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Infringement on Civil Liberties After 9/11

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EDITOR'S NOTE: This article is an edited version of remarks Ms. Lieberman delivered on September 8, 2011, at the *Lawyers and the Law in New York City: 10 Years After 9/11* event, hosted by the New York City Bar Association's New York City Affairs Committee and the *New York Law School Law Review*. The video of her full address is available at: <http://nyls.mediasite.com/mediasite/SilverlightPlayer/Default.aspx?peid=4dec496d5c4f49afb5ab187d567ab6401d>. The *New York Law School Law Review* provided some of the citations.

I. INTRODUCTION

I stand for civil liberties, and civil liberties need all the help they can get these days. There is so much to cover regarding civil liberties post-9/11 that I am going to have to omit a lot. In fact, you may be surprised at the material I do not discuss; however, I often use examples that are less well known, but help demonstrate the scope of the challenge.¹

For me, the 9/11 anniversary is very personal. Like thousands of other New Yorkers, my colleagues and I evacuated our offices, located blocks from Ground Zero. We watched in horror as the towers fell, and we spent fearful hours walking home and trying to locate colleagues and loved ones—hoping against hope for survivors and mourning the ordinary folks and the heroes we never knew. We felt the loss. We felt the pain. We still feel them today.

We also knew that nothing would ever be the same, and that our job of defending civil liberties and human rights—never an easy one—would be more challenging than we could ever imagine and that the stakes could not be higher. A decade has passed, but we—as New Yorkers and Americans—are still fragile, still seeking a new normal. Very soon after 9/11, we got a glimpse of the new reality and the challenges it would present for civil liberties. For example, on September 17, 2001—the day we were allowed back into the New York Civil Liberties Union (NYCLU) office—the New York State legislature met in a special emergency session and swiftly, that same day, passed what was pitched as the strongest state anti-terrorism law in the nation.² One problem with this law was that the entire process was done in secret. No public hearings, no public debate, no public copies of the bill. No one stopped to ask whether New York needed a new state anti-terrorism law—or the several new death penalty crimes it created—or whether the vague and sweeping definitions of terrorism and material support for terrorism criminalized lawful, protected, First Amendment activity.³ It was as if rushing to scuttle our core values in order to look tough on terror would provide a magic shield against any harm for anyone—except maybe the politicians.

Barely a month later, we got a taste of the new rules for political protest when the Giuliani administration announced a ban on demonstrations and denied a permit for a peace demonstration on October 8, 2001. Of course, the administration had already approved the Columbus Day Parade for the following day. And though the revelation

1. This article does not attempt to cover all or even the most important civil liberties and human rights issues that have emerged in the last decade. The omission of a discussion of the USA Patriot Act, the treatment of Jose Padilla, the Bill of Rights Defense Campaign, and much more is not intended to diminish their significance or the NYCLU's efforts regarding them.

2. N.Y. PENAL LAW § 490.00 (McKinney 2008 & Supp. 2010).

3. The New York Anti-Terrorism Act's definition of terrorism encompasses "intimidat[ion] or coer[c]ion of a civilian population" or "a unit of government." *Id.* at § 490.05(1)(a)(i)–(ii). "Material support" is defined as "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials." *Id.* at § 490.05(2).

of this double standard caused the Giuliani administration to reverse course and allow the demonstration, the message was clear: free speech takes a back seat to what is deemed necessary to protect national security.

And then we faced the issue of profiling. Almost immediately after the attacks, hundreds of South Asian and Muslim immigrants were rounded up as “persons of interest” in connection with the attacks. These individuals were separated from their families, thrown into detention centers, held for weeks—even months—in lockdown for twenty-three hours a day without bond, hearings, or charges. They were taunted and threatened by guards for being Muslim and accused of plotting the attacks; some had their heads slammed against a wall plastered with the American flag and, eventually, many were deported, often on technical grounds such as failing to report a change of address. Not a single person rounded up after the attacks as a person of interest was ever charged in connection with the attacks.

The actions taken in New York in the aftermath of 9/11 were a harbinger of what was to come nationwide: policymaking out of fear, fear-mongering, government secrecy, religious and ethnic profiling, torture, and selective disregard for due process—basically, giving short shrift to civil liberties in the name of national security.

It is worth noting, of course, that, as horrific and unprecedented as the 9/11 attacks were, this was not the first time our country had been gripped by fear in the face of threats to our national security. Looking back decades later, we regret, I hope, the abandonment of core principles that resulted in the horrific internment of Japanese-Americans during World War II and the McCarthy witch hunts of the Cold War era. As we remember the fear that gripped our country then, we must also recognize that the transgressions committed in those eras in the name of national security did nothing to strengthen or protect our country—and certainly not our democracy.

Unfortunately, the past is prologue. Since 9/11, we have experienced a fear-fueled myopia that has taken an enormous toll. Equally troubling, we see the bleed of anti-terrorism strategies into civic life. The NYCLU and the American Civil Liberties Union (ACLU) are deeply concerned about our national security and believe in the aggressive prosecution of those who commit or plot to commit crimes against our people. We know that democracy is not a suicide pact. But when there is a danger, and when we face a threat, just because John Ashcroft or Dick Cheney or George W. Bush or, yes, Barack Obama says we need to give up our freedom, our privacy, the fundamentals of a fair and just judicial system, or our right to protest, that does not make it so. We as New Yorkers have a right, indeed, an obligation to oppose the regime of government secrecy that keeps the public in the dark and shields our political leaders from accountability, to ask the hard questions, and to speak out against excessive surveillance, preventive detention, racial profiling, and torture, which do not make us safe, but certainly undermine our freedom.⁴

4. For example, did national security really require a ban on all protest marches in Manhattan on February 15, 2003—as people all over the world marched peacefully to oppose a U.S. invasion of Iraq? Was it really necessary to arrest and jail political protestors at the 2004 Republican National Convention in New York City for days without formal charges or bail for parading without a permit? Was it necessary

II. TORTURE

When an American is arrested abroad and held without charges or physically abused or convicted by kangaroo courts, we protest loudly—and rightly so—and we demand justice. How, then, can we justify the treatment of prisoners in Guantánamo, Bagram Airfield, and Abu Ghraib? Some of these prisoners, no doubt, are truly despicable people who have done, or attempted, evil things. However, they have been held for years without charges, and when they do get a “trial,” it is by a military commission where convictions may be based on unreliable hearsay and secret evidence that the accused is never allowed to see or contest.

And no amount of verbal obfuscation can dress up torture as something that is acceptable; yet water boarding, threats with attack dogs, sexual humiliation, freezing people, hanging people up by their limbs, and chaining people hand and foot in painful positions for days and days—we did all that in the name of national security. Yet to date, not a single individual responsible for those policies has been held accountable. There have been no real congressional investigations, no criminal proceedings, and no compensation for those tortured. We may not today have the courage, the political will, or the vision to hold people accountable for these massive human rights violations, but the ACLU has not given up on this fight. I am confident that someday—hopefully in my lifetime—we will unearth the truth about what happened in these secret prisons and who is responsible.

III. PROFILING AND SURVEILLANCE

New Yorkers know—or we think we know—that what happens in New York has a global impact. So on the eve of the ninth anniversary of 9/11, when our mayor stood up against the anti-Muslim bias that sought to drive the Park 51 Islamic Cultural Center and Mosque out of lower Manhattan, the message of religious freedom and tolerance was heard around the world, and New Yorkers had cause to be proud. But when the New York Police Department (NYPD) touts religious and ethnic profiling as the cornerstone of anti-terrorism policing, that too resonates worldwide. The NYPD denies that it engages in profiling; indeed, profiling is against department rules. However, their 2007 report, *Radicalization in the West: The Homegrown Threat*, uses different terms to justify what is, in essence, profiling.⁵ According to this unsubstantiated theory, the so-called “religious conveyor belt”⁶ leading to terrorism starts with perfectly lawful behavior, such as praying in a mosque, or (thank you, Mayor Bloomberg) quitting smoking, or frequenting

for the NYPD to send undercover agents to spy on political groups all over the country, or to maintain a permanent video database of every peaceful protest in the city to keep us safe from terrorism?

5. MITCHELL D. SILBER & ARVIN BHATT, *RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT* (2007), http://www.nypdshield.org/public/SiteFiles/documents/NYPD_Report-Radicalization_in_the_West.pdf.
6. See, e.g., *id.* at 67–75. The “religious conveyor belt” theory was amply debunked by the 2011 Brennan Center report, *Rethinking Radicalization*. FAIZA PATEL, *RETHINKING RADICALIZATION* (2011), http://brennan.3cdn.net/f737600b433d98d25e_6pm6beukt.pdf.

bookstores, or playing cricket. And therein lies the justification for police surveillance of the lawful behavior of tens of thousands of Muslims in New York City.

And while praying is not inherently suspicious, praying while Muslim apparently is. Indeed, according to recent Associated Press reports, the NYPD has a demographics unit—which the NYPD also denies—and sends officers to infiltrate centers of Muslim culture, commerce, and worship.⁷

Just as the NYPD denies racial profiling and its “anti-terror” surveillance of the Muslim community, it rejects criticism that it is engaged in racial profiling in its regular law enforcement activities, which include wildly disproportionate stop-and-frisks of innocent black and Latino New Yorkers. In 2010, the NYPD stopped over half a million innocent New Yorkers; eighty-five percent of those innocent New Yorkers were black or Latino.⁸ Here, too, the NYPD has a rationale: blacks and Latinos, it says, commit more crimes. What the NYPD fails to explain is how it makes our communities safe to stop and frisk, in just one year, more than 430,000 blacks and Latinos who are totally innocent. These individuals were so above suspicion that in an era of summons and arrests quotas and broken windows policing, these individuals were released without even receiving a summons. What that attitude reflects is a tin ear for the devastating impact these stereotype-driven policies have on the men, women, and children in those targeted communities, be they Muslim, black, or Latino. All but a tiny fraction of individuals in these communities obey the law, yet all are treated by the police with suspicion.

The Associated Press report also describes an NYPD with officers and anti-terrorism units overseas and a CIA with agents training NYPD officers in surveillance and intelligence gathering—all despite CIA prohibitions against domestic surveillance.⁹ Whatever our concerns about the CIA—and there are many—at least the CIA is accountable to Congress. Who is watching the NYPD? To whom is our city’s police force accountable? City Councilmember Peter Vallone assures us that he has regular conversations with New York City Police Commissioner Raymond Kelly. Though nice, this is no substitute for oversight by the City Council or investigation into these practices by the U.S. Department of Justice. I am also confident it will not be nearly adequate to satisfy the terms of the *Handschu* settlement.¹⁰

7. Matt Apuzzo & Adam Goldman, *Docs: NYPD Monitored Where Muslims Ate, Shopped, Prayed*, ASSOCIATED PRESS, Sept. 6, 2011, available at 9/1/11 APWires 07:38:49; see also Matt Apuzzo, Eileen Sullivan & Adam Goldman, *NYPD Ethnic Tracking Included Citizens*, ASSOCIATED PRESS, Sept. 23, 2011, available at 2011 WLNR 19467945.

8. *NYPD Stopped Record Number of Innocent New Yorkers in 2010, New Stop-and-Frisk Numbers Show*, N.Y. CIV. LIBERTIES UNION (Feb. 23, 2011), <http://www.nyclu.org/news/nypd-stopped-record-number-of-innocent-new-yorkers-2010-new-stop-and-frisk-numbers-show>.

9. See *id.*; Apuzzo, Sullivan & Goldman, *supra* note 7.

10. *Handschu v. Special Servs. Div.*, 605 F. Supp. 1384 (S.D.N.Y. 1985). *Handschu* was a class action lawsuit that challenged the NYPD’s undercover surveillance of political dissidents. *Id.* at 1388. Under the terms of the 1985 settlement, the NYPD cannot send undercover agents to spy on the non-public activities of political organizations without some basis for suspecting that the organizations are engaged in unlawful activity. *Id.* at 1420–21. The settlement also sets up an internal NYPD approval process that must be followed prior to undertaking such activities. *Id.* at 1421.

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Galloping advances in technology over the past decade have undeniably fueled—and been fueled by—the widespread perception that surveillance and data-mining will prevent the next terror attack. Without going into the details of government surveillance, it is sufficient to say that New York City has become a surveillance society. In 1998, the NYCLU found more than 2000 cameras in Manhattan, mainly on private buildings such as banks. A 2005 NYCLU survey found more than 6000 cameras in just the area below 14th Street, including a dramatic increase in government cameras. The 2005 survey also documented well over a three-fold increase in the number of cameras in the Lower East Side and Chinatown neighborhoods and a more than fifteen-fold increase in the number of cameras in the Greenwich Village and Chelsea neighborhoods.¹¹ Figures for 2011 are likely to be many, many times greater. Video cameras are everywhere, and there are few to no safeguards in place to protect against the abuse and wrongful disclosure of the massive video and data archive that is being collected.

IV. CONCLUSION

From restrictions on political protest to profiling to hyper-aggressive policing and surveillance—and even the failure to unequivocally, as a society, reject torture—it is clear that what was unthinkable on September 10, 2001, has become the new normal. At the NYCLU, we are working for a *new*, new normal. A normal in which civil liberties are important and respected, and where we understand and respond appropriately to security threats.

In closing, I want to remember John Perry, a New York City police officer and NYCLU board member in Nassau County. On September 11, John was at One Police Plaza filing his paperwork to retire from the NYPD. When the emergency call came, John ran into the towers and died. John Perry was a figure of authority who questioned authority, a police officer, and a staunch civil libertarian. His memory reminds us that we can be both safe and free. Indeed, we have no choice.

11. N.Y. CIVIL LIBERTIES UNION, *WHOSE WATCHING: VIDEO CAMERA SURVEILLANCE IN NEW YORK CITY AND THE NEED FOR PUBLIC OVERSIGHT* (2006), http://www.nyclu.org/pdfs/surveillance_cams_report_121306.pdf.