1993) (copy on file with *Tulsa Law Review*).

While the president is the titular head of the ACLU and has many important functions, as I have outlined, the executive director runs the staff machinery on a day-to-day basis, deals with the entire gamut of issues I have mentioned (and others), and is central in determining the ACLU's direction.

I presided in 1978 when Ira Glasser succeeded Aryeh Neier as executive director, and I faced many tough and sensitive problems during the contest for the position. But my clear impression is that when Anthony Romero succeeded Ira in 2001 there were even more difficult institutional issues. Nadine solved these problems, not only because at the end of the day an excellent person was selected,⁴⁵ but also because she developed the process that the organization followed. Of course, not every person in the ACLU applauded the result or even the way the search was conducted, but the entire procedure was a major success and will be counted as one of Nadine's finest achievements.

45. Anthony Romero's high quality was evidenced early. He assumed office September 4, 2001, just a week before the attacks of 9/11. Working with Nadine and a galvanized ACLU staff, Anthony showed strong leadership in addressing the myriad civil liberties problems spawned by the terrorists' actions and the United States government's reaction to them.

