

IN PRAISE OF THE RULE OF LAW, THE ROLE OF JUDGES,
AND THE RIGHT TO SHOP

NADINE STROSSEN*

Good evening.

My name is Nadine Strossen, and I am happy to welcome you all to this dinner on behalf of the *New York Law School Law Review*, which I am proud to serve as Faculty Advisor. I am so sorry that I had to miss much of today's stimulating program, but I am looking forward to reading the published version. And it has been delightful at least to see so many friends and colleagues here this evening.

New York Law School's dynamic Dean, Rick Matasar, wanted you to know that he is especially sorry that he could not attend this event, given his special interest in the subject area as the author of a casebook and other writings about federal courts. On New York Law School's behalf, Rick asked me to underscore how delighted we are that so many distinguished judges, lawyers, and others could participate in this memorable symposium, although we want to single out one distinguished Second Circuit colleague of Judge Newman's who especially regrets not being able to attend — Judge Roger Miner. Roger is a loyal alumnus and friend of our school's, who would have been here but for an irreconcilable conflict.

This is such an impressive program. I would like to thank and congratulate Professor Paul Dubinsky and others at New York Law School who have worked so hard to organize it. I also want to thank the outstanding panelists and other participants for sharing so generously of your wisdom, expertise and time. I know that the resulting publication will be a significant, enduring contribution to the legal community and to the broader community.

The reason why I could not be here for much of the day is that, as many of you know, I have a night job on top of my day job as a New York Law School faculty member. So I empathize with all of our

* Professor of Law, New York Law School; President, American Civil Liberties Union. For assistance with the research and footnotes for this piece, Prof. Strossen thanks her Chief Aide, Amy Fallon (NYLS '03) and her Research Assistants Robert Georges (NYLS '04) and Mara Levy (NYLS '02).

school's hardworking Evening Division students who are also leading double lives!

In my own "second job," as President of the American Civil Liberties Union, I had a longstanding prior engagement in Wisconsin with Senator Russell Feingold, himself a prominent member of our legal profession. As a nice coincidence and connection to today's important symposium, I and the ACLU have been working closely with Senator Feingold in his leading role on the Senate Judiciary and Foreign Relations Committees — as well as with other members of Congress, on both sides of the aisle — on key issues that have been the focus of today's symposium.¹

In particular, we have been concerned that the federal courts' jurisdiction not be eroded in terms of the power to check potential abuses by the other branches of government. This was already a major concern before September 11, in light of the 1996 "anti-terrorism" law and other "court-stripping" measures, which have severely reduced the essential power of federal courts to review constitutional claims and remedy constitutional violations.² This already serious concern about "court-stripping" has become even more urgent in the wake of the terrorist attacks and the ensuing new laws and regulations they spurred. Many provisions in the new federal anti-terrorism law, the "USA-PATRIOT Act," as well as many regulations and orders issued by the Executive Branch post-9/11, undermine or even eliminate judicial oversight and judicial review in areas ranging from search and seizure, to detention and deportation of non-citizens, to attorney-client privilege.³

We are also especially concerned that the United States honor its pertinent commitments under international law, including international human rights law. The rule of law, and the special role of our

1. See, e.g., Nadine Strossen, *The Massive, Secretive Detention and Dragnet Questioning of People Based on National Origin in the Wake of September 11* (2001) (Statement submitted to the Senate Judiciary Committee), available at <http://www.aclu.org/congress/1120401a.html> (last visited Apr. 1, 2002). See generally *Safe and Free in Times of Crisis*, at <http://www.aclu.org/safeandfree/index.html> (last modified Mar. 8, 2002).

2. See, e.g., *Upsetting Checks and Balances: Congressional Hostility Toward the Courts in Times of Crisis*, at <http://www.aclu.org/congress/courtstripping.pdf> (last visited Mar. 29, 2002).

3. See, e.g., Nadine Strossen, *Protecting Dr. King's Legacy: Justice and Liberty in the Wake of September 11th* (2002) (Testimony before Congressman John Conyers' Forum on National Security and the Constitution), available at <http://www.aclu.org/congress/1012402a.html> (last visited Mar. 29, 2002).

federal judges in upholding the rule of law — as epitomized by the leading federal judge we are honoring today — are more critically important than ever in the wake of the terrorist attacks. That point was stressed by the first public remarks by a Supreme Court Justice after September 11. Speaking at our neighboring law school, N.Y.U., Justice Sandra Day O'Connor underscored the special responsibility that all of us in the legal profession now bear. In her words, we “will help define how to maintain a fair and . . . just society with a strong rule of law at a time when many are more concerned with safety and . . . vengeance.”⁴

I would also like to quote an earlier statement by Justice O'Connor, which is also especially apt in our post-9/11 world. This came from a 1995 opinion in an ACLU case, in which Justice O'Connor sustained our position. In words that are even more on-point now, she wrote: “It can never be too often stated that the greatest threats to our constitutional freedoms come in times of crisis.”⁵ Accordingly, in the current and ongoing national security crisis, our precious constitutional freedoms are more dependent than ever on the special support of not only our independent judiciary, but also our independent bar — key institutions that have helped to keep our great country both safe *and* free.

We may well disagree among ourselves about whether any particular anti-terrorism measure constitutes a justifiable trade-off between safety and freedom, individual liberty and national security. Nevertheless, I hope and trust we can generally concur about these critical broad structural and institutional points: the importance of maintaining our delicate constitutional system of checks and balances, and in particular the vital role of the independent bench and bar within that system. Certainly, the ACLU's allies on these core principles of democratic governance, both inside and outside government, span the entire ideological spectrum. And no one has more eloquently or persistently championed the critical importance of maintaining judicial independence than Chief Justice William Rehnquist, who has ex-

4. Linda Greenhouse, *A Nation Challenged: The Supreme Court; In New York Visit, O'Connor Foresees Limits on Freedom*, N.Y. TIMES, Sept. 29, 2001, at B5.

5. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 662 (1995) (O'Connor, J., dissenting).

tollled our independent federal courts as “one of the crown jewels of our system of government.”⁶

In 1996, the concern for maintaining the independence of our federal judiciary was particularly pressing because of heightened political attacks on our federal courts from Democrats and Republicans alike, including the anti-terrorism law and other court-stripping laws passed that year.⁷ Congress also initiated a series of hearings on what it considers the “problem” of “judicial activism” — in other words, judges actively enforcing constitutional rights. Some of us consider the problem to be that Congress has not been doing likewise, not actively honoring the Constitution!⁸ Worse yet, Congress considered various measures that would have curtailed federal courts’ independence even further. The most extreme was a bill to amend the Constitution to empower Congress to overturn any court ruling, by a bare majority vote. The House Majority Whip, Tom DeLay, actually called for the impeachment of several federal judges because he disagreed with their interpretations of the Constitution in a number of specific cases.⁹ This climate of persistent political attack on our nation’s federal judges was well-captured in a joke that I heard Arizona’s then-Governor, Fife Symington,¹⁰ recount during a speech denouncing “judicial activism” at a 1995 Federalist Society conference. The joke is in the form of a riddle: “What’s the difference between federal judges and God?” Answer: “God does not think he is a federal judge.”

6. *Weekly Edition: Rehnquist Says No to Impeachment for Unpopular Rulings* (NPR radio broadcast, Apr. 13, 1996).

7. See Nadine Strossen, *The Current Assault on Constitutional Rights and Civil Liberties: Origins and Approaches*, 99 W. VA. L. REV. 769 (1997). See also Robert Marquand, *Justified or Pernicious Limits? New Judicial Curbs Draw Fire*, CHRISTIAN SCI. MONITOR, Nov. 15, 1996, at 1 (noting that Congress had quietly passed a series of laws that restrict federal judges in ways not seen since the Civil War era).

8. See Nadine Strossen, *Just Cause: Why We Need an Independent Judiciary*, available at www.speakout.com (last visited Apr. 1, 2002) (originally published on Apr. 17, 1997, at <http://www.intellectualcapital.com>); Nadine Strossen, *Is an Activist Federal Judiciary Undermining American Democracy?* INSIGHT ON THE NEWS, March 10, 1997, at 24; Nadine Strossen, *A New Kind of Judicial Activism*, available at www.speakout.com (last visited Apr. 1, 2002) (originally published on February 20, 1997, at <http://www.intellectualcapital.com>).

9. Rep. Tom DeLay, *Impeachment is a Valid Answer to Judiciary Run Amok*, N.Y. TIMES, Apr. 6, 1997, ¶ 4, at 18.

10. See Miriam Davidson, *Tired of Costly Federal Rules? Make the Judge Pay for Them*, CHRISTIAN SCI. MONITOR, Nov. 14, 1995, at 3 (describing Symington as “leading the attack on those in federal robes”).

In the face of this onslaught of attacks against federal judges, Chief Justice Rehnquist was an outspoken champion of judicial independence,¹¹ along with the ACLU and a coalition of ideologically diverse citizens' groups. The Chief Justice concluded one 1996 speech on this topic with words that are even more apt now, post-9/11, when there is even greater danger to judicial power and independence, as part of the general pressure to change even our most fundamental values and institutions. He said: "Change is the law of life, and the judiciary will have to change to meet the challenges that will face it in the future, but the independence of the federal judiciary is essential to its proper functioning and must be retained."¹²

For these reasons, I want to extend many thanks not only to Judge Newman, but also to all of you here, for continuing to be pillars of our independent bench and bar, and also of law and justice. And, on a more personal note, I want to thank all of you for being here in Tribeca, just blocks from Ground Zero. This part of the city is still reeling from the terrorist attacks and it really does make a constructive contribution, tangibly and intangibly, for you to come here. And please come back! As you can see, you can do very well here in terms of food, drink, and atmosphere, and you can simultaneously do a lot of good in terms of supporting local businesses and community members — supporting both literally and figuratively!

New York City's former Mayor, Rudy Giuliani, clearly had many positive qualities, but he was hardly the world's greatest civil libertarian.¹³ To cite just one example, he certainly had a narrower view of First Amendment rights than not only the ACLU, but also many federal judges, including on Judge Newman's court. For instance in one case a couple years ago, two of our guests tonight — Second Circuit Judges Guido Calabresi and Robert Sack — overturned a Giuliani Administration policy on First Amendment grounds.¹⁴ Moreover, Judge Calabresi used the occasion to note that this was the seventeenth case in four years in which federal courts had overturned city policies on

11. William H. Rehnquist, *1995 Year End Report by Chief Justice William H. Rehnquist on the Federal Judiciary*, available at <http://www.uscourts.gov/ttb/jan96ttb/lyearend.html> (last visited Mar. 29, 2002).

12. *Weekly Edition: Rehnquist Says No to Impeachment for Unpopular Rulings*, *supra* note 67.

13. *Some Free Speech on Mayor's Words*, N.Y. TIMES, Mar. 17, 1994, at B3.

14. *See, e.g., Tunick v. Safir*, 209 F. 3d 67 (2d Cir. 2000). *See also* Christopher Drew, *Suits Against City Burden Courts, Judges Say*, N.Y. TIMES, Mar. 28, 2000, at B4.

First Amendment grounds!¹⁵ In this particular case, the New York Civil Liberties Union had initiated the First Amendment challenge, and it was just one of approximately two dozen such challenges that the NYCLU launched during the Giuliani Administration.¹⁶

After September 11, it is well known, many of Mayor Giuliani's former critics came to have a renewed respect for him because of his inspiring and outstanding leadership throughout the crisis.¹⁷ But it is not well known that, after September 11, Mayor Giuliani became a forceful champion of individual liberties, actually advocating a new unenumerated right! In particular, in urging people to spend their money on goods and services in New York, including in this neighborhood, Mayor Giuliani declared, "Freedom to shop is one of the fundamental liberties."¹⁸ I fantasize about posting that on the ACLU website, to recruit whole new civil liberties constituencies from the malls and boutiques throughout America! I assure you, though, I am not really going to expand the ACLU's agenda — or the courts' dockets — by urging Judge Newman and his colleagues to protect this freedom in your official capacities. I do, though, urge all of you to exercise this freedom in your personal capacities, right here in lower Manhattan! Thank you very much.

15. *Tunick*, 209 F.3d at 85-86.

16. *NYCLU First Amendment Cases Against the Giuliani Administration*, available at <http://www.nyclu.org/giuliani2001.html> (last visited Mar. 28, 2002) (Just as this essay was going to press, the NYCLU won yet another First Amendment lawsuit that it had filed against the Giuliani Administration). *See also* Robert F. Worth, *Taxi Drivers Win a First Amendment Round Against the City*, N.Y. TIMES, Mar. 23, 2002, at B2 (commenting on a judge that held that city officials violated the First Amendment when they blocked a planned demonstration by taxi drivers because city's action was motivated by retaliation for a one-day strike the drivers had organized and not by concerns about traffic and safety, as the city's lawyers claimed).

17. *See, e.g.*, Felicia R. Lee, *Liberals' Ideology Challenged by Urge to Fight Terrorism*, N.Y. TIMES, Sept. 25, 2001, at A23.

18. Guy Trebay, *For A Shopping Spree, the Closet's the Place*, N.Y. TIMES, Nov. 20, 2001, at A15.