

CRITICISMS OF FEDERAL COUNTER-TERRORISM LAWS

NADINE STROSSEN*

The ACLU has always been concerned about abuses of power by any law-enforcement officials. Thus, the enormous expansion of federal law-enforcement power in recent years has focused more of our attention on checking that power. This federal expansion has occurred in both personnel and jurisdiction. Federal police officers now comprise almost ten percent of the nation's total law-enforcement personnel.¹ Personnel of fifty-three separate federal agencies have the authority to carry firearms and make arrests.² According to the Congressional Research Service, over 140 federal agencies have police—including, for example, the Government Printing Office,³ with more than 100 officers.

The growing federalization of law enforcement is of great concern not only to civil libertarians, but also to many other segments of our society. For example, we hear that concern from former top federal law-enforcement officials, including former Attorneys General of the United States—who can hardly be accused of being soft on crime. Their concern apparently stems from a respect for state sovereignty. Had former U.S. Attorney General Richard Thornburgh been able to attend this symposium, as he was planning to do,⁴ he would have expressed that perspective. And another former U.S. Attorney General, C.

* Professor of Law, New York Law School; President, American Civil Liberties Union. For research assistance, Professor Strossen thanks her Chief Aide Raafat S. Toss and Gene Guerrero.

1. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1995, at 20 tbl.1.16 (1996) (recording that of the total police employment of 857,593 at all levels of government, 87,616 were federal employees).

2. See Nancy Dunne, *Ruby Ridge Turns Up Heat on the 'Feds'*, FIN. TIMES, Aug. 29, 1995, at 3.

3. See *Who Can and Can't Pack a Gun*, WASH. POST, Feb. 10, 1983, at A17.

4. He was scheduled to speak on this Panel, but was prevented from doing so by travel problems.

Edwin Meese, recently published an article in the *New York Law School Law Review* making a similar point.⁵ Former Attorney General Meese approvingly quoted a passage in the *Lopez* opinion of Justice Clarence Thomas—yet another conservative, law-and-order champion.⁶ That passage refers to “a Constitution that does not cede a police power to the Federal government.”⁷

Such reservations about the increasing scope of federal law-enforcement powers are also shared by many state and local criminal justice officials. For example, during the summer of 1995, the Conference of Chief Justices (which consists of the chief justices of the state supreme courts) adopted a resolution that opposed Congress’s tendency to “federalize ordinary street crime.”⁸ Specifically, the state chief justices opposed legislation to make federal crimes out of any violent felonies involving firearms.⁹

Some local law-enforcement officials believe that federal law enforcement officers inevitably create more danger of abuse than state or local officers, because it is harder to hold the federal officers accountable. Texas Ranger Captain David Byrnes made this point at Congress’s hearings into the recent federal law-enforcement abuses in Waco, Texas.¹⁰ Captain Byrnes headed Texas’s criminal investigation into the Waco fiasco. He testified as follows:

[W]e are fast going down the road of a Federal police force. We federalize everything . . . from carjacking to evading child support. . . and that really worries me. . . . As a law enforcement officer, . . . I think that for law enforcement to be effective it has to be accountable, and to be accountable it has to be controlled at the lowest possible level.¹¹

Even putting aside Captain Byrnes’ concern that it will always be hard to hold federal law-enforcement officials accountable, it

5. See Edwin Meese III, *The Illusion of the Rehnquist Court’s Political Agenda: A Return to Constitutional Interpretation From Judicial Law-Making*, 40 N.Y.L. SCH. L. REV. 925 (1996).

6. See *id.* at 931 (quoting *United States v. Lopez*, 115 S. Ct. 1624, 1642-51 (1995) (Thomas, J., concurring)).

7. *Lopez*, 115 S. Ct. at 1650.

8. See Gene Guerrero, *Civilian Oversight of National Law Enforcement Agencies: The USA*, Address Before the IACOLE [Int’l Assoc. for Civilian Oversight of Law Enforcement] 1995 World Conference, at 5 (Sept. 29, 1995) (text on file with the editors of this journal).

9. See *id.* at 5.

10. See *id.* at 4-5.

11. *Id.* at 5.

is certainly impossible to do so without any independent oversight mechanism. And we currently lack that. The exponential growth in federal law enforcement power has not been accompanied by any systematic oversight or review of federal police practices. This has led to many cases of serious abuse.

Some of these are well-known. For example, thanks to the recent congressional hearings,¹² many Americans know about the disastrous episodes at Waco and Ruby Ridge.

Unfortunately, though, these tragedies are just the tip of the iceberg. The ACLU has documented many other, equally shocking incidents, where federal officers violated rights, seized and destroyed property, and caused physical injury or even death to innocent, law-abiding individuals.¹³

In January 1994, the American Civil Liberties Union wrote a letter to President Clinton describing some of these cases and urging him to appoint a national commission to study federal law-enforcement agencies and make recommendations to ensure that these agencies comply with the law.¹⁴ Significantly, that letter was signed not only by the ACLU, but also by an unusually broad coalition, spanning a wide ideological spectrum. Our coalition partners included not only groups that are generally seen as liberal—such as the National Association of Criminal Defense Lawyers and the International Association for Civilian Oversight of Law Enforcement—but also groups that are usually seen as conservative, such as the National Rifle Association and the Second Amendment Foundation.

These groups often disagree on policy and constitutional issues in the criminal justice area. But we all agree that expanded federal law-enforcement power has led to repeated abuses of the following types: improper use of deadly force; physical abuse; use of paramilitary and strike force tactics without justification; use of “no knock” entrances without justification; inadequate investigation of allegations of

12. See *Events Surrounding the Branch Davidian Cult Standoff in Waco, Texas: Hearing Before the Comm. on the Judiciary House of Representatives*, 103d Cong. (1993); COMM. ON GOV'T REFORM AND OVERSIGHT, INVESTIGATION INTO THE ACTIVITIES OF FEDERAL LAW ENFORCEMENT AGENCIES TOWARD THE BRANCH DAVIDIANS, H.R. REP. NO. 104-749 (1996).

13. See Letter from the American Civil Liberties Union to President William J. Clinton (Jan. 10, 1994) (on file with the editors of this journal).

14. *Id.*

misconduct; use of unreliable informants without sufficient verification of their allegations; use of "contingency" payments to informants—i.e., making payment contingent upon a conviction, thus giving the informants an incentive to lie; entrapment; inappropriate use of forfeiture proceedings to finance law-enforcement equipment and activities; use of military units and equipment in domestic law enforcement; and pretextual use of immigration laws for non-immigration law enforcement.

Let me outline just one of the many, relatively unknown, actual cases that illustrate these patterns of abuse. In deference to the site of this symposium, it is a case from California. It involved a rancher named Donald Scott. On October 2, 1992, agents of the federal Drug Enforcement Agency (DEA) and the Los Angeles Sheriff's Department staged a raid on the Scott ranch in the Santa Monica Mountains near Malibu. When Donald Scott emerged carrying a gun, a deputy sheriff shot and killed him. Although the agents claimed they were searching for marijuana plants, none were found. The Border Patrol, which had participated in the investigative work leading up to the raid, later claimed it was looking for undocumented aliens. None were found. An independent investigation by the Ventura County District Attorney's Office questioned the DEA's claim that marijuana had been observed through aerial surveillance. The investigation concluded that the raid was motivated, in part, by a desire to seize and forfeit Scott's ranch.¹⁵ In calling for the appointment of a national commission to look into federal law-enforcement abuses of the type that occurred in the Scott case, the ACLU and our ideologically diverse allies invoke an important precedent. In 1929, after a decade of corruption and lawlessness in federal law enforcement, President Hoover appointed the "National Commission on Law Observance and Enforcement" under the chairmanship of former U.S. Attorney General George Wickersham. The 1931 Wickersham Commission Report, entitled "Lawlessness in Law Enforcement,"¹⁶ exposed a pattern of police brutality and helped stimulate major reforms in federal law-enforcement

15. See John Dillin, *Citizens Caught in the Cross-Fire*, CHRISTIAN SCI. MONITOR, Oct. 1, 1993, at 6.

16. 4 NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT (1931).

practices.

We have been very disappointed in the Clinton Administration's response—more accurately, non-response—to the urgent concerns raised in our January 1994 letter. After trying for a year to meet with Attorney General Janet Reno to discuss these concerns, we were finally able to meet with the third-highest-ranked person in the Justice Department, Associate Attorney General John Schmidt, in January 1995. But that meeting was, at best, perfunctory, and we have never received a substantive reply to our concerns.

We are also pursuing these concerns in Congress. In October of 1995, after the congressional hearings into the federal law-enforcement abuses in the Waco and Ruby Ridge situations, the ACLU and its coalition partners—along with some additional allies—followed up on the January 1994 letter. We called on both Congress and the Administration to adopt a twenty-four-point reform plan to curb overreaching by federal law-enforcement officials. In addition to renewing the earlier call for a national commission to review existing federal law-enforcement policies and practices, the plan also urges many other specific reforms, which address the following categories of law-enforcement activity: execution of search warrants and forcible, no-knock entry; other Fourth Amendment concerns; prosecutorial mis-conduct; the use of consultants and experts; the use of deadly force; accountability and checks and balances; and the use of the military in civilian law enforcement.

While all the reforms urged in the October 1995 letter are important, for space reasons I will here focus on two general themes that run through many of them.

First, all of the disparate organizations that signed the letter agree that Congress must do more than merely hold hearings on the past abuses at Waco and Ruby Ridge. Congress must follow up on those hearings by taking steps to prevent similar abuses in the future.

Ironically, though, even while some members of Congress were expressing deep concern about the unchecked federal law-enforcement power so dramatically demonstrated at Waco and Ruby Ridge, many other members of Congress were moving in exactly the wrong direction. Far from curbing federal law-

enforcement power, they were moving to enact so-called "counter-terrorism"¹⁷ and anti-crime legislation that would do exactly the opposite, thereby expanding already far-reaching federal powers still further. Therefore, during the fall of 1995, the ACLU and its wide-ranging coalition partners called on Congress to reject the counter-terrorism bills that many politicians supported after the Oklahoma City bombing.

Among many other problems, this legislation contains a breathtakingly broad definition of domestic terrorism. Citing this problem, among others, in December 1995 a group of prominent, ideologically diverse law professors wrote to Newt Gingrich urging defeat of the pending anti-terrorism legislation.¹⁸ As these distinguished professors noted, the law would transform many minor state crimes into the federal crime of terrorism—for example, hijacking a bicycle, vandalizing a street sign with a gun, or even just planning with one's friends to do so. Such an overbroad definition creates the danger that certain individuals will be selectively prosecuted as terrorists based on their political views.

The ACLU and its allies in the coalition for federal law-enforcement reform also urged Congress to reject any effort to weaken the exclusionary rule, which prevents the police from using illegally obtained evidence. From the National Rifle Association to the National Black Police Association, all these groups maintain that the exclusionary rule is the only effective deterrent against police misconduct.

A second major theme in the October 1995 letter from the ACLU and its allies is the need to curb federal law enforcement abuses by providing for permanent, independent oversight of federal law-enforcement policies and practices, with full redress for any abuses. Similarly, we urged Congress to ensure adequate penalties for those federal law-enforcement agents who engage in misconduct.

In saying that "independent" oversight is needed, we mean genuinely independent. It is plainly inadequate for any law-enforcement agency—for example, the FBI, DEA, or ATF—to be in charge of investigating itself. Moreover, we believe that it

17. I designate it as such to make the point, to be explained later, that this legislation in fact provides no meaningful response to terrorist crimes.

18. Harvey Berkman, *Habeas Restricted in Terrorism Bill*, NAT'L. L.J., Dec. 18, 1995, at A12.

is equally inadequate for a department to be in charge of investigating one of its constituent agencies. For example, the Justice Department should not independently investigate the FBI.

Many other nations around the world have established systems for external, independent review of their national police forces to ensure their accountability. Within the United States, more and more cities and counties are setting up independent review systems for local police abuses. But for federal police misconduct we have no external review, and the internal systems for investigating federal agents' misconduct have been shown, repeatedly, to be completely inadequate.

Finally, let me make a brief comment about the "counter-terrorism" legislation recently passed by Congress.¹⁹ Back in February, 1995, before the Oklahoma City bombing, the Clinton Administration had introduced what it called the "Omnibus Counter-Terrorism Act."²⁰ The ACLU promptly issued a press release explaining that this measure would more accurately be called the "Ominous Counter-Constitution Act," because of its sweeping violations of a broad range of constitutional rights.²¹

The proposal was receiving little support until the Oklahoma City tragedy. But in the wake of that tragedy, and the ensuing public anger and fear it triggered, politicians wanted to be seen as "doing something" about terrorism. Therefore, both Democrats and Republicans portrayed this bill as a purported response to terrorist threats. In fact, though, this anti-terrorism legislation suffers from the same double flaw that mars all-too-many measures undermining civil liberties: it is unprincipled, and worse, it is also unnecessary as a tool for fighting terrorist crimes.

Even some top FBI officials have said they do not need more authority in order to combat terrorist crimes effectively. That the FBI and other law enforcement authorities already had

19. This legislation was subsequently signed into law on April 24, 1996, under the title "Antiterrorism and Effective Death Penalty Act of 1996." Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of the U.S.C.).

20. See Omnibus Counter-Terrorism Act of 1995, S. Res. 761, 104th Cong. (1995).

21. *House to Consider Ominous Counter-Constitution Act (Also Known as the Omnibus Counter-Terrorism Act)*, ACLU Background Briefing (March 31, 1995), ACLU WEBSITE <<http://www.aclu.org>>.

ample power to investigate and prosecute suspected terrorists is shown by the Oklahoma City tragedy itself: within days of the bombing, the two major suspects were identified and incarcerated, and they are being prosecuted under already-existing laws.²² Likewise, those responsible for the World Trade Center bombing in 1993 were swiftly apprehended and prosecuted, and are now serving life sentences under previous laws.

The FBI Guidelines already give federal law-enforcement officials ample authority to monitor and deter planned criminal activities, including those associated with terrorism.²³ These Guidelines already permit infiltration, surveillance, and other investigative techniques whenever there is "a reasonable indication"²⁴ that criminal or violent activity is being planned. From a civil libertarian's perspective, these broad standards already vest in federal authorities too much power to violate the privacy of law-abiding citizens, and already unconstitutionally dilute the strict probable cause standard that the courts specify as a prerequisite for any search or seizure to be found proper under the Fourth Amendment. Indeed, these Guidelines were written by the Reagan Administration expressly to give the FBI more leeway in investigating domestic terrorism. So, ironically, the Clinton Administration and the many bipartisan congressional supporters of the new law are, in effect, accusing the Reagan Administration of having been too soft on crime and terrorism!

As the recent hearings on the Waco and Ruby Ridge debacles made so painfully clear, the FBI and other federal law-enforcement agencies had been construing their extant authority in a frighteningly expansive and open-ended fashion. The completion of the congressional hearings about these excesses was hardly the time to give federal authorities still more latitude to violate people's liberties—not to mention their lives and safety.

While the anti-terrorist measure does not add any necessary

22. The suspects are being tried separately, in federal court, in Denver, Colorado. See Judith Crosson, *Oklahoma City Bomb Suspects to Get Separate Trials*, Reuters N. Am. Wire, Feb. 4, 1997, available in LEXIS, NEWS Library, CURNWS File.

23. See generally Thomas C. Martin, *The Comprehensive Terrorism Prevention Act of 1995*, 20 SETON HALL LEGIS. J. 201 (1996).

24. *Id.*

power to the already expansive federal arsenal, it violates freedom of speech and association, privacy, and the due process rights of millions of innocent Americans. This law substitutes “guilt by association” for actual evidence of criminal wrongdoing. It allows government to monitor and prosecute expressive and associational activities that are at the heart of the First Amendment. It allows citizens to be imprisoned, and non-citizens to be summarily deported, because of their support for the lawful, humanitarian activities of any group that the Secretary of State might label as “terrorist”—even if they did not know of the group’s allegedly terrorist activities, let alone support them. Moreover, non-citizens, including long-term legal residents, can be deported in kangaroo-court-like proceedings. These proceedings are closed to the accused non-citizens and their lawyers, and are based on secret evidence that they cannot see or respond to.

In short, the new anti-terrorist legislation does not make us more safe, but only less free. It therefore puts me in mind of one of my favorite quotations—favorite because, alas, it is so often apt. It is something that Thomas Jefferson wrote to James Madison more than 200 years ago, when they were corresponding about the then-proposed Bill of Rights. Jefferson wrote: “A society that will trade a little liberty for a little order will deserve neither and will lose both.”²⁵

In the aftermath of the Oklahoma City catastrophe, the counter-terrorism bill sailed through the Senate in June, 1995; only eight Senators voted against it.²⁶ It did encounter opposition in the more conservative House of Representatives. Significantly, some of the most conservative representatives spoke against the measure, probably in part because they feared its potential adverse impact on some of their constituents and supporters, including right-wing critics of government and advocates of the right to bear arms. No doubt the conservative opposition to the anti-terrorist legislation, from officials and citizens alike, also reflected their opposition to further expansion of the national government’s law enforcement powers. The hearings into the disastrous events at Waco and

25. See *Williams v. Garrett*, 722 F. Supp. 254, 256 (1989) (quoting Thomas Jefferson).

26. See Helen Dewar, *Senate Approves Anti-Terrorism Bill; Death Row Appeals Curbed in 91-8 Vote*, WASH. POST, June 8, 1995, at A1.

Ruby Ridge spotlighted the expansive nature of current federal law-enforcement power. Those of us who are deeply concerned about those abuses, which were committed under existing authority, are even more worried about what might be done under a government with further increased power.

The counter-terrorism bill's difficulty in the House was the result of opposition from an unusually broad coalition of some diverse allies put together by the ACLU—a coalition similar to the coalitions we had previously mustered to protest federal law-enforcement abuses and call for reforms to prevent such abuses in the future. It included pro-gun groups, such as Gun Owners of America; ethnic groups, such as the Irish National Caucus and the American Arab Anti-Discrimination Committee; law-enforcement organizations, such as the National Black Police Association; defendants' rights organizations, such as the National Association of Criminal Defense Lawyers; religious organizations, such as the Friends Committee on National Legislation; pro-privacy groups, such as the Electronic Privacy Information Center; and conservative organizations, such as the Cato Institute and Frontiers of Freedom (which was founded by former Republican Senator Malcolm Wallop).

Former California Governor Jerry Brown recently wrote a column in which he commented on the unusually broad political spectrum united in opposition to expanded federal law-enforcement authority. He said:

People who are liberals say it one way; people who are in the militia and the right wing say it another way, but they're all pointing to a reduction . . . in the ability of individual citizens to control their lives.²⁷

He also said:

The NRA referred to federal agents as "jack-booted government thugs who seize our guns, destroy our property, and even injure or kill us." The folks of the NRA and the militia crowd are mostly white . . . yet they're saying that the police are doing to them exactly what the Black Panthers and some of the Latino groups said twenty years ago about the FBI . . . [N]ow these red-blooded American NRA types are talking like the Black Panthers used to talk—an incredible evolution in thinking!²⁸

27. Jerry Brown, *That's the Way I See It*, NORTH COAST XPRESS, June-July 1995, at 12, 13.

28. *Id.* at 13.

Finally, Laura Murphy, the Director of the ACLU's Legislative office, recently commented on the December 1995 joint statement that the ACLU spearheaded to oppose the pending counter-terrorism legislation. She provides an excellent summary of the reasons why—far from expanding federal law enforcement authority, as done by the anti-terrorist bill—we should instead do exactly the opposite, and cut back on these already overly expansive powers, which are subject to abuse and have repeatedly been abused.

The so-called counter-terrorism legislation . . . totally disregards the lessons of Waco and Ruby Ridge. . . . [T]he Justice Department demands more federal law enforcement powers from Congress, and Congress does nothing to ensure that the vast police powers it already has are wielded responsibly All Americans—whether left, right or center—must stand strong in . . . opposition to this anti-liberty proposal. . . . The terrorism bill is a product of the politics of fear. It will make us no safer, only less free.²⁹

29. See *More Law Enforcement Power, No Accountability: The Counter-Terrorism Legislation Must Fail*, Statement of Laura W. Murphy, Director, ACLU Nat'l Washington Office, (Dec. 6, 1995) ACLU WEBSITE <<http://www.aclu.org>>.

