

ACLU BLC, Orlando
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“Taking Liberties: The ACLU and the War on Terror”

During the first week of September 2001, the ACLU got a new Executive Director for the first time in over 20 years. Anthony Romero began work in our current building at 125 Broad Street in downtown Manhattan, a building the ACLU had been occupying for only a few years, having moved down from the Roger Baldwin building on West 43rd Street, in midtown Manhattan, in 1997.

During the second week of that month, I don't need to tell you that downtown Manhattan was devastated, New York City changed, the country changed, and the world changed. And so the ACLU staff, including our new ED, faced all sorts of challenges in adapting to living and working in this new, uncomfortable physical and psychological environment: how do you meet the payroll when everything you need is locked into a building you're not allowed to enter, and how do you answer a swarm of press inquiries when, in those pre-iPhone days, the computers and telephone systems were inaccessible? One of Anthony's first tasks was to arrange psychological counseling for some staff members who were traumatized by being so close to the World Trade Center on 9/11 and afterwards. And the entire organization faced the equally daunting challenge of evaluating and responding to the government's responses to 9/11.

By the end of October, less than six weeks after the events of 9/11, Congress had enacted the USA PATRIOT Act which, I will remind you, was an acronym, standing for Uniting and Strengthening America by Providing Appropriate Tools for Intercepting and Obstructing Terrorism. The idea that in October 2001, Congress knew exactly what was required to obstruct intercept and obstruct terrorism seems, in retrospect, like fear-induced swagger. No one had yet studied what had actually happened on 9/11 and so Congress was preparing antidotes before anyone had diagnosed the disease. And in the political climate of the time, Congress was more interested in acting quickly and dramatically than in acting thoughtfully-- and in giving the President all the powers he claimed were necessary to keep us safe. The Patriot Act, a collection of hundreds of amendments to a wide variety of previous laws, was adopted with virtually no debate and no hearings. In the Senate, now former-Senator Russell Feingold was the only one to vote no. Others who privately told Feingold they admired his courage thought it would be political suicide to resist this juggernaut. A panicky American public wanted to believe that the government could keep them safe and was willing to barter constitutional rights for safety.

One of the central ideas behind many of the Patriot Act amendments was to create a variety of dragnets which, it was hoped, might catch terrorists who might not otherwise be caught under preexisting law. So in many different ways, Patriot Act provisions made it easier for the government to conduct all kinds of surveillance. For example, the Patriot Act

- authorized use of the less demanding standards of the Foreign Intelligence Surveillance Act, a Cold War era statute originally designed to allow us to keep tabs on what the Soviet Union was up to, for eavesdropping on United States citizens and other residents
- required custodians of other people's records (including medical, educational, Internet service, and library records) to turn over those records if the government got a court order that was nothing more than a fig leaf – what came to be known as the “library provision”
- allowed the government to obtain some kinds of records from telecommunications and Internet service providers with no court order at all.

2) The law also created criminal law dragnets, like the material support laws, which were expanded to require less proof of any sort of criminal intent and to allow fewer defenses. And 3) the law targeted immigrants, imposing all sorts of unfair special burdens.

During that October, I happened to be in Washington, D.C. on business and agreed to meet with Rachel King of the ACLU's Washington Legislative Office as long as I was there. Rachel, whose assignment was to figure out what the ACLU position should be on these changes to the law, wanted to talk with me because of my expertise in the Fourth Amendment. As most of you know, the Fourth Amendment is the part of the Bill of Rights that guarantees our right to be free from unreasonable searches and seizures. Rachel was quite rightly troubled by the tendency of many of the Patriot Act surveillance provisions, like the ones I've just mentioned, to allow more and more spying on Americans with less and less attention to what the Fourth Amendment says are minimal requirements for searches and seizures: 1) some sort of individualized suspicion, prototypically probable cause, and 2) judicial review – a “neutral and detached magistrate” who decides whether or not the government agents really have sufficient basis for wanting to search someone's home, wiretap our telephones, or read our emails – the classic second opinion we all want before we do something important like agree to an operation.

Rachel was also, as she told me, fairly terrified at the responsibility she had taken on. The Fourth Amendment law and the web of statutes involved were dauntingly complex. And the Patriot Act itself did not even make clear how it was changing the law. One of the major changes wrought, for example, in expanding the government's authority to conduct Foreign Intelligence Surveillance on Americans, was effected by an amendment that said only that the word “the” in a particular statute was being deleted and replaced with the words “a significant.” This turns out to be an enormous change, for technical reasons I won't stop to explain now. But to figure out the import of that apparently trivial word change, Rachel had to look back at the wording of the original statute, compare the two versions, and then figure out what body of additional statutes and case law provided the context for understanding how great a change this actually

was, and for analyzing whether or not the revised statute was unconstitutional. This was an elaborate and enormously loaded treasure hunt. In those days, some of you will recall that people still used books for legal research, and Rachel's desk, her credenza, and the floor around her desk were piled high with what looked like practically every volume of the United States Code, each one of which had dozens of yellow post-its sticking out of it. And the ACLU staff was essentially alone in conducting this elaborate treasure hunt because there had been no hearings on any of this, and so there was no research by congressional staff, or testimony by opponents of the new law to consult or to fall back on.

As Rachel led me through her analysis, I was very glad to be able to provide her with reassurance -- I thought she was exactly right about the provisions she had identified as most problematic and about the defects and dangers of those provisions. There was no possibility of testifying in Congress and persuading them to take it all back. So we tried public education -- as the ACLU had in one of its very first actions, a report about the abuses of the Palmer Raids in 1920. The ACLU's analysis of the Patriot Act, identifying particularly troubling provisions and explaining the concerns civil libertarians should have about those provisions, was posted on the ACLU website -- an innovation still in its early days. And because our website was about the only source of reliable reporting about what the Patriot Act actually did -- as opposed to the Act's own often cryptic language -- reporters and others who wanted to discuss or evaluate the Patriot Act relied on the ACLU's work. The number of hits on our website went up astronomically during those days. And today, when I speak around the country about the Patriot Act, and a large percentage of the audience equates the words "Patriot Act" with overreaching and abusive legislation, I think to myself that this evolution of public opinion was largely due to the work of Rachel King (who died much too young) and of course to her colleagues, including Laura Murphy, Steve Shapiro, and that brand new ED, Anthony Romero.

Part of the challenge faced by Rachel and the rest of the ACLU staff was that in the fall of 2001, it took considerable courage to speak out against any measure the government claimed was necessary to fight terrorism. You may recall Attorney General John Ashcroft's words: "To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists, for they erode our national unity and diminish our resolve. They give ammunition to America's enemies." To this, the ACLU responded that there is nothing more patriotic than dissent. Ashcroft, Bush, and Cheney insisted that we had to give up some of our privacy, our liberty, and our commitment to equality in order to be safe; the ACLU responded that this is a false choice -- we can and should be both "safe and free" -- a formulation that has since been echoed by many people, including our current President.

We can all take pride in the fact that under Anthony's leadership, the ACLU did not flinch from fighting the excesses of the so-called "War on Terror." In January of 2002, Nat Hentoff, not always one to lavish the ACLU with compliments, wrote a front-page article in the Village Voice entitled, "The ACLU on the Ramparts," in which he described our often solitary efforts to defend our constitutional heritage. He concluded

by saying of Anthony, “You will be hearing a lot from him as the battle to regain our rights goes on.” Never did Nat Hentoff speak truer words.

One of the great impediments to establishing whether or not the Bush/Cheney Administration was acting unconstitutionally in surveillance, in detentions, in interrogation practices, was the fog of secrecy. A corollary of the assertion that we were at war was insistence that the President, as Commander-in-Chief, should be allowed to make unilateral decisions about what rights we needed to give up in order to be safe, and that those decisions needed to be made in secret – so that our enemies would not be able to find out what we were doing and adapt their actions accordingly. Under this “mosaic theory,” Ashcroft and others argued that any tiny bit of information could be concealed if, in combination with other tiny bits of information, it might tell the enemy something about our strategies. We were told that we just had to trust the President. And so essential policy decisions that changed American law radically were being made while the American people—and often Congress and the courts -- were being kept in the dark.

So ACLU lawyers learned to love the Freedom of Information Act. There’s an inside story about two of our staff attorneys with the National Security Project at the time which actually was printed in the NY Times, so it must be true: Jameel Jaffer and Amrit Singh told a senior colleague that they wanted to try using FOIA to find out what the government was doing. The colleague thought they were being naïve and told them, “I’ll give you a nickel for every page you actually get a court to order the government to turn over.” Hundreds of thousands of pages later, that lawyer had to renege on the bet. Because of ACLU FOIA litigation, we found out something about who the government was locking up in the fall of 2001. Because of ACLU FOIA litigation, we found out about the FBI’s expanded use of National Security Letters. Because of ACLU FOIA litigation, we got President Obama to release the Office of Legal Counsel memos showing clearly that our government had condoned torture.

And the ACLU did not only go to court for information. Since Congress and the President were not protecting and defending our rights, we sued John Ashcroft, George W. Bush, the Department of Justice, etc., in lawsuits so numerous that I haven’t attempted to count them. Sometimes we won, as in the lawsuit known first as *John Doe v. Ashcroft*, then as *Doe v. Gonzales*, then *Doe v. Mukasey*, and finally *Doe v. Holder*, as Attorneys General came and went. This John Doe was an Internet service provider named Nick Merrill who was served with a National Security Letter demanding that he turn over information about his client and that he never tell anyone anything about this experience. Nick thought this was unconstitutional and so he decided to consult the ACLU – despite the intimidating breadth of the gag order. He told me that in their first meeting, he asked the lawyers, “If I challenge the government on this, will someone come and put me in a sack and drag me away?” The lawyers told him that they could not tell what might happen if he sued the government, but he decided to proceed anyway. It took six years, but because of the courage of Nick Merrill and the talent and persistence of his ACLU lawyers, the law was changed (although not as much as we would have liked) so that now recipients of National Security Letters are allowed to talk to a lawyer and a court about their options, and at least have some possibility of being released from

what had been automatic and absolute gag orders. While he was still prohibited from revealing to anyone that he was the John Doe in this litigation, he wrote an anonymous Op Ed in the Washington Post describing how the gag order affected his life.

“When I meet with my attorneys I cannot tell my girlfriend where I am going or where I have been. I hide any papers related to the case where she will not look. When clients and friends ask me whether I am the one challenging the constitutionality of the NSL statute, I have no choice but to look them in the eye and lie.”

The ACLU awarded this “John Doe” its highest honor, the Roger Baldwin Medal of Liberty while Nick was still prohibited from identifying himself. And so at the award dinner, when the time came for acceptance of the award the room darkened, a blue-dotted face appeared on a videoscreen, and an actor’s voice read lines Nick had written for the occasion, beginning: “My name is not John Doe and this is not my real voice.”

But the courts dismissed most of the cases we brought to challenge overbroad surveillance and abusive interrogation practices -- on procedural excuses, like the state secrets privilege, immunity, etc. Not one of our clients who suffered extraordinary rendition or torture has yet had a real day in court. The Fourth Circuit Court of Appeals dismissed the lawsuit we brought on behalf of Khaled el-Masri, a German citizen of Lebanese descent who was kidnapped from a bus in Macedonia, where he was on vacation, and subjected to months of wholly illegal detention and torture – evidently because his name resembled that of a suspected terrorist. The court accepted the government’s argument that any involvement of American agents in this horrific conduct should remain a “state secret” – even if the incident had already been widely reported in the press. And President Obama has taken the position that there need not be any accountability for those who condoned or engaged in torture because it is best if we just turn the page and promise to do better in the future. I don’t think it’s time to turn that page until the truth has been written on it.

Another example of the courts failing to play their part in preserving our rights was the Sixth Circuit Court of Appeals dismissal of our challenge to the patently illegal NSA surveillance regime on the ironic ground that our clients would not be allowed to challenge this covert surveillance program unless they could show that they themselves had been spied on – a real Catch 22, since the whole point of secret surveillance is not to tell people when they are under surveillance. In 2008, Congress endorsed something very like the NSA program and the ink had barely dried on George W. Bush’s signature before the ACLU was in court again, challenging the constitutionality of this statute. The District Court dismissed that case too for lack of standing, but the Second Circuit recently ruled that our clients will be allowed to challenge the constitutionality of the successor to the NSA program – the FISA Amendments Act or FAA.

In another historic decision, we instituted the John Adams Project to provide representation to Guantanamo detainees in military commission proceedings, because the government was not providing adequate resources for a fair defense – especially in cases

where the punishment could be execution. As many of you know, this project was named after our second President who once said that in his highly illustrious career, one of the professional actions of which he was most proud was representing British soldiers who were charged in the Boston Massacre – and winning acquittals for some. I was gratified that the National Board was supportive of this project, recognizing as Adams did that we were standing up for the principle of due process. Guantanamo was designed to be a land without law, and when our government is acting unjustly, the ACLU's proper place is on the ramparts.

It is a pleasure for me to speak with an audience of ACLU leaders because I don't have to explain to you why this sort of thing matters. But outside this room and the ACLU family, there are a lot of people who would vilify us for defending people accused of being terrorists. Unlike John Adams, they can't or won't separate defense of a principle from defense of terrorism itself. Last year, I was debating the Guantanamo version of justice at the University of Pittsburgh law school and I told the audience about the case of Mohammed Jawad – the teenager who had spent nearly 7 years at Guantanamo on the flimsiest of evidence. His mental health deteriorated, and he tried to commit suicide by repeatedly beating his head against the wall of his cell. When his case finally came before a federal court, the judge was shocked at the nature of the so-called evidence leading to his prolonged detention and to serious charges against him. As a result, the Obama Administration finally sent Jawad home to his family in Afghanistan. My opponent said, in response to this story, "Oh, boo hoo. Cue the violins. So mistakes were made."

When Barack Obama became President, in his first Executive Orders he committed himself to ending the use of torture and to running a more transparent government. He also tried to shut down Guantanamo, but that hasn't worked out so well in practice. There were a lot of people who assumed that when Obama was elected, the ACLU could close up shop – as I like to say, maybe put up a big banner in front of the Broad Street office reading, "Mission Accomplished." Many Americans still assume that the antiterrorism regime has nothing to do with them, and that any abuses ended when George W. Bush left the White House. But we've all learned to be cautious not to display that Mission Accomplished banner prematurely. In most areas of antiterrorism policy – surveillance, material support laws, etc. – Barack Obama has continued the policies and arguments of the Bush Era. I hope you've seen the excellent ACLU staff report, "The New Normal," done 18 months into the Obama Administration. In this area, Obama has not brought us enough of that change we can believe in.

So I've reminded you of a lot of what the ACLU staff has been doing about all of this during the past ten years. What I have done, for my part, is to write a book, the chief point of which is to explain why people *should* care, and how much of the antiterrorism regimen threatens ordinary Americans. The excesses of the "War on Terror" are about us and they exist now.

This is a highly literate crowd – although most of the people by the pool were reading macabre Swedish mysteries, I saw one woman reading David McCullough's

biography of John Adams, probably one of you. And a man was reading a book with a familiar red, white, and blue cover, which when I walked closer did turn out to be “In Defense of Our America” by Anthony Romero. So I’m not going to try to tell you all of what I put in the book. But I’ll give you three examples of the kinds of things I discuss:

- 1) I include stories of ordinary Americans who have suffered because of post 9/11 policies and practices, like Hossam Algabri, whose bank told him that they were canceling his bank account because they believed it was not “in our best interest to continue your banking relationship with us” (Hossam is an Egyptian born US citizen who happens to be a Muslim); like Nanci and Tom Kubbany, who tried to buy a home in Arcata, CA, but were thwarted because, as they later were able to discover, Tom’s very common middle name, Hassan, was on a watchlist because it was an alias of one of Saddam Hussein’s sons; like Nick George, who was detained and interrogated for five hours at the Philadelphia airport because he had brought his Arabic-English flashcards to study on the long plane ride back to Pomona College, where he was studying the Arabic language; and like Jangir Sultan, a Kashmiri-American who was stopped by the New York Police Department 21 times during the first few years of the NY subway search program, when a statistician calculated that the odds of one person being stopped that many times if the stops were indeed random are one in 165 million.

I also discuss people whose lives were devastated, like Kansas-born Abdullah al-Kidd, who was arrested and detained as a “material witness” even though he was never called to testify anywhere. You probably know Abdullah’s story because the Supreme Court just held that his lawsuit against John Ashcroft -- for developing the strategy of cynically using the material witness statute for the purpose of preventive detention -- should be dismissed because Mr. Ashcroft deserves immunity. This story has been all over the media as well as the ACLU website. So I’ll tell you the story of someone you probably don’t know about, because she is not an ACLU client and has not received much media attention. “Roya Rahmani” is a pseudonym used by a woman who grew up in Iran in the days of the Shah, admiring the work of a group known as the PMOI which sought to bring democracy to Iran. When the Shah was deposed, democracy did not come to Iran, and so “Roya” decided to work with the PMOI, which was now advocating that the mullahs be replaced by a democratic form of government. She continued to work with the group even though people around her were being arrested and then killed by the regime for their advocacy, including her brother. Then she was arrested and locked up in an Iranian jail, under horrifying conditions, for the crime of “waging war on God.” When she was finally released, she moved to a neighboring country and then, after discovering that she was still close enough to Iran to be subject to harassment and threats, she emigrated to the US and applied for political asylum, which she was granted. She lived in Los Angeles and worked with a group supporting Iranian refugees. One day, she was sitting in a Starbucks when FBI agents came in and arrested her. For what crime? Providing material support to the PMOI, the same pro-

democracy group. Roya had no intention of supporting terrorism – she was just trying to help refugees by working with a group that evidently had ties to the PMOI, a group she denied used terrorism as a tactic. But the US State Department, under President Bill Clinton, had designated the PMOI as a terrorist group. Why? Evidently because one of the Iranian government’s preconditions for even discussing normalization of relations was that we brand its political opponent as a terrorist group. Once a group is on that designated terrorist list, it is a crime to provide any sort of support to the group even if one has no intention of supporting terrorist activity. That is one way in which the material support statute has become a dragnet, picking up people whose intentions are innocent if they get too close to a group the government regards as dangerous. So instead of protesting her own innocence, Roya and her lawyers wanted to tell the jury that the State Department had made a mistake – that the PMOI was not actually a terrorist group at all. But the Ninth Circuit Court of Appeals ruled in her case (where some of her codefendants are American citizens) that she is not allowed to challenge the government’s designation. Right or wrong, the designation is conclusive. (Other countries which agreed to designate the PMOI as a terrorist group, like the UK and the EU, subsequently rescinded those decisions, supporting Roya’s theory.) She said to me “It seems that I have moved from one prison to another prison.”

- 2) I also set out to explain how our constitutional rights are suffering – like the First Amendment freedoms of speech, association, and religion – a 2009 ACLU report called “Blocking Faith, Freezing Charity,” for example, describes how the government’s misguided attempts to staunch terrorist financing became a war on Muslim charities and caused many Muslims to fear the FBI rather than cooperate with terrorism investigations. Other rights which have been compromised include the First Amendment right of access to the courts, and even the right to petition for redress of grievances – you may recall the ACLU’s representation of the Connecticut librarians who wanted to testify before Congress about the Patriot Act but were prohibited from doing so. And due process; equal protection; even the right to jury trial – as Roya’s case shows, under some of the New Normal criminal statutes, there is nothing much left for juries to decide once the government has designated groups or individuals as terrorists.
- 3) All this power accumulating in the government also poses a threat to the essence of American democracy itself. As Elaine Scarry so elegantly put it, “The Patriot Act inverts the constitutional requirement that people’s lives be private and the work of government officials be public; it instead crafts a set of conditions in which our inner lives become transparent and the workings of the government become opaque. Either one of these outcomes would imperil democracy; together they not only injure the country but also cut off the avenues of repair.”

Many of the antiterrorism strategies we are using today were launched in the emergency mindset of the fall of 2001 and have never been seriously examined by Congress or the courts. I question whether some of these strategies might be ineffective, too costly in terms of the rights they compromise, or even counterproductive. Publication of my book will coincide with the 10th anniversary of 9/11 because ten years of emergency is enough. I want to convince people that this New Normal is not our America – and not who we want to be.

There is no way to know what the future will bring. Will the death of Osama bin Laden end an emotional chapter and enable us to rethink our course? Or will the future, perhaps due to a different President, perhaps due to another terrorist incident, bring even greater repression? But one thing I can predict – if threats to our rights and our democracy continue, the ACLU will be on the ramparts – as we were to fight the Palmer Raids, the internment of Japanese-Americans during WWII, and the excesses of 9/11. And I am so glad to know that we will all be on the ramparts together.