REFLECTIONS ON THE ESSENTIAL ROLE OF LEGAL SCHOLARSHIP IN ADVANCING CAUSES OF CITIZEN GROUPS

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I. LEGAL SCHOLARSHIP AS A VEHICLE FOR PROMOTING INDIVIDUAL JUSTICE

Like many people in my generation, who came of age in the late 1960s, I went to law school to change the world. The then-new public interest law movement was flourishing, and I was especially committed to civil liberties, the concept of full and equal rights for everyone. I was not interested in getting onto law review, since I was spending all my spare time working with student organizations that addressed various aspects of the civil liberties agenda: the Legal Aid Bureau, Prison Legal Assistance Project, Voluntary Defenders, and Women’s Law Association. Given how much time I spent working with these organizations, I had relatively little time for studying, so I did not expect to make the law review on grades, and I did not enter the law review’s writing competition.

I still vividly recall when the then-President of the Harvard Law Review called to invite me to join its staff on the basis of my grades; I thought he was joking! When I realized that he was serious, I decided to accept the invitation, even though it meant an enormous

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The author also thanks the following individuals who provided information and materials concerning particular textual points or footnotes: Misty Buswell, Linda C. O’Donnell, and Catherine O’Sullivan.
investment of time (for which, in those days, we received no academic credit at all, so this had to be done on top of the usual course load), thus reducing the time I had available for my civil liberties-oriented pursuits. Despite the extremely demanding workload that we law review editors shouldered — or, in fact, because of that heavy workload and the associated educational and professional benefits — I am extremely grateful that I had the opportunity to serve as a law review editor. To this day, that experience stands out as one of the most important professional training opportunities in my entire legal career. Even the aspects of a law review editor’s work that seem menial or technical, including such painstakingly detail-oriented tasks as cite-checking and proofreading, afford invaluable training for the most substantive and consequential professional work. Such technical details can determine the security of people’s liberty and property, and even their lives — literally. That dramatic point is illustrated by a particularly tragic case in the U.S. Supreme Court in 1991. The Court refused to review the merits of this death penalty case because of a lawyer’s procedural error that made the appeal untimely. The lawyer had missed a filing deadline by three days.\(^1\) As a result of that “technical” error in a matter of “detail,” a man lost his last chance to have a court overturn his death sentence on substantive legal grounds; he was executed.\(^2\)

Unfortunately, this kind of case is all too common. As studies consistently indicate, many death row inmates are the victims of lawyering errors — errors that are serious enough likely to make a life-or-death difference,\(^3\) but not deemed serious enough to satisfy the Supreme Court’s extremely narrow concept of “ineffective assistance of counsel” that will warrant a new trial.\(^4\) I have learned a lot

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about these tragic cases from Amy Tenney, a New York Law School alumna who was an officer of the *New York Law School Law Review* and is now working at the Washington, D.C. office of Jenner & Block, specializing in appellate death penalty work, and focusing on issues of ineffective assistance of counsel. Throughout her law school career, Amy also worked in my office, where she applied and further developed her talents in the context of both academic and activist projects. She periodically sends me e-mails with shocking examples of “technical details” that defendants’ lawyers overlooked, which could well have life-or-death consequences. Amy has given credit to her experiences as a *Law Review* member and Supervising Editor, as well as her work in my office, for honing her own meticulous attention to detail, which has already enabled her to make noteworthy contributions to life and liberty even as a relatively novice attorney.5

Recently, Amy sent me a letter telling the story of Kevin Wiggins, who was sentenced to death for murder in Baltimore County, Maryland. As Amy recounted the case, there was no physical evidence linking Mr. Wiggins to the murder. The jury that sentenced Mr. Wiggins to death heard evidence about the murder, but none about his moral culpability. The two public defenders who were assigned to represent him never investigated his childhood and thus never learned that as a child Mr. Wiggins suffered physical and sexual abuse, that he eventually ran away to escape the abuse and became homeless, and that he was borderline mentally retarded. Had the attorneys discovered this information, Mr. Wiggins would not have been sentenced to death, because under Maryland sentencing law if one juror concludes that a death sentence is inappropriate, a life sentence is imposed. After years of pro bono representation by attorneys with Jenner & Block, in 2003 the Supreme Court ruled that Mr. Wiggins’s trial attorneys had provided ineffective assistance of counsel by failing to investigate his background.6 Although his conviction for murder still stands, Mr. Wig-


6. Wiggins v. Smith, 539 U.S. 510 (2003). The *Wiggins* decision was only the second occasion on which the Supreme Court found that its strict standard for satisfying a claim for ineffective assistance of counsel had been satisfied. In addition, increas-
gins is entitled to a new sentencing hearing as a result of the meticulous legal work of Amy Tenney and her colleagues.

II. LEGAL SCHOLARSHIP AS A VEHICLE FOR PROMOTING A JUST SOCIETY

In addition to drilling me in invaluable detail-oriented habits, my own experiences as a law review editor also introduced me to legal scholarship and showed me how influential such scholarship can be as a vehicle for promoting justice. That realization is what prompted me to return to legal scholarship *per se* after I had been practicing law and volunteering for the ACLU for the first eight years of my legal career (following a one-year judicial clerkship, which entails almost exclusively scholarly work). At that point, I joined the faculty of New York University (NYU) Law School to serve as Supervising Attorney of its Civil Rights Clinic. I accepted that position to work with law students handling human rights cases, not to pursue any scholarly goals. However, shortly after I joined the NYU faculty, one of my new colleagues invited me to co-author a law review article with him about a then-breaking issue of constitutional law that was clearly headed to the Supreme Court.

In considering his invitation, I realized that this scholarly article could serve the same activist ends as an amicus curiae brief or legislative testimony, influencing judges and policymakers. The reason I say that this article was my first venture in legal scholarship *per se* since my days as a law review editor is that throughout my intervening practice of law, I had constantly been engaged in scholarship as an integral aspect of lawyering. That was true both in private practice, and in the kind of law reform work that I have done with the ACLU. By definition, those of us engaged in law reform are operating on the frontiers of the law, trying to

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7. James B. Jacobs & Nadine Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C. Davis L. Rev. 595, 625-32 (1985). The author will take this opportunity to express her eternal gratitude, again, to NYU Law Professor James B. Jacobs, Chief Justice Warren E. Burger Professor of Constitutional Law and the Courts, and Director, Center for Research in Crime and Justice, for having helped to launch her scholarly career; this thanks cannot be repeated too often!

expand accepted understandings of legal rights. To accomplish that, we must do what all legal scholars do — thoroughly understand existing precedent and use it creatively in new contexts. Excellent scholarly articles are much like excellent briefs: they reflect a deep familiarity with past precedents but are not hidebound by them. Rather, they build on precedent to provide new understandings and insights — and, in the policy context, new legal rights as well.

I am proud of compliments that Supreme Court Justices have paid to the ACLU’s briefs, acknowledging their scholarly merits and, accordingly, their influential nature. Following are two such compliments from Justices who have two different perspectives on a number of key constitutional issues: Ruth Bader Ginsburg and Antonin Scalia.

Several years ago, Justice Ruth Bader Ginsburg was kind enough to meet with a group of ACLU supporters in her chambers. Earlier in her career, Justice Ginsburg had worked as an ACLU lawyer, becoming the founding director of the ACLU’s Women’s Rights Project in 1971. During this meeting, she showed us a library cart adjacent to her desk that was filled with many briefs concerning a single case, including multiple amici curiae briefs. One member of the group asked Justice Ginsburg how she decided which amici briefs to read, and whether she found any particularly helpful. Justice Ginsburg responded that she always promptly turned to the ACLU’s briefs, noting that when she had worked as an ACLU lawyer, the ACLU’s National Legal Director had drilled her and other ACLU attorneys in the highest standards of intellectual rigor and accuracy, and that she continued to see these standards fulfilled in most briefs filed on the organization’s behalf.

From the opposite end of the Court’s ideological spectrum, Justice Antonin Scalia reportedly has paid the ACLU’s briefs a backhanded compliment. I have been told that he has quipped, in public presentations, that he regularly turns to the ACLU’s briefs first to see the strongest statement of the weakest arguments! I have no idea whether Justice Scalia actually made this point in so many words, but the anecdote is consistent with a recent article surveying the Justices’ reliance on particular amicus briefs, based on inter-
views with seventy former Supreme Court law clerks, who served from 1966-2001. As that article reported:

[M]ultiple clerks from both Justice Scalia’s and Justice Thomas’s chambers listed the ACLU as an organization that always receives closer attention . . . . It is . . . likely . . . that clerks and justices use amicus briefs to prepare for cases by seeking out the best arguments presented by the opposing side, and that the ACLU is uniformly perceived to be outstanding. According to one of Justice Scalia’s clerks, “Justice Scalia does respect the views of the ACLU; he views himself as being intellectually honest, and likes to consider other viewpoints.” The suggestion that one would be challenged by ACLU viewpoints necessarily implies that they are generally thoughtful and of high quality.9

Recent scholarly studies of the impact of amici briefs in the Supreme Court provide systematic confirmation of these anecdotal attestations to the influential nature of the ACLU’s Supreme Court briefs, thanks to their high level of scholarship, similar to what one would expect from an outstanding law review note or article.10 For example, the recent survey of former Supreme Court law clerks I just mentioned revealed that the ACLU’s briefs earned substantially more consideration than those filed by any other institution, other than the U.S. Solicitor General’s office,11 and that the ACLU’s


10. See Joseph D. Kearney & Thomas W. Merrill, The Influence of Amicus Curiae Briefs on the Supreme Court, 148 U. Pa. L. Rev. 743, 802 (2000) (“[T]he national offices of both the ACLU and the AFL-CIO are widely regarded by knowledgeable Supreme Court observers as consistently producing briefs of superior quality.”).

11. See Lynch, supra note 9, at 51. Thirty three percent of the respondents said that the ACLU’s briefs are “always considered more carefully than” other briefs. The group that was cited by the next highest percentage of respondents — 21% — was state and local governments. Lynch also noted:

First and foremost among [public interest groups] cited was the ACLU . . . Clerks gave the ACLU’s amicus briefs more consideration principally on account of their consistent superiority . . . While a few clerks noted an ideological preference for ACLU briefs, most clerks’ comments related to the excellence of the staff attorneys and their ability to raise the most salient legal arguments.

Id. at 49.
briefs are highly esteemed even in the chambers of Justices who often disagree with ACLU positions.\footnote{See id. at 49. (“Clerks’ plaudits of ACLU amicus briefs were remarkably similar across all chambers.”).}

The recently published survey of Supreme Court law clerks, commenting on amicus briefs that are especially influential, underscores the integral inter-relationship between scholarship and advocacy in another respect, beyond its demonstration that excellent advocacy embodies excellent scholarship. This survey revealed that especially influential briefs include not only those filed on behalf of a citizen group that reflect a high level of scholarship, but also those authored by prominent law professors.\footnote{Id. at 52.}

III. THE MUTUALLY REINFORCING RELATIONSHIP BETWEEN SCHOLARSHIP AND CITIZEN ADVOCACY

A. The ACLU Women’s Rights Project

Since March is Women’s History Month, it is an especially appropriate occasion for reflecting upon the scholarly and activist work of one of the two Justices I have just cited — Ruth Bader Ginsburg. In her historic contributions to combating gender-based discrimination, she embodies the synergistic combination of scholarship and citizenship in the service of women’s rights. Ruth Bader Ginsburg initially undertook her pathbreaking contributions to gender equality as a law professor, writing scholarly works that documented women’s inequality under the law and explored constitutional theories for challenging these inequalities.\footnote{See Ruth Bader Ginsburg, Sex and Unequal Protection: Men and Women as Victims, 11 J. Fam. L. 347 (1971); Ruth Bader Ginsburg, Treatment of Women by the Law: Awakening Consciousness in the Law Schools, 5 Val. U. L. Rev. 480 (1971).} She then looked for an institutional base for launching a law reform campaign, whereby she could implement her scholarly theories to reshape the law. She has stressed that a major reason why she chose the ACLU as the institutional home for her law reform initiative is that, throughout the ACLU’s then-half-century of existence, it had earned a solid reputation for excellent work of high scholarly caliber.\footnote{See generally 2 ACLU Women’s Rights Report 5 (1980).} The close inter-relationship between then-Professor Ginsburg’s scholarly work and the ACLU’s law reform initiatives is
typical. The ACLU is constantly drawing upon legal scholars to help generate creative new ideas to advance our agenda: to secure all fundamental freedoms for all people.

B. The ACLU’s Campaign Against Racial Profiling

Another example of a surprisingly recent and very successful law reform campaign, which is still ongoing, is the ACLU’s Campaign Against Racial Profiling.16 Awareness of racial profiling — targeting individuals for law enforcement actions based not on what they have done but on who they are — has now become so widespread that it is hard to believe that, until several years ago, most non-minority individuals in the United States were either completely unaware of the practice or believed that it was not happening in our country.17 Accordingly, one of the major initial goals of the ACLU’s Campaign was to spread public awareness of the problem of racial profiling that pervades too many law enforcement efforts, in order to mobilize a multi-pronged strategy for eradicating it. This campaign has spurred substantial reform efforts all over the country to document and curb racial profiling. These efforts have led to lawsuits to vindicate those who have been the victims of racial profiling, as well as forward-looking state and federal legislation, and training programs and rules within law enforcement agencies. While there is still much work to do, enormous progress has been made, including putting in place tools to continue the effort — in the form of both public awareness and remedial laws and policies.18

All of the ACLU’s law reform efforts in this important area — and, hence, the resulting improvements in United States law and practice around the country — were spurred by a major academic/activist conference that the ACLU’s Northern California affiliate convened in San Francisco in 1998. Hot on the heels of California’s anti-affirmative action voter initiative,19 and the federal courts’ ultimate rejection of a lawsuit challenging it that the ACLU had

19. CAL. CONST. art. I, § 31, previously known as “Proposition 209.”
spearheaded, my California ACLU colleagues wanted to strategize on new approaches for galvanizing public awareness of the ongoing racial injustice in our country, and for combating it. After all, the success of the anti-affirmative action movement was based on the (mis)perception that we now have attained the proverbial “level playing field,” so that there is no longer any need for affirmative action.

How could civil libertarians shed a spotlight on the dramatic differences that race still makes, all else being equal? To brainstorm about these issues, the ACLU of Northern California convened a major conference, bringing together leading scholars in the area of racial justice, including Harvard Law Professor Lani Guinier, as well as leading litigators in the area, including Johnnie Cochran. From their discussions and writings, the seeds of the Campaign Against Racial Profiling grew.

As a further step in this Campaign, the ACLU also commissioned a study by University of Toledo Law School Professor David Harris, documenting the extent of one form of racial profiling, commonly called “Driving While Black.” Professor Harris’s widely cited study showed that dark-skinned males are stopped for alleged driving infractions far disproportionately to their numbers in the general population, and also far disproportionately to their numbers among actual violators. This study, which Professor Harris expanded into a book, has helped foster lawsuits and laws designed to end racial profiling.

In short, the ACLU’s Campaign Against Racial Profiling illustrates the symbiotic relationship between scholarship and citizen ac-

24. See http://www.utlaw.edu/faculty/Harris/harris.htm (last visited Jan. 10, 2005) (“Professor Harris’s early work on profiling became the basis for the Traffic Stops Statistics Act . . . . This has led to new anti-profiling data collection laws in thirteen states, [and] to pending bills in more than twenty states . . . . ”).
tivism, with each one stimulating the other, to promote common goals of furthering justice.

C. The Ira Glasser Racial Justice Fellowship Program

Another example of the ACLU’s harnessing of legal scholarship to stimulate law reform in the area of racial justice is a new program, the “Ira Glasser Racial Justice Fellowship Program.” Named after the ACLU’s longtime national Executive Director, who retired in 2001, this program honors his tireless commitment to racial justice by awarding fellowships to individuals who are doing innovative thinking and writing about means to advance racial justice. The program aims to select fellows who range from leading, established scholars, to relatively young people with impressive potential to contribute important new ideas. The first group of Ira Glasser Fellows was named in 2004, and it includes two law professors who have focused their scholarship on racial justice issues.

I have used women’s rights and racial justice to illustrate the mutually reinforcing relationship between legal scholarship and activist law reform; this relationship exists throughout all areas of law. No matter what the area of law, there are constantly new issues emerging, which depend on careful and creative new scholarship for resolution. For this reason, every semester when I put together materials for my advanced constitutional law course, I never have any shortage of “hot” new cases to include that are either currently pending before the Supreme Court or wending their way there, presenting pathbreaking issues of constitutional law. In fact, it never ceases to amaze me how many seemingly basic issues have never even been addressed by the Supreme Court, let alone definitively resolved, even more than two centuries after the Constitution’s adoption. Consider, for example, all the novel issues that have been presented by the recent political controversies that have wound up in the courts: from the Starr investigation, to the Clinton impeachment, to (s)election 2000. Based on this track record, I can confidently predict that there will always be emerging new issues on which both scholars and activists can “cut their teeth,” for the mutual benefit of each other and our larger society.
IV. TECHNOLOGICAL AND SOCIETAL EVOLUTION, AND THE CONSTANT EMERGENCE OF NEW ISSUES WHERE LEGAL SCHOLARSHIP IS ESSENTIAL FOR THE CAUSES OF CITIZEN GROUPS

One reason for the steady emergence of such new issues is new technical developments, such as the advent of the Internet. In the early 1990s, before the Internet had hit the public radar screen, the ACLU formed a “cyberliberties task force” to begin analyzing the emerging civil liberties issues in this increasingly dominant new medium. To undertake research and planning in this new venture, we hired a young lawyer, Ann Beeson, who had just completed a one-year post-law school fellowship at Human Rights Watch, where she researched human rights issues in the new cyber-context. The ACLU initially hired Ann for another research fellowship, and then hired her as a full-time member of our Legal Department. As one of the pioneers in Internet-related legal scholarship and lawyering, Ann quickly became a star in this increasingly important new field. Today she is the ACLU’s Associate Legal Director, which makes her the second-ranking attorney in the ACLU’s entire national Legal Department, and yesterday she made her second Supreme Court argument in a leading case about online free speech, Ashcroft v. ACLU.25 Along with other examples I have been citing, Ann embodies a creative combination of scholarship and active citizenship.

Another reason for the constant emergence of new legal issues, which provide vehicles for legal scholarship and activism alike, is society’s evolution. Here too we see a symbiotic relationship. For example, as the law becomes more supportive of the equal rights of certain traditionally marginalized groups, those groups become more openly and actively engaged in society, which in turn leads to further legal reforms to promote their rights. A dramatic current example is the movement for the rights of gay, lesbian, bisexual, and transgendered people. Who would have thought, even a year ago, that there would be such constantly proliferating legal issues about gay marriage as we are witnessing today?26 Just as the societal

25. Ashcroft v. ACLU, 124 S. Ct. 2783 (2004). The Supreme Court issued its decision in this important case on the last day of its 2003-2004 term, vindicating the ACLU’s position.

acceptance of LGBT individuals has progressed remarkably in the past decade — both spurred by and reflected in landmark Supreme Court decisions that recognize basic constitutional rights of such individuals — the pressure to accord full societal recognition to LGBT relationships, through civil marriage, has burgeoned during this year. All over the country, government officials and citizens are invoking the law, challenging the law, and testing the law, in an effort either to promote or to thwart same-sex marriages. Again we see many essential legal issues at stake, which never have been definitively resolved, or even addressed. Again we see a crying need for both legal scholarship and active citizenship.

One crucial issue in the gay marriage controversy is the constitutionality of the federal Defense of Marriage Act or “DOMA,” which purports to exempt any state from honoring any same-sex marriage that was performed in another state. Opponents of DOMA contend that it violates the Constitution’s “Full Faith and Credit Clause,” which ordinarily obligates states to honor contracts, including marital contracts, from other states. Until the DOMA/gay marriage controversy surfaced, there had been virtually no Supreme Court interpretation of the Full Faith and Credit Clause and scant scholarship about it. Now, as activists anticipate an ultimate Supreme Court ruling on DOMA’s (un)constitutionality, especially given the paucity of Supreme Court precedents, scholarly analysis of the issues is especially important.

As this piece was going to press, yet another new constitutional issue leapt to the forefront of the ever-expanding public debate about the single-sex marriage issue. On July 22, 2004, the House of
Representatives approved a measure entitled the “Marriage Protection Act,” which purports to bar all federal courts, including the U.S. Supreme Court, from adjudicating any constitutional challenge to DOMA’s exemption of any state from honoring same-sex marriages that were contracted in another state.\(^{32}\) The ACLU maintains that this law is unconstitutional, contravening core constitutional principles of separation of powers, equal protection, and due process.\(^{33}\) However, the Supreme Court never has decided a case on point. Therefore, one could not confidently predict that the Court would concur with the ACLU’s constitutional arguments concerning this statute.

IV. SCHOLARSHIP AND CITIZENSHIP COALESCE TO ADDRESS NOVEL LEGAL ISSUES AND PRESERVE LIBERTY AFTER 9/11

Yet another critical area where scholarship and advocacy have worked hand-in-hand is in tackling the range of post-9/11 issues. There has been an overwhelming amount of both scholarship and active citizenship on these novel legal issues, which the Supreme Court either never resolved before, or resolved long ago, under very different factual and legal circumstances. For example, the Court’s notorious *Korematsu* decision,\(^{34}\) upholding the World War II internment of Japanese-Americans, was decided before the Court’s landmark Equal Protection Clause ruling in *Brown v. Board of Education*,\(^ {35}\) and also before its modern decisions robustly enforcing rights under the Due Process Clauses. How will the current Court rule on parallel issues now, in the domestic “war on terrorism,” in light of the intervening precedents that have vigorously enforced constitutional equality and due process rights? It is fair to say that these are open questions that the Court has only begun to address this term.\(^ {36}\)


\(^{34}\) *Korematsu v. United States*, 323 U.S. 214 (1944).

\(^{35}\) 347 U.S. 483 (1954).

\(^{36}\) Shortly before this essay was submitted for publication, during the last week of its 2004-05 Term, the Supreme Court issued decisions in three cases that pitted claims of individual liberty against executive power in the context of the post-9/11 “War on Terrorism.” See *Hamdi v. Rumsfeld*, 124 S. Ct. 2635 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004). That the prior precedents
Supreme Court Justices realize the historic responsibility and opportunity they have to shape, or reshape, the pertinent legal principles in the wake of the 9/11 terrorist attacks. Last year, for its 2002-2003 program, the Supreme Court Historical Society chose as its theme, “The Constitution in War Time.” I was invited to the kick-off lecture in that series by University of Chicago Law Professor Geoffrey Stone, who discussed the First Amendment in times of war or other crises, including the current “war on terrorism.” Although it is unusual for Justices to attend these lectures, which are not sponsored by the Court, there were four Justices in attendance at Professor Stone’s presentation. Several took notes, and all were animatedly engaging in discussion with him and among themselves afterward. Moreover, a number of the Justices have made public speeches in which they have noted the weighty new constitutional issues at stake. They have stressed that they are open-minded on these critical issues, waiting to read the lawyers’ briefs and to reread the precedents, as well as to consider scholarly work such as that of Professor Stone.37

Professor Stone has now published his scholarly work on the issues he preliminarily discussed in his Supreme Court Historical Society lecture in an impressive new book.38 It will be the subject of a major conference at the University of Rutgers-Camden Law School next year, bringing together scholars and activists to comment on the book’s significance.

During its current term, the Supreme Court reviewed three major post-9/11 cases challenging the government’s asserted power to “detain” — i.e., imprison — both citizens and non-citizens as so-


called “enemy combatants” without any hearings, charges, or representation by counsel. In one of these key cases the petitioner, Jose Padilla, is represented by two NYLS graduates, Donna Newman and Andy Patel. Their groundbreaking briefs, discussing novel constitutional issues, have been published by the *New York Law School Law Review* and they have generously spoken to several NYLS audiences, including my advanced constitutional law course. Once again, we see the intertwining of legal scholarship and citizen activism — along with teaching and studying.

Since 9/11, the ACLU has instituted dozens of lawsuits to ensure that civil liberties are not unnecessarily sacrificed in the name of national security. These lawsuits have raised many pressing new issues, all of which have required substantial research and scholarship. The ACLU’s national Legal Department regularly circulates among ACLU lawyers and leaders a list of all pending and projected lawsuits specifically concerning civil liberties and terrorism. One section of this regular memorandum is devoted to ongoing research projects, relating to potential new lawsuits.

Following are just a few of the novel efforts that the ACLU already has undertaken post-9/11, based on significant legal scholarship. In the fall of 2003 we filed a Freedom of Information Act request about plausible allegations that prisoners “indefinitely detained” at Guantanamo Bay are being subjected to torture and a process of “extraordinary rendition,” whereby they are turned over to governments known to engage in torture.

In the spring of 2004, we filed a complaint with the United Nations Working Group on Arbitrary Detentions on behalf of hundreds of immigrants who had been peacefully living and working in the U.S. but were swept up in the immediate 9/11 aftermath and

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39. *Hamdi*, 124 S. Ct. at 2635; *Rasul*, 124 S. Ct. at 2693, 2696 (treating specifically the question “whether the habeas statute confers a right to judicial review of the legality of Executive detention of aliens” at the Guantanamo Bay Naval Base); *Padilla*, 124 S. Ct. at 2715. The *Padilla* Court declined to reach a decision on the ultimate issue: “We confront two questions: First, did Padilla properly file his habeas petition in the Southern District of New York; and second, did the President possess authority to detain Padilla militarily. We answer the threshold question in the negative and thus do not reach the second question presented.” *Id.*


41. See http://www.aclu.org/international/international.cfm?ID=13976&c=36.
imprisoned incommunicado for weeks or even months. These “indiscriminate and haphazard” detentions were condemned by two scathing reports by the Inspector General of the Department of Justice itself, Glenn Fine. Inspector General Fine’s reports documented that these individuals had been arrested based essentially on ethnic and religious profiling, not reasonable suspicion of actual terrorist activity. In fact, not a single one was even charged with any terrorist-related crime. The lower courts ultimately rejected the legal efforts that the ACLU and other human rights groups had made to secure information about these individuals, who were held, tried, and deported in secret. After the Supreme Court declined to review the case, the ACLU decided to pursue possible remedies in the international arena. At the very least, this innovative initiative plays the essential role of creating a record about “America’s Disappeared.”

Last year, ACLU lawyers made a creative effort to persuade the Supreme Court to review an unprecedented 2003 order by the super-secret Foreign Intelligence Surveillance Act — or “FISA” — appellate court, which had never previously convened. In a proceeding in which only the U.S. government appeared, the appellate court overturned the lower FISA court’s rejection of the government’s expansive interpretation of its surveillance power under the USA-PATRIOT Act. Since these proceedings are ex parte, with only the government appearing, and since the government prevailed in the appellate FISA court, there was no party to seek Supreme Court

42. See http://www.aclu.org/safeandfree/safeandfree.cfm?ID=14804&c=206.


review of that decision, even though it affects the privacy and freedom of everyone in this country.\textsuperscript{46} ACLU lawyers devised an imaginative and scholarly theory for seeking standing in the Supreme Court specifically to give the Court an opportunity to pass on these significant constitutional issues. Therefore, a construction of the statute denying other parties the opportunity to seek review would effectively prevent the Court from reviewing any decision that was in favor of the government. This was contrary to the apparent intent of the statute to grant jurisdiction to the Supreme Court.\textsuperscript{47} Again, these ACLU’s legal filings reflected prodigious legal scholarship.

The ACLU also brought the first constitutional challenge to the controversial USA-PATRIOT Act, challenging the notorious section 215 of the Act, which allows government agencies secretly to seize any records about any of us — including such sensitive records as library, financial, medical, and student records — merely by alleging that the records are “sought for” a counter-terrorism investigation.\textsuperscript{48} Our clients include individuals who are deterred from exercising their First Amendment free speech, religious freedom, or free association rights for fear the government may invoke section 215 to engage in secret surveillance of them. Given the extent to which Muslim Americans have been targeted for post-9/11 enforcement measures, including the “indiscriminate and haphazard” detentions that the Justice Department’s Inspector General denounced, Muslim individuals are deterred from participating in religious observances at their mosques and from speaking out on post-9/11 policy issues.

The government is seeking to defeat the constitutional challenges to section 215 through a classic “Catch-22.” The law imposes a gag order on anyone who turns over records about any of us to the government, forbidding the disclosing party, on pain of criminal penalty, from telling us they have done so. Therefore, one of the law’s constitutional flaws, the ACLU argues, is its violation of

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Muslim Cmty. Ass’n of Ann Arbor v. Ashcroft, No. 03-72913 (E.D.M.I. filed July 30, 2003).
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due process principles. How can you effectively challenge a violation of your freedom or privacy if you do not even have notice that it has occurred? The government, however, seeks to defeat not only the due process claim, but also the underlying privacy and First Amendment claims, by contending that the ACLU’s clients lack standing. Since the law prevents our clients from knowing that they have been subject to surveillance, the government contends that they — along with everyone else — are barred from challenging the government’s secret surveillance powers.49

An important development in this area occurred in September 2004, a timely example of the ACLU’s scholarly brief writing at the forefront of change. A judge in the United States District Court for the Southern District of New York ruled that 18 U.S.C.A. § 2709, as amended by the PATRIOT ACT, violates both the First and Fourth Amendments. The ACLU was co-plaintiff with an anonymous internet service provider (ISP). The case challenged a “national security letter” that, consistent with the amended statute, required the ISP to produce customer records and barred disclosure to any person that the FBI had sought or about whom it had obtained the information. The court held that the statutory provision barring disclosure is an unconstitutional prior restraint on free speech that is not narrowly tailored to meet the government’s objectives.50

Several of the ACLU’s post-9/11 lawsuits challenged the government’s many policies that have thrown a shroud of secrecy over all aspects of its anti-terrorism efforts. The first such lawsuit was brought in New Jersey to challenge the secret incarceration of immigrants who had been swept up right after the terrorist attacks.51 Many were being held in New Jersey, which happens to have state

49. Plaintiff’s Response to Defendant’s Motion to Dismiss at 11, Muslim Cmty. Ass’n of Ann Arbor V. Ashcroft, No. 03-72913 (E.D. Mich. filed Nov. 3, 2003).


51. ACLU v. County of Hudson, No. HUD-L-463-02 (N.J. Super. Ct. 2002) (condemning the Administration’s “secret arrest” policy as “odious to a democracy”). After this state court ruling, the Commissioner of Immigration and Naturalization (“INS”) issued a new interim rule purporting to prohibit state officials from releasing information regarding INS detainees in their custody, and the U.S. Government argued that this interim rule preempted the New Jersey statutory and case law that the New Jersey Superior Court had enforced in this case. On that preemption ground, the New Jersey intermediate appellate court reversed the lower court’s ruling. ACLU of N.J. v. County of Hudson, 2002 WL 1285110 (N.J. Super. Ct. App. Div. 2002).
laws that require public disclosure of all prison inmates. The legal research and other work in this key challenge was done by students and faculty members at the Constitutional Litigation Clinic at Rutgers-Newark Law School. Ultimately, these particular secrecy issues yielded conflicting rulings by the U.S. Courts of Appeals for the Third and Sixth Circuits. The Supreme Court declined to review the issue, leaving critical questions unresolved — and a fruitful topic for future scholarly analysis.

These are just a few examples of breaking legal issues concerning post-9/11 efforts to preserve both personal liberty and national security. But they make clear that we will never run out of questions that are interesting, important and essential for engaged citizens, and which will both turn on and fuel future scholarly research.

IV. CONCLUSION

The significant role — and responsibility — of legal scholarship in shaping our post-9/11 legal and political order was stressed in the very first public remarks by any Supreme Court Justice after the terrorist attacks. Speaking at NYU Law School on September 28, 2001, Justice Sandra Day O’Connor, the first woman appointed to the Supreme Court bench, said: “Academics will help define how to maintain a fair and a just society with a strong rule of law at a time when many are more concerned with safety and . . . vengeance,” More recently, early in 2004, Justice Ginsburg was being honored for her towering contributions to women’s rights at the Association of the Bar of the City of New York. After Justice Ginsburg’s opening remarks, a member of the audience asked her if people’s rights are endangered by the domestic war on terrorism. In response, she stressed that “an active public” had made the difference in ensuring women’s rights. In other words, the success

of efforts to combat gender discrimination, such as her original legal scholarship and pathbreaking litigation, ultimately depended on citizen engagement. As in all law reform movements, many initiatives come from the citizenry, including legislative reforms and constitutional amendments. Even litigation victories are only meaningful if active citizens are aware of, and exercise, their newly recognized rights.

Justice Ginsburg then drew an analogy between this aspect of the women’s rights movement and the current context of post-9/11 civil liberties. In her words: “On important issues, like the balance between liberty and security, if the public doesn’t care, then the security side is going to outweigh the other.” But that would change, she said, “if people come forward and say we are proud to live in the USA, a land that has been more free, and we want to keep it that way.”55 In short, to combine the wisdom of our two women Justices, we members of the legal profession all have a special opportunity — and responsibility — to come forward, as both scholars and citizens, to uphold the rule of law that has kept our great country both safe and free.

55. Id.