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AN UNPRECEDENTED THREAT TO CIVIL LIBERTIES: AN ESSAY IN HONOR OF NADINE STROSSEN

Erwin Chemerinsky*

I. INTRODUCTION

I have heard it said that one does not need many heroes if one chooses wisely. Nadine Strossen is one of my heroes. In addition to being a dear friend, she is my role model of a person who combines being a committed teacher, an accomplished scholar, and an activist for social justice. About fifteen years ago, we attended a conference in San Antonio and took a long walk along the River Walk. As we did, she mentioned that she was thinking of running to be president of the American Civil Liberties Union (“ACLU”) to replace Norman Dorsen, who led the organization so successfully for many years. As a long-time ACLU member, I was thrilled to hear this and said that I could not imagine anyone in the country who would be better. Her accomplishments as ACLU president have been enormous and have exceeded what anyone could possibly have imagined.

I am honored to have been included in this symposium in Nadine’s honor. As I considered a topic, I decided I wanted to focus on the war on terrorism and civil liberties. Without a doubt, the greatest threats to civil liberties during Nadine’s presidency of the ACLU have been the events since September 11, 2001. The unprecedented attack on American soil combined with a presidential administration totally insensitive to considerations of civil liberties have combined to create profound threats to individual liberties. The Bush administration has claimed the authority to detain American citizens as enemy combatants without complying with the Fourth, Fifth, and Sixth Amendments. The administration has asserted the ability to torture human beings in violation of international law. It has engaged in warrantless eavesdropping in violation of the Fourth Amendment and the Foreign Intelligence Surveillance Act (“FISA”).¹ It has claimed the power to detain individuals in Guantanamo indefinitely and without any form of judicial review.

On all of these issues, and on so many more that have arisen since September 11, the ACLU under Nadine’s leadership has been at the frontlines of battling to protect civil liberties. I doubt that Nadine could even begin to count the number of speeches she has

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1. Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended at 50 U.S.C. §§ 1801–1862).

given in the last four years on civil liberties and the war on terrorism, or begin to list all that the ACLU has done in this effort.

The threat to civil liberties as a result of the attacks on September 11 was foreseeable, even if the precise actions of President Bush and Congress could not have been known. On the morning of September 11, when I was called by the media, I said that throughout American history, whenever there has been a perceived threat to the country, the response has been repression. In hindsight, we later realize that the loss of liberties did nothing to make us safer.

The legacy of suppression in times of crisis began early in American history. In 1798, in response to concerns about survival of the country, Congress enacted the Alien and Sedition Act, which made it a federal crime to make false criticisms of the government or its officials.² The law was used to persecute the government's critics and people were jailed for what today would be regarded as the mildest of statements. Within a few years, after the election of 1800, Congress repealed the law and President Thomas Jefferson pardoned those who had been convicted. The right to freedom of speech was lost and nothing was gained.

During the Civil War, President Abraham Lincoln suspended the writ of habeas corpus. Additionally, dissidents were imprisoned for criticizing the way the government was fighting the war. There is no evidence that this aided the fighting of the Civil War in any way. Ultimately, the United States Supreme Court declared unconstitutional Lincoln's suspension of the writ of habeas corpus.³

During World War I, the government aggressively prosecuted critics of the War. One man went to jail for ten years for circulating a leaflet arguing that the draft was unconstitutional;⁴ another, Socialist leader Eugene Debs, was sentenced to prison for simply saying to his audience, "[Y]ou need to know that you are fit for something better than slavery and cannon fodder."⁵ At about the same time, the successful Bolshevik revolution in Russia sparked great fear of communists here. The Attorney General, Mitchell Palmer, launched a massive effort to round up and deport aliens in the United States. Individuals were summarily deported and separated from their families without any semblance of due process.

During World War II, 110,000 Japanese-Americans were forcibly interned in what President Franklin Roosevelt called "concentration camps."⁶ Adults and children, aliens and citizens, were uprooted from their lifelong homes and placed behind barbed wire. Not one Japanese-American was ever charged with espionage, treason, or any crime that threatened security. There is not a shred of evidence that the unprecedented invasion of rights accomplished anything useful. Nonetheless, the Supreme Court, in *Korematsu v.*

2. *An Act for the Punishment of Certain Crimes against the United States*, ch. 74, 1 Stat. 596 (1798).

3. *Ex parte Milligan*, 71 U.S. 2 (1866).

4. *Schenck v. U.S.*, 249 U.S. 47 (1919).

5. *Debs v. U.S.*, 249 U.S. 211, 214 (1919) (internal quotation marks omitted).

6. William Manchester, *The Glory and the Dream: A Narrative History of America, 1932-1972*, at 300 (Little, Brown & Co. 1974).

United States,⁷ expressed the need for deference to the executive branch in wartime and upheld the removal of Japanese-Americans from the west coast.

The McCarthy era saw enormous persecution of those suspected of being communists. Jobs were lost and lives were ruined on the flimsiest of allegations. In the leading case during the era, *Dennis v. United States*,⁸ the Court approved twenty year prison sentences for individuals for the crime of “conspiracy to . . . advocate the overthrow of the Government”⁹ for teaching works by Marx and Lenin.

Since the morning of September 11, I have recounted this history, in more or less detail, countless times. My thesis has been that one of the worst aspects of American history is repeating itself now in repression that does nothing to make us safer. Yet, now I realize that there are ways in which I was wrong: the threat to civil liberties, in many respects, is worse than that at any other time in American history.

I do not make this statement as hyperbole or unmindful of the extent of past wrongs. Thankfully, nothing in the war on terrorism begins to approach the deprivation of rights that occurred for the 110,000 Japanese-Americans who were interned in concentration camps during World War II. But what I seek to explain in this article is why the threat to civil liberties as a result of the war on terrorism is so grave. Part II addresses this. Part III then discusses the many essential roles of the law professor, in following the model of Nadine Strossen, in fighting this repression.

As I think of all the administration has done since September 11 to restrict civil liberties—the detentions, the torture, the eavesdropping, the U.S. Patriot Act¹⁰—I realize that the loss of rights happens gradually a step at a time. Today, the administration claims that inherent presidential power and the authorization for the use of military force permits them to ignore the Fourth Amendment and a federal statute. Once established, tomorrow, that same authority becomes a basis for ignoring the First Amendment. Today, the government claims the authority to detain a few individuals as enemy combatants without complying with the Constitution’s requirements for grand jury indictment, trial by jury, and proof beyond a reasonable doubt. Once established, tomorrow, this provides limitless authority to detain more individuals. One step at a time, with each justified by the noblest rhetoric and the compelling need to fight terrorism, our freedom is lost.

II. WHY THE WAR ON TERRORISM IS AN UNPRECEDENTED THREAT TO CIVIL LIBERTIES

As I complete this article in February 2006, almost four and a half years since September 11, it is apparent that there are ways in which the war on terrorism poses an unprecedented threat to our civil liberties.¹¹ First, the war on terrorism is of indefinite

7. 323 U.S. 214 (1944).

8. 341 U.S. 494 (1951).

9. *Id.* at 516–17.

10. *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).

11. As this article is going to press in mid-2007, it is even clearer that the war on terrorism will extend

duration. It already has lasted longer than the Civil War, World War I, or World War II. The President has told us that it will last long beyond our lifetime and he is surely right on this. In part, this is because the enemy—and I do not dispute in any way that there is a serious enemy—is not going away. I believe that the most important development in the world in the last quarter century has been the rise of fundamentalism. The terrorism of September 11 is unquestionably a product of this. There are no signs that the desire of these violent fundamentalists to harm the United States is in any way abating. Quite the contrary, I fear that one consequence of our misguided war in Iraq is the further radicalizing of many against the United States.

There is another, more subtle way in which the war on terrorism poses an indefinite threat to civil liberties. There never will be a formal end to it, so the loss of liberties it entails will seemingly continue forever. There is no single defined enemy and no concession or peace treaty will end the war and the loss of liberties.

William Rehnquist wrote a prescient book a few years before September 11 in which he advanced the thesis that civil liberties are restricted in wartime, but then restored after the completion of the wars.¹² Descriptively, this is an accurate statement, though I very much disagree with his normative conclusion that the deprivations of rights were justified or necessary. The widespread assumption since September 11 has been that this pattern would be followed once again, that the loss of liberties would be temporary. But there is no indication that this will be so. The Bush administration has not backed off a single repressive action. New violations of civil liberties are being revealed, such as warrantless eavesdropping on Americans' conversations. The temporary provisions of the U.S. Patriot Act are likely to be renewed and made permanent.

Thus, in duration alone, the threat to civil liberties is unprecedented. Except for the "Cold War," no other period of civil liberties has last so long, and the war on terrorism seemingly will continue indefinitely into the future.

Second, the personal nature of the threat ensures significant deprivation of liberties. September 11 produced unprecedented violations of rights because it was the first attack directly on United States soil since the War of 1812. The understandable reaction to such an attack is to want the government to do what is necessary for safety. Unfortunately, civil liberties are then perceived as a luxury. In the months since the Bush administration's warrantless eavesdropping was revealed, I have heard countless individuals say that they have nothing to hide and that the government should be able to listen to conversations to catch al Qaeda. The problem with this argument, of course, is that it has no stopping point. Under its reasoning, it is impossible to see why the government could not search anyone, any time, because it might stop terrorism. Moreover, no one denies that the government needs the power to wiretap and eavesdrop; the question is whether it should be able to do so without getting a warrant. FISA makes

indefinitely. There are now individuals, such as my client Salim Ghorebi, who have been in custody for over five years in Guantanamo Bay, Cuba and still have not had a meaningful hearing or any semblance of due process. Nor is there any end in sight.

12. William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (Alfred A. Knopf 1998).

it remarkably easy for the government to gain a warrant if it says that a significant purpose is intelligence gathering. One study found that between 1978 and 1999, the Foreign Intelligence Surveillance Court ("FISA Court") granted more than 11,883 warrants and had denied none.¹³ This was even before the Patriot Act relaxed the standard. The U.S. Justice Department reported that in 2002, 1,128 secret warrants were requested from the FISA Court.¹⁴ Of these requests, 1,128 were granted.¹⁵ This suggests a court that is an automatic rubber-stamp for all government requests. Yet, the Bush administration did not even use this procedure.

No one doubts that there will be future attacks on American soil. A committed enemy and a free nation make it impossible to completely prevent terrorism. Future attacks could be even worse than September 11, especially if the attacks involve nuclear, chemical, or biological weapons. The result of such attacks will be calls for greater powers for the government and further erosion of civil liberties.

Third, much of the deprivation of rights is occurring outside the United States and thus is largely invisible and immune from scrutiny. No one knows how many individuals the government is detaining in foreign camps as part of the war on terrorism. A glimpse of the problem was seen last summer. The ACLU represented a man by the name of Cyrus Kar. He is an American citizen and a filmmaker who was in Iraq to make a movie. The taxi that he was riding in was stopped at a checkpoint. Washing machine timers, that could be used in making bombs, were found in the trunk. Kar protested that he was just a passenger and knew nothing of what was in the trunk. He was given a lie detector test and passed. He was thoroughly investigated and nothing was found to indicate that he was a threat. Still, he remained in a military prison in Iraq. His family came to the ACLU and they filed a habeas corpus petition on his behalf in the United States District Court for the District of Columbia. The petition was filed on a Wednesday and by Sunday, Kar was released.¹⁶

Kar then told the ACLU of the man in the cell next to him, Numan Adnan Al-Kaby. Al-Kaby was a long-time American resident. He was working in Iraq and called in sick the day that the building where he worked was bombed. Entirely because he had been ill and not at work, he was taken into custody as a suspect. He was thoroughly investigated. He was told that he had been cleared. But still he remained in military custody. The ACLU filed a suit on his behalf and less than a week later Al-Kaby was released.¹⁷

13. Lawrence D. Sloan, *ECHELON and the Legal Restraints on Signals Intelligence: A Need for Reevaluation*, 50 Duke L.J. 1467, 1496 (2001).

14. Tanya Weinberg, *Patriot Act, Initiatives Disturb Civil Libertarians*, Sun-Sentinel (Ft. Lauderdale, Fla.) 1B (May 11, 2003).

15. *Id.*

16. See generally ACLU, *American Detained in Iraq Released Following ACLU Action*, <http://www.aclu.org/safefree/general/20128prs20050710.html> (July 10, 2005); ACLU, *ACLU, Family Members Sue for Release of American Citizen Detained in Iraq*, <http://www.aclu.org/safefree/detention/17626prs20050706.html> (July 6, 2005).

17. See generally ACLU, *Innocent Civilian Held in Iraq Released Days After ACLU Files Lawsuit*, <http://www.aclu.org/intlhumanrights/gen/20164prs20050906.html> (Sept. 6, 2005); ACLU, *ACLU Calls On*

Would Kar and Al-Kaby still be in custody if not for the ACLU suits? How many others are there being held indefinitely without justification? Since they are being held in foreign nations, outside American scrutiny, there is no way to know.

Fourth, the threat is unprecedented because so much of what the government is doing is completely secret. It is impossible for the democratic process, or the courts, to provide any check when the actions are invisible.

How many individuals were arrested and detained by the federal government after September 11? How many individuals are now being detained? Who are the detainees and why are they being held? Astoundingly, the answers to these questions remain unknown. The Bush administration and the Justice Department have steadfastly refused to answer these basic inquiries, so that no one knows how many people have been held in custody and for what reasons. A federal district court ruled in favor of the plaintiffs in a lawsuit that would have provided much of this information, but the United States Court of Appeals reversed.¹⁸ On January 12, 2004, the Supreme Court denied certiorari.¹⁹ The effect of the Court's denial of review in *Center for National Security Studies v. United States Department of Justice*,²⁰ is that there is no way to learn the most basic information about the government's actions in the last two and a half years.

The lawsuit was brought by a coalition of public interest groups, including the Center for National Security Studies, ACLU, People for the American Way Foundation, Arab-American Anti-Discrimination Committee, and Reporters Committee for Freedom of the Press.²¹ As the District Court explained, the lawsuit resulted from the fact that "the Government refused to make public the number of people arrested, their names, their lawyers, the reasons for their detention, and other information relating to their whereabouts and circumstances."²²

The plaintiffs sued seeking basic information, including: (a) the identities of those being held and the circumstances of their arrest, including the dates of any arrest and release and the nature of any charges filed against them; (b) the identities of lawyers representing any of these individuals; (c) the identity of any courts, which have been requested to enter any sealing orders with regard to proceedings against these individuals; and (d) all policy directives issued to government officials about these individuals and what may be said to the press about them.²³

The United States District Court for the District of Columbia largely ruled in favor of the plaintiffs based on the Freedom of Information Act ("FOIA"). The District Court ordered the Department of Justice to disclose the names of the detainees, the identity of counsel representing detainees, and any policy directives to government officials about

U.S. Government to Release Innocent Civilian Held in Iraq, <http://www.aclu.org/intlhumanrights/gen/20005prs20050831.html> (Aug. 31, 2005).

18. *Ctr. for Natl. Sec. Stud. v. U.S. Dept. of Just.*, 331 F.3d 918 (D.C. Cir. 2003), *rev'd in part and aff'd in part*, 215 F. Supp. 2d 94 (D.D.C. 2002).

19. *Ctr. for Natl. Sec. Stud.*, 331 F.3d 918, *cert. denied*, 540 U.S. 1104 (2004).

20. 331 F.3d 918 (D.C. Cir. 2003).

21. *Ctr. for Natl. Sec. Stud.*, 215 F. Supp. 2d at 95 n. 1.

22. *Id.* at 96 (footnote omitted).

23. *Id.* at 97.

making public statements or disclosures regarding the detainees.²⁴ The District Court, however, held that the Department of Justice did not have to reveal the dates and locations of arrest, detention, and release.²⁵ The most significant effect of the District Court's order is that we finally would know how many people are being detained and, by contacting them, why they were being held and how they were treated. Only through this information can it be learned if the government has significantly abused its power to arrest and detain individuals.

The United States Court of Appeals for the District of Columbia Circuit reversed in a 2–1 decision.²⁶ The Court of Appeals decision repeatedly emphasized the need for great deference to the executive branch. For example, the Court said that “the judiciary is in an extremely poor position to second-guess the executive’s judgment in this area of national security” and that the “need for deference in this case is just as strong as in earlier cases. America faces an enemy just as real as its former Cold War foes, with capabilities beyond the capacity of the judiciary to explore.”²⁷

Specifically, the Court of Appeals rejected the argument that there is a First Amendment right to the information and concluded that the information is protected from disclosure under exemption 7(A) of FOIA, which exempts from disclosure information that “could reasonably be expected to interfere with enforcement proceedings.”²⁸ The court accepted the government’s argument “that disclosure of the detainees’ names would enable al Qaeda or other terrorist groups to map the course of the investigation and thus develop the means to impede it Moreover, disclosure would inform terrorists which of their members were compromised by the investigation, and which were not.”²⁹ The court said that the names of attorneys should not be disclosed because that could lead to learning the identity of those detained.³⁰

The Court of Appeals decision is clearly wrong as a matter of law and policy and therefore it is very unfortunate that the Supreme Court denied review. First, there is no basis for believing that revealing the number held or their names would compromise investigations in any way. For example, there is no imaginable reason why the government will not disclose the number of people who have been held as material witnesses. Nor is the government’s argument against disclosing the names even logical; terrorist organizations surely already know which of their members have been arrested and it tells them nothing useful to give them names of people who have been arrested but have nothing to do with them. Nor is there any privacy interest in keeping the names secret. The identity of those arrested is usually a matter of public record.

Second, the Court of Appeals expressed a degree of almost complete deference to the executive branch that is inconsistent with the text and purpose of FOIA, which

24. *Id.* at 113–14.

25. *Id.* at 113.

26. *Ctr. for Natl. Sec. Stud.*, 331 F.3d 918.

27. *Id.* at 928.

28. *Id.* at 920 (quoting 5 U.S.C. § 552(b)(7)(A)) (internal quotation marks omitted).

29. *Id.* at 928.

30. *Id.* at 932–33.

creates a strong presumption in favor of disclosing government records. As Judge David Tatel expressed in his dissent to the Court of Appeals decision:

[T]he court's uncritical deference to the government's vague, poorly explained arguments for withholding broad categories of information about the detainees, as well as its willingness to fill in the factual and logical gaps in the government's case, eviscerates both FOIA itself and the principles of openness in government that FOIA embodies.³¹

As Judge Tatel powerfully declared, "this court has converted deference into acquiescence."³²

Third, the Court of Appeals erred by giving no weight to the strong public interest in learning how the government has used its power to arrest and detain individuals. The plaintiffs alleged that the government had abused its powers by wrongly detaining hundreds or thousands of individuals, many solely because of their religion or ethnicity. The government is preventing scrutiny of its conduct by invoking secrecy. As Judge Tatel expressed: "Just as the government has a compelling interest in securing citizens' safety, so do citizens have a compelling interest in ensuring that their government does not, in discharging its duties, abuse one of its most awesome powers, the power to arrest and jail."³³

A few years ago, I debated Michael Chertoff, then the Assistant Attorney General for the Criminal Division, and now Director of the Department of Homeland Security. I asked him how many people are now or have been held, particularly as material witnesses. He said that he could not disclose the information because of national security. I asked how could knowing the number being held, whether it is dozens or hundreds or thousands, reveal anything that remotely could harm national security. There was no answer.

The Supreme Court should have granted certiorari in *Center for National Security Studies v. United States Department of Justice* to protect the right of the people to know under the First Amendment and FOIA. Secrecy of the sort claimed by the Bush administration and the Ashcroft Justice Department hides and encourages serious abuses of power. Again, the government has used its traditional powers for secrecy as to national security and applied it to domestic law enforcement.

This, of course, is just one example of the secrecy. The warrantless electronic eavesdropping went on for a significant period of time without it being revealed. The *New York Times*, for example, apparently waited a year after learning of it before disclosing its existence.

The simple reality is that there are no checks against secret violations of rights. There is no way to know what else this administration has done to restrict liberties that has not yet come to light.

Fourth, the threat to civil liberties is particularly grave because the victims are racial and ethnic minorities. It is much easier for people to accept violations of rights

31. *Ctr. for Natl. Sec. Stud.*, 331 F.3d at 937 (Tatel, J., dissenting).

32. *Id.* at 940.

33. *Id.* at 938.

when they are inflicted on others and when the majority of society has no reason to feel threatened. The internment of Japanese-Americans during World War II is a powerful example of this.

Additionally, since September 11, the government has detained individuals in Guantanamo. As best as is known, over 600 individuals have been held there at almost all times since January 2002. As this article is written in February 2006, not one of these individuals has been tried for any crime in any court or military tribunal. As best as is known, these are overwhelmingly individuals of Arab descent and none are United States citizens.

There is simply no way to know how many individuals have been deported because of suspected activity. In all likelihood, the overwhelming majority have again been of Arab descent. Likewise, there is no way to know how much racial profiling has occurred and how many individuals have been stopped, questioned, or even arrested based just on race.

Democracy is certainly the best form of government, but one of its flaws is that majorities are historically insensitive about the threat of rights to minorities. The war on terrorism is a particularly insidious threat to rights because the victims of the deprivations are overwhelmingly racial and ethnic minorities.

Fifth, the complexity of many of the violations of rights makes it very difficult to rally public opinion and support to put an end to the government's actions. For example, the ways in which the Patriot Act expands the powers of the FISA Court are complex and not easily translated into soundbites.

FISA as adopted in 1978 applied only to "foreign powers" or their "agents" in order to obtain "foreign intelligence information."³⁴ A key aspect of the law is that it relaxed the usual probable cause standard followed under the Fourth Amendment. The Act provides that an order can be issued if there is "probable cause to believe that the target of the electronic surveillance is a foreign power or an agent of a foreign power."³⁵ If the target is a "United States person,"³⁶ then there also must be a determination that it is not based on First Amendment activities of the individual. FISA created a new court, the FISA Court, comprised of seven district court judges, appointed by the Chief Justice, and serving staggered seven year terms.³⁷

FISA provided that criminal defendants may not have access to information obtained under a FISA warrant. In response to a suppression motion, the judge makes an *in camera* and *ex parte* review to see if suppression is warranted. The defendant is not allowed to see the basis for the FISA warrant in making the suppression motion. As originally enacted, FISA applied only to electronic surveillance, but was amended in 1995 to include physical searches.³⁸

34. The definition of "foreign power" is defined in section 1801(a). The definition of "agent of a foreign power" is defined in section 1801(b). The definition of "foreign intelligence information" is defined in section 1801(e).

35. 50 U.S.C. at § 1805(a)(3).

36. *Id.* at § 1805(a)(3)(A).

37. *Id.* at § 1803(a).

38. *Intelligence Authorization Act for Fiscal Year 1995*, Pub. L. No. 103-359, 108 Stat. 3423, § 807 (1994).

The Patriot Act marked a significant shift by expanding FISA to include domestic law enforcement so long as a purpose is also foreign intelligence gathering. Under section 218 of the Act, foreign intelligence gathering now only needs to be “a significant purpose,” not “the purpose.”³⁹ This is one of the most important provisions of the Act, substantially expanding the authority of the FISA Court. This provision is key in taking powers that had been given for foreign intelligence gathering and giving them to domestic law enforcement so long as the government says that it also has a significant purpose of foreign intelligence gathering. The distinction between foreign intelligence gathering and law enforcement is substantially eroded, if not in practice, eliminated.

Because the FISA Court operates entirely in secret, it is impossible to assess how these expanded powers have been used. But the reality is that the ways in which the Patriot Act changed the law with regard to FISA are complicated. It is much harder to rally support and check complicated threats to rights than those that are more easily comprehended and understood.

Finally, the threat to civil liberties is grave because it is being institutionalized. The Department of Homeland Security is now a huge, permanent government agency with vast, little understood powers. The Patriot Act is likely to be renewed, many of its most controversial provisions indefinitely. A new federal statute permanently denies those held in Guantanamo access to habeas corpus. All of this is permanent.

III. THE ROLES OF AN ACADEMIC

Taken together, these factors create a frightening picture of a government with ever expanding powers to violate civil liberties. The most frequent question I am asked when speaking to audiences is, “What can we do about it?” People feel a powerlessness in dealing with an administration that is completely tone deaf as to voices expressing concerns for civil liberties.

For academics, Nadine Strossen provides a model of what we can and must do. First, as teachers, we need to educate our students. In large classes and seminars, we need to inform our students of what has happened and encourage them to discuss and debate its necessity and usefulness. We need to plan programs at our school to look at the issues in depth and to provide a variety of voices and viewpoints.

Second, as scholars we need to write articles and books discussing the legal issues in detail. We need to do the research and develop the arguments that can inform lawyers writing briefs and judges crafting opinions.

Third, we must find ways to engage in public advocacy and reach larger audiences. We must write op-ed pieces and do media commentary. Law professors are opinion leaders on matters of law. We have credibility and access to venues that are not available to most lawyers or concerned citizens. We must use this platform to educate and persuade a wide audience.

39. Pub. L. No. 107-56, § 218. The provision simply states that the provisions of the FISA “are each amended by striking ‘the purpose’ and inserting ‘a significant purpose.’” *Id.*

Fourth, we must work with legislators and their staffs, both in Congress and at the state level. We need to testify and work on proposed legislation. State legislatures, like Congress, are constantly considering bills to increase law enforcement powers as a result of the war on terrorism. They have far less resources than Congress and law professors are a particularly important resource and influence.

Fifth, we must litigate and write amicus briefs. Law professors already have played a key role, such as in the Guantanamo litigation. Many amicus briefs already have been written. This must be a continuing and increased effort.

Sixth, we must educate judges. Judges at all levels have conferences and academics are frequent speakers. We need to use these occasions, when appropriate, to discuss what is happening and to inform judges of the relevant law and legal principles.

Seventh, we must do organizational work. Many organizations are involved in fighting the threats to civil liberties. Organizations are far more effective than individuals in effecting change. As law professors, we can play a key role in shaping the agenda of these organizations.

Few law professors can possibly be involved in all of these activities. Nadine Strossen is extraordinary and a role model for all of us because she is involved in each. But all of us can do some of these and all of us can do more in the future.

IV. CONCLUSION

The late Justice Louis Brandeis wrote:

Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.⁴⁰

Louis Brandeis, of course, never knew George W. Bush or Donald Rumsfeld, but if he had, he could not have chosen a more apt description.

Now, more than ever, we need the ACLU. Now, more than ever, we need Nadine Strossen.

40. *Olmstead v. U.S.*, 277 U.S. 438, 479 (1928) (footnote omitted).

