the breakfast table

Strossen and Kozinski

Alex Kozinski

Posted Monday, Sept. 21, 1998, at 12:06 PM PT

From: Nadine Strossen

Subject: The Sexual Is Political

Posted Monday, Sept. 21, 1998, at 9:56 AM PT

Good morning, Alex,

Happy new year! It's off to a good start, with this chance to chat with you. Someone recently told me that you were recently profiled in a snowboarding magazine. Since we are welcome to discuss magazines, you might fill me in on the latest boarding news!

This weekend I was traveling in some remote places where I couldn't get my *New York Times* fix. I'd like to share with you the particularly choice above-the-fold headline in Saturday's *Missoulian*: "High times at the Testicle Festival"! No, that is not yet another clever name for what *Slate* has been calling "Flytrap," but rather an annual Montana celebration of that consummate Western delicacy, "Rocky Mountain Oysters" (and, for any man who doesn't know what those are, let him eat--well, quiche).

I was told that another edition of the *Missoulian*, earlier last week, mentioned that a local bookstore was prominently displaying the newly-released book version of the Starr Report alongside a stack of my book, *Defending Pornography*! Which brings me back home to this morning's *New York Times*. In the business pages, I was delighted to see a picture of my human rights colleague, Peter Osnos, who had left a major publishing house to start a new company dedicated to publishing "serious nonfiction scorned by conglomerates seeking best-seller profits." Ironically, the leading title on his debut list this fall is, as the *Times* puts it, "a breast-heaving. . . tale of unrequited love"--of course, none other than the Starr Report. Even more ironic is the name that Peter had chosen for his new publishing company:

"Public Affairs"! I do revel in this dramatic illustration of the incoherence of the supposed dichotomy between political and sexual expression, which too many judges and scholars contend should be at polar extremes of the First Amendment hierarchy.

The other article in today's *Times* that I found most intriguing touched on strikingly parallel themes in a dramatically different setting--the politically repressive, conservative Muslim country of Malaysia. Not only has a top political figure there been accused of sexual improprieties, but also, the raging public debates about the case have included graphic, sexually-explicit expression that have broken even more taboos in that society than Starr, et al. have broken in ours. Even more intriguingly, the unleashing of sexual expression has also loosened political dissent in revolutionary fashion. That is because the target of the sexual misconduct allegations, the top opposition leader Anwar Ibrahim, has responded with unprecedented public criticism of the longtime, authoritarian Prime Minister Mahathir Mohamad. Indeed, the *Times* story suggests that many Malaysians were even more excited by the liberation of political dissent than by the newly open sexual speech. As the *Times* put it, "Shouting words that had hardly been whispered here before, Mr. Anwar roused his listeners with statements like, 'Dr. Mahathir has lost the people's support,' and the time has come for him to step down." Now, to this human rights activist, that expression is truly exciting in a way that the Starr Report is not!

From: Alex Kozinski
Subject: Ich Spy
Posted Monday, Sept. 21, 1998, at 12:06 PM PT

Good morning, Nadine--or more likely good afternoon in your time zone.

You're right. Sexual politics are freeing up political discourse in a whole lot of unexpected ways. Take a look at the stories in the *Wall Street Journal* and the *NY Times* about internet companies bracing for, and looking to take full commercial advantage of, an obscure videotape being released today. Together with the Starr report, this has made the web a significant medium for real-time distribution of large quantities of information. If this pries people

away from the processed, over-analyzed TV junk, that's a step in the right direction.

Alas, though, there is never a positive development that doesn't give bureaucrats an excuse for more regulation. Did you catch the *NYT* story about how the "F.T.C. is 'Losing Patience' with Business on Web Privacy"? It turns out that websites gather information from people who browse them and use it for nefarious (read commercial) purposes. Did the FTC get a lot of complaints from consumers about this "problem"? No, they sent "dozens of lawyers" cruising on the net (what they call "the Big Surf") to search for privacy problems. Just goes to show you, there is no situation that can't be turned into a problem if you just send enough lawyers after it.

I have to say, though, that the most interesting news story I saw this morning is the AP story, posted to the *NYT* website, about a former British spy who claims that Britain recruited a German official in the Bundesbank to pass on secret information. "What kind of secret information?" you ask in hushed tones. Well, things like interest rate movements and the German negotiating position on the Maastricht Treaty. Can't you see the movie version: *The Bond Who Loved Me*, or maybe *Deficits are Forever*? I suppose it's a good thing that we are now using spies for such genteel purposes, but it does make you wonder whether we still have the ability to get information of military significance when we need it. Contrast the *Times*'s story on the "inferences"--a polite term for "guesses"--that led to our decision to bomb the Sudan, including the fact that "In January 1996, the C.I.A. formally withdrew more than 100 of its intelligence reports on Sudan after concluding that their source was a fabricator."

While the spies who gave us the Sudan bombings are out looking for new jobs, they might turn for advice to the *LA Times*'s story on Monica Lewinsky's career prospects. The *LA Times* counsels Monica that silence is golden: made-for-TV movies, book deals, television interviews, modeling gigs, centerfolds--all this and more could be hers if she doesn't let the cat out of the bag too early. I'm not sure there's any bag left to let the cat out of. Then, again, I still don't understand how Marcia Clark got a $5 million book deal for losing the case that couldn't be lost. I think I'll write a book myself soon: Cases where I've been reversed by the Supreme Court 9-0. Know a good agent?

Until tomorrow morning...

Ciao. AK

P.S. I don't get the *Missoulian* here and it's not on the web (yet) so I hope you cut out a new recipe for those Prairie Oysters. I get so tired of the same old, same old . . . .

From: Nadine Strossen
Subject: Private Parts
Posted Monday, Sept. 21, 1998, at 2:34 PM PT

Dear Alex,

Yes, I did see the *New York Times* story about the FTC's proposed law enforcing Internet privacy standards, but my reaction was the opposite of yours. While you apparently deplore "more regulation" per se, I will lobby for or against the regulation depending on what it does--notably, whether it violates civil liberties, as did the Communications Decency Act, or instead reinforces civil liberties, as the proposed privacy legislation would do. Contrary to your assertion that "only" FTC lawyers were complaining about on-line privacy violations, as the *Times* story itself points out, the FTC personnel were acting in response to complaints from many individuals and groups. Those groups include the ACLU and other leading cyberliberties advocates, such as EPIC and EFF. And what we are seeking is simply respect for the most fundamental tenets of data privacy: that no information about an individual should be collected or revealed without his/her knowledge and consent; and that even information that s/he knowingly reveals to one source for one purpose should not be revealed to any other source or for any other purpose.

Alex, I know how much you cherish individual freedom. Therefore, I'm surprised that you are so dismissive about these privacy concerns. As the story notes, some of the information that is wrested from us and disseminated without our knowledge or consent is highly personal--e.g., about our health, income, and personal preferences. Now I realize that you happen to be a real "ham," Alex, and might readily consent to revealing this kind of information! (BTW, do you favor jockeys or boxers? Just testing!) But don't you agree that

that should always be a matter of informed, voluntary, individual choice? As the FTC's investigation makes clear, market forces are not effectively promoting consumer choice in this area--no doubt because too many Net users don't realize how much privacy they're unwittingly forfeiting as the price of accessing certain sites. My in-home free-market economics expert (who also passes on greetings to you) confirms to me that Federal regulation of the type advocated by the ACLU (see links one and two.) and the FTC--which simply assures consumer information–would be in aid of a well-functioning market.

Well, at least we did share common reactions to the reports about our government's (mis) informants in the Sudanese situation. Again, I saw interesting parallels between domestic and international concerns here as I did in the stories I discussed earlier today. As the *New York Times* reported, these agents created a "climate of fear and mistrust" about "startling terrorist threats" that became the basis for our government's (over) reactions. Remember the fears of terrorism that were sparked by the TWA explosion, triggering government "security" measures such as creating vast new computerized databases of personal information about airplane travelers (yet another online privacy invasion) and using "profiles" to subject particular travelers (we-know-who) to especially intrusive surveillance? Notwithstanding our subsequent information that terrorism was not responsible for the TWA tragedy, the repressive government policies are still in place. (Oh, and one of the pending new airport "security" measures--body-imaging technology --would supply the answer to my previous question about your undergarments--inter alia!)

From: Alex Kozinski
Subject: The Invisible Ham
Posted Monday, Sept. 21, 1998, at 3:31 PM PT

Nadine:

Aren't you forgetting the difference between private action and government coercion? Civil liberties as I understand the term involves freedom from the government. When the government threatens to regulate interactions between private parties, that's when civil libertarians should start getting worried. This

is particularly true when the interactions are in the form of private communications.

The justification for the FTC's involvement here seems sparse. Websites can only learn about you what you choose to tell your web browser and communications software. Most people recognize no obligation to tell the truth when asked nosey questions by electronic snoopers--they lie to protect their privacy. Moreover, there are lots of *private* solutions to this supposed problem: You can use Anonymizer or Luckman's Anonymous Cookie to hide your tracks when cruising the web, and you can use encoding (e.g., Pretty Good Privacy-PGP) to ensure that no one misuses your e-mail. And as the Geocities settlement shows, you can enforce existing norms about consumer fraud and misrepresentation.

Let's not always go to Big Brother for the solution. Give freedom a chance to work.

G'night.

Ciao. AK

P.S. The answer is neither.

From: Alex Kozinski
Subject: Revenge of the Nerds
Posted Tuesday, Sept. 22, 1998, at 6:24 AM PT

Good morning, Nadine.

Our discussion yesterday got me thinking about the power of computer technology in our daily lives. Browsing the "papers" this morning (interactive editions, thank you), I noticed how many stories illustrate this in one way or another. The *Wall Street Journal*, for example, reports that much of the evidence gathered by Ken Starr in the Lewinsky matter came from emails Monica had sent to various of her friends, and then had deleted from her computer. The story makes the point that once an email message is sent

through cyberspace, it becomes almost impossible to delete. This, of course, has very significant implications in terms of privacy. We tend to think of communications as pieces of paper that can be destroyed and thereby kept from prying eyes, but email is very different. Once something is written to a disk, it can later be recovered, or there may be backup copies that the author is simply not aware of. The rule of thumb seems to be that if you don't want the world to know what you're thinking, you'd better not put it in an email message.

A *New York Times* story, in the Technology section, focuses on negative grassroots campaigning by individuals who disseminate adverse information about candidates. The information is posted to websites constructed for the very purpose of injecting these slurs into the campaign.

Two stories in the *Wall Street Journal* address somewhat different aspects of computer power. In Asia, the proliferation of personal computers threatens to turn the established social order (where age is equated with knowledge) on its head. Younger workers, comfortable with the use of computers, are now showing their superiors how to use email and save their jobs. The second story discusses how access to the internet has changed the tenor of salary negotiations by giving employees and job candidates access to various data bases containing information about salary levels in their fields.

All of which leads me to revise somewhat my concern about the tinkering of the FTC and other government agencies. The simple fact is that this thing is much too big for any government bureaucrat to even understand, never mind regulate. How, for example, does the Federal Election Commission begin to figure out who's behind a website that sways large numbers of voters against a particular candidate, thereby helping the opposing candidate? Let's face it, Nadine, fair or unfair, laissez-faire is the way of life on the internet. What Adam Smith could only dream of, Bill Gates and his army of nerds have made a reality. Libertarians (civil or rude) should applaud these developments.

Ciao. AK

From: Nadine Strossen

Subject: Is That the Way the Cookie Crumbles?

Posted Tuesday, Sept. 22, 1998, at 9:07 AM PT

Both our dialogue and this morning's newspapers resonate with questions of public-versus-private in two senses: (1) When should government regulate private conduct to secure to individuals the same sorts of freedoms (including privacy) that the Constitution promises concerning public/governmental action? (2) What are the bounds of the private sphere that all individuals should be entitled to secure against unwanted intrusions by anyone, from government agents to private snoops? Of course, yesterday's spectacle of Clinton's televised grand jury testimony pointedly raises a corollary question to (2): Are the bounds of privacy different when the individual in question is a public official or public figure?

Your latest posting underscores how difficult--if not impossible--it is to maintain confidential communications in cyberspace. Thus, notwithstanding your penultimate posting--boasting of how the Ham Nerd could render his online tracks invisible--you seem to acknowledge that even HN might unwittingly leave a trail of cookie crumbs. And for those individuals who are neither hams nor nerds, the problem is obviously even greater. The fact that we cannot expect to maintain our online privacy--thanks to not only technological, but also socio-politicial realities--perversely nixes any constitutional protections of privacy under current Supreme Court doctrine. That's because the Court has ruled that it will grant constitutional protection only to those expectations of privacy that society recognizes as "reasonable." Thus, in a downward-ratcheting spiral, the more the government (and others) invade our privacy, the more constitutional latitude they will have to do so still more, etc.

Of all the televised-testimony coverage and commentary in this morning's news, I was most riveted by Anthony Lewis's op-ed mourning the "shattered norms of privacy." He quotes the chilling warning issued by Czech writer Milan Kundera, about the enormous toll taken by public revelation of "intimate life," whether the invaders are state police or private journalists: "[L]ittle by little the people themselves lose their taste for private life and their sense of it. Life when one can't hide from the eyes of others--that is hell . . . Without secrecy, nothing is possible--not love, not friendship." In the same vein, a Harvard literature professor (in a *NYT* op-ed) compares the Starr

Report to various literary genres and concludes that its closest analogue is to works documenting Middle Age inquisitions, in which "the most intimate spaces in the community, the home and the body itself were ruthlessly . . . exposed to common view."

Of course, regarding Clinton, there are two other, complicating factors that fairness requires me to note, even though neither dispels my general concerns for individual privacy. (1) Given his position, his privacy rights have to be assessed against countervailing First Amendment rights to convey and receive information. (2) Clinton himself has been responsible for enormous privacy violations, ranging from the air travel measures I decried yesterday, to restrictions on encryption, to "Filegate," to unprecedented wiretapping, etc. etc.

Just as Ollie North became a Fifth Amendment fan when his own privilege against self-incrimination was threatened, maybe the press and public prying into Clinton's personal life might convert him on Clipper Chip? (The etymological origin of my name is "hope"!)

From: Alex Kozinski
Subject: Persecution-be-gone
Posted Tuesday, Sept. 22, 1998, at 2:02 PM PT

Your concern about the loss of privacy is well taken, Nadine, but the problem may be self-correcting. After Prince Chuck's mishap we all learned the dangers of speaking on a cellphone; recent events teach us to be more careful about e-mails. People adjust--the next generation has already adjusted. My sons are on the Internet all day long and I'm pretty sure they've figured out ways to maintain their anonymity. The trick is learning the constraints and opportunities provided by the new technology.

On a different note, I'm wondering what you think about the legislation currently being considered to sanction nations that engage in religious persecution. The *LA Times* carries a big story on page A5. The bill is being championed by fundamentalist and conservative groups, and is being opposed by business interests. It looks to be headed for fast action in the Senate.

Combating persecution certainly seems like a worthwhile objective, but do you think it's appropriate (constitutional?) to single out persecution on the basis of religious affiliation? Seems like a tough call for the ACLU, no?

Off to the airport to catch a flight to San Francisco. Law clerk orientation, a couple of en bancs and (be still my beating heart) a rules committee meeting.

Later.

Ciao. AK

From: Nadine Strossen
Subject: Balancing Acts
Posted Tuesday, Sept. 22, 1998, at 3:45 PM PT

Dear Alex,

In terms of understanding and counteracting online privacy hazards, your sons should not be taken as typical of Internet users (or, having spent time with one of them, anyone else! And that's a compliment!). Beyond the sources I previously cited , let me add some anecdotal evidence of my own. Last week, I spoke at a high-level conference sponsored by *Upside*, the magazine aimed at computer-company executives. Audience members were, accordingly, *at least as* sophisticated about computers as the average cyber-surfer. Still, when asked if they regularly encrypt their cyber-communications, almost none responded affirmatively, whereas, when asked if they would like to have an encryption option available by default, all responded affirmatively. The point is that, even among those who cherish their privacy and are aware of online privacy threats, the large majority may well (however reluctantly) decide that it is simply too burdensome to take the necessary steps available to them to try to counter those threats. But, under our current (non) privacy constitutional doctrine, this inaction then operates as a waiver of privacy rights–for everyone (including your sons).

One of the reader e-mails that *Slate* forwarded to us pursued an issue that I had flagged in my previous posting: whether public figures should have fewer

privacy rights than anyone else. (According to a story in today's *New York Times*, the top leaders of all the major German parties, "disgusted" by yesterday's Clinton broadcast, concurred in "the need for public officials to retain a sphere of privacy.") I think the answer is "Yes," because of the individual's deliberate decision to participate in the public sphere, and the correspondingly greater public interest in receiving information about him/her. In fact, because of these First Amendment considerations, the ACLU disfavors any legal sanction for disclosing information about public figures.

For example, we have opposed the anti-Paparazzi laws sparked by Princess Diana's death. (Now we've both invoked Windsors!) But that does not mean that we should not criticize the press for disclosures that we consider inappropriate. There's even a civil libertarian rationale for protesting these privacy invasions, since (as I've previously noted) each successive invasion lessens the "reasonable" expectations of privacy against which any of us can seek judicial protection.

The new subject you raise also involves important First Amendment issues. The ACLU has supported laws that protect religious freedom (most recently, the Religious Freedom Restoration Act), although you're absolutely right that we must take care that such laws not violate the overarching constitutional mandate of government neutrality toward religion. It can be a tightrope sometimes--to avoid either favoring or disfavoring religion. Ironically, in this context, some have charged that the ACLU has unduly favored religion. I say "ironically," because the Christian Coalition and other "Religious Right" organizations demonize us in their fundraising letters as the "Anti-Christian Liberties Union." Well, if you're trying to walk a fine line, I guess criticisms that you've stepped over it in two opposite directions provide some indication that you're on course!

From: Alex Kozinski
Subject: Over The Hill
Posted Wednesday, Sept. 23, 1998, at 6:37 AM PT

Top of the morning, Nadine.

I was a little puzzled by your anecdote yesterday concerning the computer-company executives who seldom encrypt their communications, but wish they had encryption available as an option. There are any number of encryption products available, including Pretty Good Privacy, that are neither very expensive nor difficult to install. That sophisticated users don't take advantage of these options is not an indication that it's too burdensome to do so; it may only mean that most users are not that concerned about privacy for most of their communications.

This morning's *Wall Street Journal* discusses a new product designed to protect home telephones from unwanted callers. It works something like this: Caller ID determines whether an incoming call is from a "friendly" number, in which case it is put through. Calls from other numbers are screened by a recording which asks the callers to identify themselves; if they refuse, they are disconnected, otherwise they are asked to wait while the homeowner decides whether to accept the call. This all seems pretty elaborate just to avoid a telemarketing call during dinner so I doubt whether a lot of people will use it. And therein lies the tension: Everyone likes privacy in theory, but few want to spend the resources--or suffer the hassle--of achieving total privacy. More often we resort to ad-hoc solutions: When telemarketers call, I just hang up on them. Or, as a friend of mine reports, when her daughter is required to give her parents' email address (as often happens on child-oriented websites), she dutifully fills in sorry@canttell.com.

On the question whether public figures should have less privacy than ordinary individuals, my answer is: It depends. If the private matter in question bears on an issue about which the public has a legitimate interest, then the public official's privacy interests must usually give way. But I do not agree that a public official has a diminished privacy interest in matters that do not have a fairly direct bearing on the official's performance or fitness for office. For example, if a public official on a government salary suddenly starts driving expensive cars and buying exotic art and jewelry, it would be entirely legitimate for the public to inquire into the sources of this new wealth. But the public official does not have a diminished interest in his daily activities (such as where he goes shopping, who his friends are, or what restaurants he frequents). The difficult cases are those where it's not clear whether the area inquiry has a legitimate bearing on the public official's fitness for duty--such as some of the questions raised during the confirmation of Justice Clarence

Thomas.

Speaking of Justice Thomas, the *Washington Post* carries an interesting story this morning about his recent series of speeches where he has begun to confront his critics. I was struck by a quote from Thomas in a speech to a group of black lawyers where he stated, "It pains me . . . more deeply than any of you can imagine, to be perceived by so many members of my race as doing them harm." Justice Thomas has now been on the Supreme Court for seven years and has proven to any objective observer that his views on the law are well-developed, genuine and strongly felt. Is he any less entitled to the freedom of his conscience because of the color of his skin? And given recent developments in Washington, don't the allegations against Thomas (even if you assume them to be true--which I do not) seem petty and insignificant? In other words, isn't it about time liberals start according Justice Thomas the full dignity of the office to which he was appointed?

Finally, for those who fear we may be running out of lawyers, there is a comforting story in the *New York Times*' Technology section about the Concord University School of Law which will be held in cyberspace. That's right, you can now get a law degree via home study on the internet. Somehow, I have a hard time imagining Professor Kingsfield being quite so daunting in a chatroom rather than a classroom.

Best.

Ciao. AK

From: Nadine Strossen
Subject: More Tightrope Acts
Posted Wednesday, Sept. 23, 1998, at 6:59 AM PT

Alex,

Consistent with your observation about privacy, most people value *all* of their rights more in theory than in practice, alas. Should they--and we--therefore forfeit those rights? Take the right to vote, for example. Most people simply

can't be bothered to exercise it. I would support measures to reduce the inconvenience of voting, to encourage people's actual enjoyment of their theoretical right--for example, allowing voting by mail; where it's been done, it's increased voter turnout substantially. I should think that, even-- indeed, *especially*--from a small-government, libertarian perspective, one of the most legitimate government functions would be to facilitate the exercise of individual rights.

While we agree that the media--and its citizen critics--should respect the privacy of certain aspects of the lives of public figures, I want to re-emphasize that government must not police this line. As ACLU policy stresses, any legal sanctions for the publication of truthful facts on invasion-of-privacy grounds "would subject the press to someone else's assessment as to whether the information was overly intimate or of insufficient concern to the public so as to make the government, through the courts, the arbiter of ideas."

Thanks for drawing my attention to the *Washington Post* story about Justice Thomas. I have followed his increasing public appearances, over the past few months, with interest. As someone who regularly addresses hostile audiences myself, I especially admired Thomas's courage in carrying through on the National Bar Association's on-again, off-again invitation to address its convention this summer. And, from a free speech perspective, I was dismayed by the efforts of some NBA leaders to deny Thomas an opportunity to express his views. A year earlier, I had invited him to speak at New York Law School, and I was thrilled when he accepted--what a terrific educational opportunity for my students! Of course, I disagree strongly with some of his views and rulings, but if that were a disqualifying factor, I couldn't invite anyone to speak at my school--not even you, Alex!

I'm surprised not to have seen media discussion of Clinton's grand jury observations about Anita Hill's allegations against Thomas, which I found fascinating. As Clinton noted, given the disparities between Hill's and Thomas' versions of their interactions, most people concluded that one or the other was lying. But, Clinton said, he believed that both were sincerely recounting their good-faith perceptions. Obviously, Clinton had a vested interest in stressing the subjective nature of "truth," but I do believe that it can be a complex, nuanced matter--especially in the arena of sexual interactions. Which is why the law can be a clumsy tool indeed for policing these interactions, fraught with dangers to privacy, due process, and free speech.

A *Slate* reader who emailed me yesterday seemed surprised that I would acknowledge potential civil liberties downsides to sexual harassment policies, but the ACLU has successfully challenged some such policies--notwithstanding their important aim of fostering gender equality--as violating other rights. Yet another tightrope!

'Til later.

From: Alex Kozinski
Subject: Truth Be Told
Posted Wednesday, Sept. 23, 1998, at 1:42 PM PT

I think we have identified a very important question about when it is legitimate for the government to get involved in regulating human relations. As I understand your position, it's fine for government to regulate even though there are relatively cheap and easy private means for individuals to protect themselves from the threatened harm. But aren't individualized private solutions superior because they allow people to modulate the remedy to fit the degree of harm they perceive? Thus, some of my email buddies feel strongly about privacy and always send encrypted messages--good for them. I don't feel that strongly about the issue, so I don't. And government regulation, particularly in the area of expression, has hidden costs and dangers: Bureaucrats have to make delicate judgments that may have important substantive effects on people's ability to engage in the regulated activity. Do we want to hand such power to the government absent some compelling reason?

Note, for example, the story on CNN interactive discussing a decision of the European Court of Justice holding that British law violates human rights because it allows parents to cane their children. Of course, we all deplore child abuse, but this did not look like a case of parental sadism but an effort (perhaps misguided) to discipline a child who was "totally out of control" and had "run riot" (according to his mother). Note also that the case was brought by the boy's father who is estranged from the mother. The court's judgment (which runs against Britain!) requires the payment of compensation and a change in the law to prohibit such punishments. Is it really wise to require

legislation that will interject the government into disputes between parent and child, and between estranged spouses?

I too had noted President Clinton's reference to the Thomas/Hill testimony. While I have my own view of who told the truth there, the important thing to keep in mind is that there *was* a truth to be told, though we may never know what it was. The simple fact is, Thomas's and Hill's accounts of some of the details can't both be true. I found the president's suggestion that somehow he believed both of them (or something like that) most troubling. It tells the public that in some matters--perhaps in all matters--there is no such thing as objective reality; it's only a matter of individual perceptions and prejudices. I know that this view has been disseminated in our universities and law schools for the last three decades, but it has very troubling implications for the truth-finding process in our courtrooms. How can we send anyone to prison--even death; how can we resolve contract disputes; how can we award tort damages, if past events are not a matter of objective reality but of personal opinion? Sure, I understand that sometimes memories get fuzzy and that perceptions are unreliable, but that is very different from saying that everyone is entitled to come into court and testify to his own version of reality.

On a brighter note, the *LA Times* reports that Salmon Rushdie has been taken off Iran's hit list. In terms of human rights that is certainly to be applauded as a step in the right direction, though it's a long ways from the enlightened days of the Shah.

Until tomorrow.

Ciao. AK

From: Nadine Strossen
Subject: From Ham to Salman
Posted Wednesday, Sept. 23, 1998, at 2:10 PM PT

Dear Alex,

There's government regulation and there's government regulation. Don't forget

that all I've been advocating in terms of online privacy (in addition to government lifting the impositions it has imposed on private companies' development and individuals' use of encryption) is a consumer-information-type approach. I don't want government to mandate that any particular computer user disclose (or not) any specific information. Rather, I only want government to mandate that computer users be given the information that will facilitate their decisionmaking. Also, the government should ensure that, absent a computer user's affirmative waiver of privacy, the "default" set-up should preserve that privacy.

In the resulting universe of fully informed computer users, freedom of choice and market forces could truly flourish. Drawing upon the writings of my free-market-economist spouse, I look forward to a scenario in which companies and consumers bargain about the (non)disclosure and (non)use of personal information, and money is exchanged, in ways that would reflect the value that each entity and individual places on the use--or withholding--of the information. Some individuals might choose to provide certain personal data in return for a fee; some might choose to pay a fee in return for special privacy protections; and some Hams might even pay for opportunities to be exhibitionists!

Yes, it is tricky to determine when government should intervene in parent-child relationships for the same reason, as I noted earlier today, that it's tricky to determine when government should intervene in sexual relationships. So here you and I are, yet again, in still another context, discussing how hard it is to draw the appropriate boundaries between the public and the private spheres!

On the one hand, we can easily agree that there are certain aspects of parental discipline of children that should be none of the government's business (e.g., "grounding" them, reducing their allowance). But, at the opposite end of the spectrum, we also would surely agree that there are certain kinds of discipline--the sadly real cases of parents starving and torturing children who "misbehave"--where the government should intervene, even to the point of terminating parental rights. Then there are those difficult borderline cases that keep us judges and activists busy. The Supreme Court has held that parents have a constitutionally-grounded right to shape their children's education, but it has also held that minors have their own constitutional rights. Sometimes the two sets of rights conflict--for example, when there are differing religious

beliefs, or views about abortion.

As for the latter, the Supreme Court consistently has held that pregnant minors--no matter how young--must have an avenue for getting abortions without parental consent. In other words, even if a parent would want to prohibit the abortion, the law will intervene in the family relationship by preventing the parent from doing so. While I recognize the complexities, I firmly believe that's the correct outcome.

Speaking of complexities, the fact that human perceptions and recollections are so imperfect is why the law should proceed cautiously. This is particularly so in areas where perceptions are likely to be especially subjective (viz.: anything to do with sexual and gender relations--hence, the debates about whether sexual harassment should be judged from the perspective of a "reasonable woman" or that of a "reasonable person"), or where the consequences of inaccuracy are particularly draconian. In the latter category, I appreciate your (unintended, I assume) argument against the death penalty--the latest study (a 1997 report by the Death Penalty Information Center) continues to document depressingly high numbers of Death Row denizens who turned out to be innocent.

And the death penalty brings me to the Fatwa against Salman Rushdie. Its lifting is great news, although I assume it won't dramatically change his life. That's because there must be many militant acolytes of the Ayatollah who will not have heard about this new development, and who would be eager for the chance to earn the huge bounty that had been put on Rushdie's head, not to mention the promised trip to paradise. In any event, I'm so glad that you raised this subject, Alex, since too many people have forgotten about the Fatwa, and it does continue to haunt not only Rushdie himself and his family (I recently had the pleasure of dining with them--and their bodyguards), but also many other lesser-known writers (as well as publishers and booksellers) who are chilled in their discussion of certain "dangerous" or "forbidden" topics .

But, thank goodness, your speech and mine is hardly chilled -- I look forward to more heated discussions tomorrow!

From: Alex Kozinski
Subject: Buzzing Around Flytrap
Posted Thursday, Sept. 24, 1998, at 5:19 AM PT

Good morning Nadine.

The news this morning is dominated, once again, by zillions of stories and op-ed pieces on the Clinton/Starr tug-of-war. Even if I were free to talk about it--which I'm probably not--I couldn't think of anything to say that hasn't already been said several times over. But here is my suggestion: The Independent Counsel law should immediately be renamed the Full Employment for Journalists and Political Pundits Act.

Moving on, there are a few interesting stories out there--but you have to dig hard for them. The *Washington Post* reports on the near-collapse of the Long-Term Capital Management Co. hedge fund because it lost "more than $100 billion of bets it made in financial markets around the world." The collapse was averted (or postponed) when top officials from two dozen of the world's largest banks and brokerage firms hammered out an agreement for a $3.5 billion rescue plan. To tell the truth, I'm not sure I understand how all of this financial stuff works. Have you noticed that when things go badly in our economy we expect the Fed to reduce interest rates and (if things get bad enough) the government to increase spending to fire up the economy. But when things go badly in other countries, we insist that they tighten their belts by raising interest rates and cutting government spending. How can something that's good for us be bad for them and vice versa?

The *New Republic* carries a lengthy article by MIT economics professor (and frequent *Slate* contributor) Paul Krugman, exploring this very subject. Krugman argues that the mobility of capital across national borders forces less developed countries to adopt the kind of austerity policies that once drove the United States into the Great Depression. He suggests as a solution that international capital mobility be reduced. The massive overseas losses suffered by the Long-Term Management fund may actually solve this problem as investors become far more wary of international investments.

Technology of all sorts continues to be a hot item. *Wired News* reports on a phenomenon called Hacktivism--electronic sabotage as a means of political protest. The story features "the Hong Kong Blondes, a near-mythical group of

Chinese dissidents that have been infiltrating police and security networks in China in an effort to forewarn political targets of imminent arrests," as well as an organization known only as the Cult of the Dead Cow whose spokesman (a former United Nations consultant) goes by the moniker Oxblood Ruffian. (I'm not making this up, honest.) In response to this threat, the FBI is establishing a cyberwarfare center called the National Infrastructure Protection Center which will involve the intelligence community and the military. Sounds like more tightrope walking for you and the ACLU.

The *Kansas City Star* and the *Boston Globe* carry lengthy and informative articles about genetic engineering. The Globe focuses on the activities of the Monsanto Life Sciences Research Center in developing vegetable strains that are resistant to various attacks, including Monsanto's own pesticides. The *Star* picks up a story I had missed in yesterday's *Los Angeles Times* about gene-therapy experiments in the womb designed to cure two genetic diseases. The story reports that gene therapy has been performed on some 2000 adults and children, but points out that performing the same therapy in the womb carries special risks because the engineered gene could be passed along to the patient's descendants.

Finally, the *New York Times* has a story--quoting no fewer than 5 current, former and future deans of major law schools--lamenting the likely fallout from the "legal gamesmanship" carried on by both sides in the Flytrap scandal. As I suggested yesterday, this is an entirely legitimate concern.

I'm off to do justice. Have a good day.

Ciao. AK

From: Nadine Strossen
Subject: Telling-Off "Don't Tell"
Posted Thursday, Sept. 24, 1998, at 7:52 AM PT

Good morning, Alex--

Thanks for the interesting rundown about such an array of publications and

topics. It's been great to consult my computer first thing in the morning this week and find such a personalized reporting service--I could get used to starting my days this way! (Now, if you could deliver breakfast in bed, too . . . !)

As for *that* subject, I *do* have something to say "that hasn't been said several times over." In fact, to the best of my knowledge, it hasn't been said at all. It's been on my mind for a while, but never more so than today, with its news reports about yesterday's Second Circuit Court of Appeals decision upholding the Clinton Administration's discriminatory "don't ask, don't tell" policy, targeting gay men and lesbians in the military. (Alex, I realize that your court has ruled on this issue too, so you are likely in a "don't-tell" position about the issue--never fear, I'll do enough "telling-off" for both of us!)

The ACLU, along with the Lambda Legal Defense Fund, had mounted this constitutional challenge to the military's policy of excluding not only service members who engage in homosexual conduct, but also those who indicate a "propensity" to do so--including by "telling" of their sexual orientation. Therefore, I was delighted when federal judge Eugene Nickerson held that this rule violated free speech rights--by punishing expression suggesting homosexual orientation--as well as equality rights--by catering to biases and prejudices against homosexual people as a group, regardless of how exemplary the performance is of individual service members who happen to be gay. I was correspondingly disappointed by the appellate court's contrary ruling, and even more so by its "reasoning"--or, rather, its express disavowal of any responsibility to engage in any independent reasoning about the ban's (non)justification, on the ground that it essentially had to rubber-stamp the military's asserted "national security" concerns.

This is precisely the sort of knee-jerk judicial deference to military claims that prompted an earlier Supreme Court to uphold violations of the constitutional rights of another group of individuals who were not in fact undermining "national security," but rather, were also the victims of prejudice--namely, the 110,000 Japanese-Americans whose property was confiscated, and who were "removed" from their homes to "relocation centers" during World War II. Almost all of the judges who capitulated to those phony claims of "military necessity" subsequently apologized, and our civilian judiciary's abdication to military leaders has been universally condemned--including by then-President Ronald Reagan (no "sissy" civil libertarian, he!). And that was in wartime,

after the U.S. had been bombed! It is surely even more inappropriate for judges to kowtow to asserted military imperatives during these peaceful times for The Only Superpower.

Now, you may be "asking," do "tell" what this policy has to do with *that* topic dominating the news. The connections lie (pun intended) in ironies, hypocrisy, and discriminatory double-standards. Isn't it ironic, in retrospect, that this ban, one of the first major policy initiatives coming from the Clinton Administration, expressly prohibited officials from "asking" or "telling" about sexual conduct of a verboten variety? Isn't it ironic--and hypocritical--that this Administration championed a policy that forces service members to lie about their sex lives in order to maintain their government positions? And isn't it a discriminatory double-standard that brave, patriotic, loyal men and women are being dishonorably discharged when they refuse to lie about their sex lives? Indeed, that they are dishonorably discharged even when they have been sexually celibate, but just truthfully "tell" about their sexual identities?

So, this is yet another riff on our weeklong theme, pervading so many different news topics, of private-versus-public. Private sexual conduct between consenting adults should not be relevant to their eligibility for one of our basic public institutions, the military. Bill Clinton, who has asked us to forgive private sexual conduct that many consider immoral, and to let him continue his public service--he, of all people, should not have signed a law that unforgivingly punishes service members for private sexual conduct that some consider immoral, and bars them from continuing their public service.

Hope you can say something in response. If not, thanks for listening, anyway!

From: Alex Kozinski
Subject: Politics By Any Other Name
Posted Thursday, Sept. 24, 1998, at 4:14 PM PT

Nadine, I agree you have come up with a whole new angle on the Flytrap controversy. I think I'll pass it on to Ken Starr and maybe he can amend his report to add another cause for impeachment: Hypocrisy While in the Oval Office.

Just kidding--it's been a long day. There is a serious point here, though. Politics is the art of the possible. Is it fair to blame the President for acquiescing to a policy he may have personally disagreed with, but which avoided what he considered a worse result--namely the complete ban from military service of gays and lesbians? Your disagreement, it seems to me, is not with the President (at least not on this issue) but with the Supreme Court for its *Bowers v. Hardwick* decision, which held that the government can make homosexual conduct criminal. Given this ruling, it seems very difficult to argue that the government cannot impose a lesser burden--like exclusion from the military. There is an excellent discussion of this point in a case I know you're familiar with, namely *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988). The Watkins majority (written by my former colleague Bill Norris), and the dissent (written by my colleague Steve Reinhardt) provide an excellent disquisition of this issue.

I do agree with you about the troubling First Amendment implications of the Don't Ask Don't Tell policy. As you know, my court affirmed the policy in *Holmes v. California Army National Guard*, but I joined a dissent by Harry Pregerson in which he argued that it is unconstitutional to base eligibility for government service on speech rather than conduct. It is possible that the Supreme Court will take this issue, so I'd better say nothing further.

Ciao. AK

From: Nadine Strossen
Subject: Hams in Black Robes
Posted Friday, Sept. 25, 1998, at 8:18 AM PT

Good morning, Alex,

Well, we're really getting into legal issues here--a perfect warm-up for the advanced constitutional law seminar I'm about to teach, since (as a pure coincidence) we'd long been scheduled to talk about the Second Circuit case tonight.

Before I answer your substantive points, let me note how grateful I am that

you feel at liberty to discuss these issues. I know some judges who don't feel comfortable engaging in public discussion of any legal issues. Not having recently perused the applicable judicial standards, but drawing inferences from the widely varying stances of different judges I know concerning public statements, I infer that the standards leave wide room for individual discretion. Speaking as both a First Amendment champion and an educator, I am always happy when judges do exercise their own free speech rights--and thus honor the First Amendment rights the rest of have in receiving information about our judicial branch--to the maximum extent permissible. In short, I like hams in black robes! (And the ACLU has come to the defense of judges who have been sanctioned for transgressing limits on their free speech--for example, we recently came to the defense of a state judge in Washington who was disciplined for having appeared at an anti-abortion rally.)

And, speaking of the First Amendment, I am delighted to be reminded that you agreed with the ACLU and Judge Nickerson that the "don't tell" aspect of the current anti-gay military policy is unconstitutional--even assuming hypothetically that its ban on homosexual conduct were constitutional. Of course, I do think that the Supreme Court was wrong in the *Bowers* case, in holding that the Constitution permits the government to criminally prosecute sexual conduct between consenting adults in the privacy of their own homes. And I say that not only because *Bowers* was an ACLU case that we lost. I also note that we were in good company, with four of the nine Supreme Court Justices at the time voting our way, and yet another one (Lewis Powell) subsequently stating publicly (after he had retired from the court) that he had voted the wrong way. Even if *Bowers* had been correctly decided, though, in permitting the government to punish homosexual conduct, it still would not follow that the government should have the power to punish statements expressing a homosexual identity or the mere status of being a gay man or lesbian. Yet, the "don't ask, don't tell" rule does both of those things.

As for your (devil's advocate?) defense of Clinton, in championing this policy, on the theory that lesbian and gay service members were even worse off under the previous exclusionary rule, I disagree for several reasons. For one thing, Clinton was the first president ever to sign a federal law that embodied any anti-gay military policy, thus for the first time "elevating" such a discriminatory policy to the status of a congressional statute. For another, this policy is the first that expressly outlaws not only conduct, but also speech; for

those who believe that First Amendment rights are particularly precious, this policy is accordingly particularly pernicious. Finally, despite the vaunted "don't pursue" prong of the policy, which was touted as curtailing the notorious "witchhunts" against gay service members, the Pentagon's own data demonstrate that the persecution has not abated. To the contrary, the number of lesbians and gay men who have been discharged from the military has risen 67 percent since the new policy was implemented.

But, Alex, I'm not criticizing only the Executive and Legislative Branches of government for defaulting on their constitutional obligations here--no, my post yesterday morning was fair in apportioning the criticism among all three branches of government, including our esteemed judiciary. I want to underscore how disheartened I was by the Second Circuit's abdication of its responsibility, as an independent and coequal branch of the federal government, to assess seriously the various constitutional arguments made against this policy. Instead, the entire opinion did little more than explain why it wasn't the court's appropriate role to do that, in the face of asserted military concerns. Yet I thought that the military was relegated to an appropriately subordinate role in our government structure. And I wasn't aware that martial law had been imposed, somehow deposing the authority of civilian courts and legal norms. Last but far from least, I thought the judicial branch of government had an especially important role as guardian of the rights of unpopular individuals and minority groups, to protect them against what James Madison called the "tyranny of the majority." So, Alex, your East Coast brethren are not only letting me down; worse yet, they're letting down James Madison!

Having now exercised my First Amendment rights to criticize members of our judiciary, I repeat that I defend their First Amendment rights to answer back to critics such as Yours Truly. I look forward to emails!

One of my students recently heard Justice Scalia give a public lecture (another black-robed Ham, and another to whom I am grateful for his public appearances!) about his favored approach to constitutional law issues. She said that she went up to him afterwards and said, "Justice Scalia, my con law professor exposes us to many different perspectives on all of these issues," to which he quipped, "My dear, I feel sorry for you!"

From: Alex Kozinski
Subject: To Speak or Not to Speak
Posted Friday, Sept. 25, 1998, at 8:29 AM PT

Good Morning, Nadine.

You raise an important point about the limits of judicial speech. As you note, judges have First Amendment rights, like everyone else, but there are certain limitations that are sensible and not terribly onerous. First, judges may not participate in political discourse. Thus, I am not allowed to make campaign speeches or endorse candidates for public office. Consistent with this rule, I believe I may not express a view on the merits of Ken Starr's report, nor on what sanctions, if any, Congress should impose on the president. I may, however, comment on other issues raised by the controversy--as I did on Wednesday when I discussed the significance of certain comments Mr. Clinton made during his grand jury testimony.

The second prohibition concerns speech about pending cases. Thus, if a case is pending in *any* court in the country, I may not comment on how I think it should come out. The case from the Second Circuit Court of Appeals we discussed yesterday is still pending because the parties may petition for rehearing or for certiorari in the Supreme Court. However, my only comment about the case concerned the fact that I had joined a dissent that took a contrary position. Since my views on this subject were already public by virtue of the dissent, I was free to comment to that extent only.

Contrary to popular belief, there is no general prohibition against judges discussing legal issues. To the contrary, the Code of Judicial Ethics imposes an affirmative obligation on judges to engage in educational activities in order to help the public gain a better understanding of our legal system. Many judges are nevertheless reluctant to do so, perhaps out of fear that they might inadvertently cross the line into impermissible speech. (As you are aware, this is what's known as a chilling effect.) I take a very different view. I believe that there are certain perspectives on the law and other matters that judges are particularly well qualified to discuss because of the unique function we serve in our legal process. It is largely for that reason that I occasionally write for ***Slate*** and other non-legal publications.

Turning to the news, I have some further thoughts on the story that has dominated the entire week, namely the fallout from the Starr report and the airing of the president's grand jury testimony. I am coming around to the view that we have entered an era of direct democracy where some of our most significant and divisive issues are decided not by our elected representatives but by direct vote of the people. It's happened twice before. The first was at the time of the Bork confirmation hearings. As I recall, there were a number of senators on the fence, until the congressional phone-lines started to buzz and the poll returns started to weigh in heavily against confirmation. It happened even more dramatically at the time of the Thomas confirmation. Going into the weekend before the vote, several senators were undecided--or at least unwilling to declare themselves. Then the weekend polls came out and showed that the majority of the people believed Thomas and not Hill. Soon afterwards enough senators declared for confirmation to put Thomas safely over the top. My intuition is that the current crisis will be decided by the polls as well. In that regard, this morning's news is favorable to the president: the *New York Times*/ABC poll shows that the president's approval rating has risen since release of the tapes, and that there may be a backlash against Republicans who voted to release the tape. *USA Today* carries a different poll showing similar trends.

While I agree that elected officials ought to be guided by the wishes of their constituents, I am nevertheless a bit uneasy about this transition to direct democracy. As polling gets more sophisticated, as it becomes easier to track and analyze an elected representative's voting record, the temptation will become ever greater for elected officials to hold a finger in the wind rather than exercise independent judgment. As we know from history, public passions ebb and flow quickly, and sometimes destructively. In the long run it may be healthier for us as a nation if our government officials were more willing to exercise the leadership for which we elected them.

Any thoughts on this?

Ciao. AK

From: Nadine Strossen

Subject: More than Mirrors

Posted Friday, Sept. 25, 1998, at 8:45 AM PT

Dear Alex,

Thanks for that helpful explanation about the guidelines concerning judges' speech on legal issues. I'm glad to learn that the code of judicial conduct, far from prohibiting judges' discussion of legal issues, to the contrary affirmatively encourages it. Unfortunately, though, as you note, the actual effect of the code--coupled with other factors, such as the increasingly strident attacks on judges that some politicians and citizens groups recently have been--means that too many judges are deterred from saying too much.

I am particularly disturbed by the constraints imposed on state court judges who have to run for office, but then are barred from discussing issues that may well be foremost in voters' minds. Worse yet, their critics in the press and the public are--appropriately--not similarly constrained, so therefore can make charges to which the judges (or judicial candidates) cannot respond. This is one of the reasons why I personally believe that judges should not be subjected to election and recall processes in our state courts, anymore than in our federal courts.

As I noted at the end of my earlier post, the federal judiciary was deliberately designed to be relatively insulated from majoritarian pressures, thanks to the Constitution's appointment and lifetime-tenure arrangement. And this position, one step removed from partisan politicking and polling, has enhanced the federal courts' ability to stand up for constitutional rights after they have been trampled by elected officials. We've seen this over and over again--from the 1960s Civil Rights movement, to the current battle for cyberliberties.

On the latter front, for example, there is a striking disparity between elected officials and unelected federal judges. The Communications Decency Act sailed through Congress, with overwhelming support on both sides of the aisle (out of 535 members of Congress, only 21 voted against it), and it was enthusiastically supported by the Clinton Administration. Yet of the 15 judges who ruled on its constitutionality--including the entire U.S. Supreme Court, in *Reno v. ACLU*--every single one agreed with us that it squarely violated the First Amendment. Likewise, the ACLU also has brought constitutional

challenges to four state cyber-censorship laws, and we have won every single one of those cases. The total of 19 judges who have unanimously upheld First Amendment rights in cyberspace were appointed by 6 different presidents, from Richard Nixon to Bill Clinton, and represent a broad idelogical spectrum.

(And the fight still goes on--just as I'm writing this, NPR is reporting on pending Congressional legislation that we call "Son of CDA"--and I anticipate that we'll eventually have to battle against "Daughter of CDA," "Granddaughter," etc.!)

In short, just as our elected officials are distressingly eager to censor online expression, regardless of ideology, our non-elected federal judges have shown the opposite tendency. Where would we be--where would online freedom be--without our independent federal courts? Certainly the Starr Report could not have been transmitted over the Internet--not to mention many judicial decisions, including some of the lesbian/gay rights decisions that you and I discussed yesterday. (Alas, virtually any reference to homosexuality could well be considered "indecent" or "patently offensive.")

This discussion leads directly to your point about politicians' poll-driven pandering. I share your concerns about lack of leadership and political courage among too many elected officials, especially because civil liberties issues--by definition--are almost never going to win any popularity contest. After all, the Bill of Rights was designed to be a counter-majoritarian document, to preserve certain fundamental rights against the "tyranny of the majority." Scapegoating civil liberties, especially of politically marginalized groups, is a popular political ploy. Last year I wrote a column precisely on this topic for which I re-read John F. Kennedy's *Profiles in Courage* for the first time in 35 years. It really stood the test of time, and I highly recommend it to both you and your sons, if you haven't read it recently. It contains inspiring portrayals of political figures from throughout U.S. history who exemplified principled leadership--always incurring scorn in the short run, but occasionally earning widespread respect in the long run. Don't you think that many of our fellow Americans are hungering for office-holders whom they can respect--now more than ever? And can they really respect someone who merely mirrors the latest survey data?

Respectfully yours,

N

From: Alex Kozinski
Subject: Over and Out
Posted Friday, Sept. 25, 1998, at 1:10 PM PT

Nadine:

Thanx for that sign-off. As a conservative judge that's a compliment particularly appreciated from the head of the ACLU. And many thanx for recommending *Profiles in Courage*. I will certainly pick up a copy for myself and my sons. You will be pleased to know that the two ACLU publications you sent my son at Yale some years ago are still in active use, as he keeps the now dog-eared copies on his bookshelf and consults them regularly.

Regarding your comments about the Communications Decency Act, here is what I found most troubling. Shortly after it was passed, I was on a panel with a Member of Congress who had been actively involved in passage of the CDA. He admitted quite candidly that *everyone* who worked on it knew that it would be held unconstitutional by the courts, but they felt the need to do *something*. And here is my problem: Aren't all public officials sworn to uphold the law, including the United States Constitution? It seems to me that this imposes an affirmative obligation on Members of Congress and the President not to enact legislation they believe to be unconstitutional. The idea that they will pass a law believing it to be unconstitutional because the courts will fix the problem seems like a betrayal of the oath of office. Our system of checks and balances relies on the best efforts of public officials in all three branches of government to avoid unconstitutional action. This, I would have thought, meant that one does not vote for or sign a law one believes violates the Constitution, and in the case of the Executive, one does not enforce such a law once it is on the books. I'm afraid that many public officials are not aware of this responsibility and rely instead entirely on the courts to preserve the Constitution.

A final word about judicial elections in the state courts. I agree with you that they are very troublesome. I find them particularly so where judges are given

the responsibility to impose sentence in capital cases, as happens in some states. It seems to me that it would be very difficult for a judge to exercise independent judgment in a capital case if he then has to face a contested election where an opponent will parade the judge's failure to impose a death sentence as proof that the judge is soft on crime.

I can't tell you how much I've enjoyed our exchange this week. Hope to see you and Eli next time I'm in New York. I hope you will have time to visit next time you're in Los Angeles.

And keep up the good work, both in terms of your scholarship and your stewardship of the ACLU.

Over and out.

Ciao. AK

From: Nadine Strossen
Subject: Tough on the Constitution
Posted Friday, Sept. 25, 1998, at 2:12 PM PT

Dear Alex,

As I entered this week--facing the prospect of keeping up with the news and with you, on top of everything else--I was quite daunted. I can't believe how intensely but enjoyably this week has flown by, punctuated by your postings. I'll really miss them!

The comments you described by a member of Congress concerning the CDA are all-too-typical of what we heard in the lobbying process. I couldn't agree with you more that all public officials, in every branch of government at every level, have a responsibility to uphold the Constitution. Yet, too many elected officials not only "pass the constitutional buck" to federal judges, but then--to add insult to injury--attack the judges for in fact honoring the oath of constitutional fidelity that in theory binds all of them.

Earlier this year, I testified before the House Judiciary Committee on issues

concerning what I think of as "judicial independence," but that many House Republicans have been demonizing as "judicial activism." One of the most interesting presentations was made by another House Republican, Rep. Thomas Campbell (R-Calif.), who unfortunately is not your typical member of Congress--in either party. For starters, before being elected, he was a professor at Stanford Law School. To underscore the Founders' intent that members of Congress, as much as federal judges, should take seriously their responsibility to honor the Constitution, Tom noted that the very first recorded debate in one of the Houses of Congress, shortly after the Constitution's ratification, was about whether a particular proposed law was or was not constitutional! It's hard to imagine that kind of debate being brought to us via C-SPAN today.

Hey, that makes me think of a great new campaign slogan, to counter that ubiquitous, seemingly successful "soft on crime" slur, which, as you note, has doomed the re-election prospects of too many judges (not to mention other office seekers). What do you think of this alternative accusation: "Soft on the Constitution"?!

In the past couple of days, New York Sen. Al D'Amato has been campaigning against his would-be replacement, Chuck Schumer, by charging that he is "soft on crime." Since Chuck was the main force behind the 1994 federal crime law--whose "soft" features included more than 50 new death penalties, a "three-strikes-you're-out" policy, and draconian punishments for juvenile offenders--it's hard to imagine whom D'Amato would consider a sufficiently "tough" crime-fighter. Dirty Harry? (I'm surprised you didn't work any film references into your posts, Alex. Or were they there, but just too subtle for someone who hasn't attained quite your level of filmophilia?!) (Uh-oh, hope that doesn't land you on some registry!)

It's so appropriate that the theme in our exchanges today (as well as throughout the week) has been constitutional rights, since today is the Birthday of the Bill of Rights--the anniversary of the date when that glorious document was approved by Congress and sent to the states for ratification. Good thing that Congress took care of that matter 209 years ago. As this latest exchange underscores, I'm far from confident that we could count on enough votes today.

Thank you for your kind closing words, Alex. Since the respect is mutual,

they mean a great deal. And you keep up your important work--and play!

Warm regards to you, Marcy, and your amazing offspring.

N

Nadine Strossen is president of the American Civil Liberties Union and author of *Defending Pornography*. Alex Kozinski is a federal judge in California. He sits on the 9th U.S. Circuit Court of Appeals.