

NOT UNDER FIRE

**Dissent in
Post-9/11
America**



FREEDOM UNDER FIRE:

Dissent in Post-9/11 America

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THE AMERICAN CIVIL LIBERTIES UNION is the nation's premier guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and freedoms guaranteed by the Constitution and the laws of the United States.

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MON UNDER FIRE D E E R F

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FOREWORD

THERE IS A PALL OVER OUR COUNTRY. In separate but related attempts to squelch dissent, the government has attacked the patriotism of its critics, police have barricaded and jailed protesters, and the New York Stock Exchange has revoked the press credentials of the most widely watched television network in the Arab world. A chilling message has gone out across America: Dissent if you must, but proceed at your own risk.

Government-sanctioned intolerance has even trickled into our private lives. People brandishing anti-war signs or slogans have been turned away from commuter trains in Seattle and suburban shopping malls in upstate New York. Cafeterias are serving “freedom fries.” Country music stations stopped playing Dixie Chicks songs, and the Baseball Hall of Fame cancelled an event featuring “Bull Durham” stars Tim Robbins and Susan Sarandon, after they spoke out against the war on Iraq.

Compounding the offense is the silence from many lawmakers. There is palpable fear even in the halls of Congress of expressing an unpopular view.

Why should this disturb us? Because democracy is not a quiet business. Its lifeblood is the free and vibrant exchange of ideas. As *New York Times* columnist and author Thomas L. Friedman has pointed out, the war on terror is also a war of ideas. How are we going to convince holdouts in other countries about the importance of free speech and civil liberties if we show so little faith in our own?

With U.S. forces deployed overseas, and concerns about safety and freedom at home, we ought to be having as robust a debate as possible.



Anthony D. Romero, Executive Director

But if this report describes a shadow across America, we can also find much to cheer in the multitudes fighting to push it back. One could even see, countering the vehemence of the government’s response, signs of the opposition’s success.

Cities from Honolulu to Portland, Me. and one state (Hawaii) have adopted resolutions affirming their constituents’ free speech, privacy and due process rights, even against federal incursions. As this report went to press, more than 100 cities and counties had taken such stands, and dozens more were preparing to do so. I heartily urge members of communities interested in taking similar action to contact the nearest ACLU affiliate, or to visit our Web site (www.aclu.org/safeandfree), for sample resolutions and strategies for getting them passed.

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The California Police Chiefs Association and police departments from Detroit to Austin have also come out publicly against a blurring of the lines between federal and local law enforcement. Many have refused to become extensions of the FBI or the Immigration and Naturalization Service – bravely risking their shares of a promised \$1.5 billion in federal anti-terrorism funds – for fear of jeopardizing their primary, crime-fighting roles in immigrant communities.

The American Library Association says the FBI is treading on the rights it is supposed to uphold. Libraries from Buffalo to Santa Cruz have posted signs to warn patrons that records of the materials they view and borrow may wind up in the hands of federal agents. Some are shredding some library records, in an effort to preserve patrons' privacy.

Not only has the government failed to suppress dissent; the protest movement has actually picked up steam. For every person who has grown wary of speaking out, this report indicates there are many demanding to be heard. The number of “card-carrying” members and supporters of the ACLU surged in the fall of 2001, after Attorney General John Ashcroft accused his critics of disloyalty, rising to more than 400,000 in 2003.

Yes, some government officials, including local police, have come down hard on protesters, as this report makes clear. But in most of the cases that have come to light, protesters have stood firm. Lawsuits

alleging excessive force, wrongful arrest and denial of due process have been filed on behalf of hundreds of protesters in New York and Washington alone. Undaunted by suspensions, arrests or other actions taken against them, a high school student in Michigan, a pair of college students in Iowa, a shopkeeper in Colorado and two grandmothers in Tampa are among those stepping forward to challenge those who would violate their First Amendment rights.

These democratic stirrings encourage us. We recall that although some of the greatest names in American liberalism (President Franklin D. Roosevelt and Supreme Court Justices Earl Warren and Hugo Black) supported the Japanese internments after Pearl Harbor, history has exonerated the people of good hearts and minds who opposed them.

Dissenters who take unpopular positions in their own times are often seen as heroes later on. We believe that when future generations look at what was done to our core freedoms and values after 9/11, the voices of dissent will stand out as the true defenders of democracy.

A stylized, handwritten signature in black ink, appearing to read "A. Romero".

ANTHONY D. ROMERO
Executive Director, ACLU

FREEDOM UNDER FIRE: Dissent in Post-9/11 America

IN THE TENSE TIME FOLLOWING THE Sept. 11, 2001 terrorist attacks on New York and Washington, Attorney General John Ashcroft mocked government critics and assailed their patriotism, calling their concerns “phantoms of lost liberty.” And the American Civil Liberties Union shot back with a national ad campaign asserting our right to be “safe and free.”

“The nation’s highest ranking law enforcement officer is using his bully pulpit to shut down dissent and debate,” ACLU Executive Director Anthony D. Romero charged, declaring that free and robust debate is the engine of social and political justice.

But Ashcroft’s words were just the opening volley in a war of intimidation. White House spokesman Ari Fleischer also warned Americans to “watch what they say.” Conservative commentators like Bill O’Reilly suggested prosecuting war protesters as “enemies of the state.” Since 2001, hundreds have been arrested for exercising their constitutionally protected freedoms, and some have lost their jobs or been suspended from school. Many have called on the ACLU for assistance.

We need to stop and consider the direction in which we are going, for we are in danger of allowing ourselves to be governed by our fears rather than our values. We are not the first generation to face this challenge.

Since the administration of President John Adams, who feared that sympathy with the radical ideas of the French Revolution would throw America into

upheaval, there have been attempts to silence dissent. The Alien Act of 1798, which gave Adams the power to deport any non-citizen he judged dangerous, was never enforced, but his Sedition Act was used to suppress freedom of the press. President Abraham Lincoln suspended the writ of *habeas corpus* during the Civil War. And President Woodrow Wilson used the Espionage Act of 1917 not to catch spies but to mount a full-scale assault on free speech.

Faced with strong domestic opposition to the First World War from citizens who believed he was less interested in “making the world safe for democracy” than in protecting the investments of the wealthy, Wilson encouraged “patriotic citizens” to report on neighbors they suspected of disloyalty. His Justice Department prosecuted more than 2,000 critics of the war and judges were quick to hand down harsh punishments. In 1918, Congress also enacted a Sedition Act, restricting criticism of the government, the Constitution, the flag and the military.

The decades that followed ushered in some of the most shameful chapters in American history: the World War II internments of Japanese Americans; the McCarthy hearings; the Pentagon Papers, Watergate and FBI spy scandals. All involved government restrictions on speech, the press and freedom of movement. All were popular at the time, and are now seen as abhorrent to the national interest.

This is the latest in a series of special reports issued by the ACLU – along with *Insatiable Appetite* (April 2002), *Civil Liberties After 9/11* (September 2002), and *Bigger Monsters, Weaker Chains* (January 2003) – on government actions since 9/11 that threaten fundamental rights and freedoms without making us safer. While not intended to be a comprehensive analysis of dissent since 2001, this report, drawn from recent and pending ACLU case files, does

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suggest how challenging it has become to oppose the current administration.

Dissent since 9/11 has taken three principal forms: mass protests and rallies, messages on signs or clothing, and other acts of defiance by communities and individuals. These have ranged from silent vigils in parks to the passage of resolutions by dozens of local governments protesting federal measures that threaten fundamental freedoms.

Some government officials, including local police, have gone to extraordinary lengths to squelch dissent wherever it has sprung up, drawing on a breathtaking array of tactics – from censorship and surveillance to detention, denial of due process and excessive force. Police have beaten and maced protesters in Missouri, spied on law-abiding activists in Colorado and fired on demonstrators in California, and campus police have helped FBI agents to spy on professors and students in Massachusetts. Ashcroft's Justice Department has further asserted the right to seize protesters' assets and deport immigrants under anti-terrorism statutes rushed through Congress after the attacks, and debated whether to revoke U.S. citizenship in some cases.

Some of the most insidious government practices, such as the compiling of political dossiers on protesters arrested in New York, didn't come to light until they were exposed and challenged by the ACLU.

The cases described here present a disturbing post-9/11 picture of life in America's streets, malls, parks, schools, airports and harbors.

IN THE STREETS

RIGHTS AT RISK IN NEW YORK: The ACLU has been engaged in a running battle with America's

largest city over the right to protest and to engage in lawful political activity during times of war.

In February 2003, the New York Civil Liberties Union sued the city on behalf of protest organizers who were denied permission to hold a large antiwar march on the brink of the American attack on Iraq. Though the federal courts upheld the unprecedented denial, public outcry forced the city to take a less confrontational approach in March, when more than 200,000 protesters marched down Broadway with a permit obtained by the NYCLU.

But police arrested hundreds and, the NYCLU later discovered, interrogated them about their political affiliations and prior activities, methodically entering the information into a database. Not only was that information constitutionally protected, NYCLU Executive Director Donna Lieberman declared in a letter to Police Commissioner Raymond W. Kelly, police also used "the coercive environment of an arrest" to obtain it illegally, "outside the presence of counsel."

Embarrassed, the NYPD halted the program abruptly. But the disclosures were telling, just two weeks after a federal judge relaxed guidelines that for nearly 20 years had limited NYPD surveillance and investigation of political groups. "As a city and a nation, we are at a crossroads about civil liberties when the visceral response to political protest is to contain it and curtail it," Lieberman said. "The police interrogations reveal how willing government is to abandon basic First Amendment values in these difficult times," she said; but the reversal "shows that New Yorkers can successfully defend their freedoms."

PERMIT DENIED IN PLEASANTVILLE: The ACLU of New Jersey is challenging the City of



New York police struggle to confine burgeoning crowds at a February 15, 2003 anti-war protest.

Pleasantville's permit requirements on behalf of the Coalition for Peace and Justice, a group that was barred from holding an Oct. 9, 2001 event to protest the bombing of Afghanistan – and was then thwarted in its attempts to obtain a permit. The permit ordinance requires a "procession or parade of any kind" to obtain a permit before it may "pass, congregate or be in or over any of the streets, highways, alleys or any other public place in the City of Pleasantville."

The permit must be approved by both the chief of police and the mayor, there are no limits placed on their discretion, and applicants are required to purchase costly insurance. Penalties include fines of up to \$1,000 and up to 90 days in jail. The city agreed in negotiations not to enforce its provisions against coalition members but did not adequately protect free speech rights. The ACLU of New Jersey was preparing to file suit as this report went to press.

MASS MOVEMENT IN WASHINGTON: In a class-action lawsuit filed March 27, 2003, the ACLU of the National Capital Area charged police with deliberately violating the constitutional rights of more than 400

peaceful anti-war demonstrators and bystanders by directing them into a police trap and then arresting them – though they had not violated any law.

"In this country, the government is not supposed to arrest you unless you break the law," said local ACLU Legal Director Arthur Spitzer. "But the evidence will show that the police deliberately rounded up hundreds of people who had not broken any law, many of whom were not even involved in the demonstration.

No one in the neighborhood was safe from the lawless conduct of the D.C. police."

The arrests occurred on Sept. 27, 2002 in Pershing Park, two blocks from the White House. Arrestees were charged with failing to obey a police order – though no order to disperse was ever given; in fact, people who tried to leave were physically prevented from doing so, according to the ACLU complaint. One demonstrator suffered broken ribs after being knocked down by the police. The true purpose of the mass arrests, the ACLU contends, was to disrupt and prevent peaceful political demonstrations scheduled for that weekend.

Plaintiffs include: Julie Abbate, a local attorney and graduate of Howard University School of Law, who was observing the demonstration when she was trapped in Pershing Park and arrested; Christopher Downes, a demonstrator who did not resist arrest but whose ribs were broken when he was knocked down by police; Joe Mayer, a retired U.S. Army lieutenant colonel who accompanied his daughter, in part to be sure she didn't get arrested (they were both arrested);

SCAPEGOATING: Palmer Stomped on Immigrants to Stamp Out Unrest

The ACLU was born as the First World War came to an end, trailing economic and political turmoil, rising dissent, waves of labor strikes – and terrifying attempts to suppress them. When the strikes led to violence, including the explosion of a bomb on the doorstep of Attorney General A. Mitchell Palmer’s Washington townhouse, Palmer lashed out at immigrant communities with a vengeance.



Attorney General A. Mitchell Palmer tried to stop political unrest by rounding up suspected “Bolsheviks” in 1920.

Agents rounded up more than 5,000 people in 33 cities as suspected “Bolsheviks” over two months in 1920 – making arrests without warrants, conducting unreasonable searches and seizures, and wantonly destroying property. Suspects were brutally beaten and detained without charges for long periods of time. Palmer also invoked the wartime Espionage and Sedition Acts of 1917 and 1918 to deport residents without trial – among them, anarchist Emma Goldman, who was shipped back with 248 others to the Soviet Union. Most of those detained in the U.S. were ultimately released and none were charged in the bombings. But a group of affluent, well-connected East Coast liberals headed by Roger Baldwin was radicalized, seeing in the trampling of civil liberties the need for permanent vigilance. They organized themselves as a watchdog group, which in 1920 became the American Civil Liberties Union.

and Tom Ulrich, a Maryland resident and grandfather who was trapped and arrested and was then detained for more than 24 hours. The D.C. Council’s Judiciary Committee is also investigating allegations of police misconduct.

DELAYS IN DEARBORN: Waiting periods “prevent citizens from demonstrating at a time when they can be most effective in influencing public policy,” the ACLU of Michigan said, in a Jan. 21, 2003 lawsuit challenging the constitutionality of Dearborn’s 30-day waiting period for protest permits. “If the Dearborn City Council schedules a vote next week on a proposal to fire half of the city employees, should the workers have to wait a month to protest that proposal?”

The lawsuit was filed on behalf of the American-Arab Anti-Discrimination Committee and Imad Chammout, a business owner who staged a timely protest without a permit to oppose the incursion of Israeli soldiers into a Palestinian refugee camp in Jenin. Chammout was prosecuted for violating the local law, punishable by up to 90 days in prison and a \$500 fine. The ACLU also asked for a preliminary injunction barring enforcement of the waiting period because of strong likelihood that it would be found unconstitutional. ★

ON CAMPUS

SPIES IN AMHERST: The ACLU of Massachusetts filed a Freedom of Information Act request in December 2002 seeking details of government surveillance of college professors and students nationwide. The presence of FBI agents on college campuses came to light after FBI agents in the war on terrorism questioned a faculty member and campus organizer at the University of Massachusetts in Amherst. Their presence “can have an enormous chilling effect on students and faculty,” said attorney Bill Newman, director of the ACLU’s Western Massachusetts office. “We need to know what the FBI is doing on our nation’s campuses.”

DISTRESS SIGNAL AT GRINNELL: The Iowa Civil Liberties Union in December 2002 sued two police officers and a county attorney who threatened to arrest a pair of Grinnell College students for hanging a U.S. flag upside-down from their dormitory window. “People tell me it offends them to see the flag upside-down, but sometimes I tell them it offends me to see one right-side up,” said Juan Diaz, 18, who with John Bohman hung the flag Sept. 26, 2002 as a sign of their “displeasure with the policies of the United States Government” toward Iraq.

Flag etiquette says that a flag should be flown upside-down only as a sign of distress. And after the lawsuit was filed in U.S. District Court in Des Moines, authorities agreed that hanging it upside-down was protected under the First Amendment. But officials defended other restrictions in their flag ordinance, which the suit says is unconstitutional in its entirety. The students also seek damages for willful violation of their speech rights.

“Police use this (flag etiquette) law for no other purpose than to silence government critics,” ICLU exec-

utive director Ben Stone said, citing a 30-year-old Iowa Supreme Court ruling (*State v. Kool*, 212 N. W. 2d 518 (Iowa 1973)), that displaying an American flag upside-down was protected speech and could not be prosecuted. In 1989, the U.S. Supreme Court threw out the conviction of a protester who was arrested for actually burning a flag during a demonstration (*Texas v. Johnson*, 491 U.S. 397), declaring that the right of free speech protected symbolic use of the flag.

IN FLORIDA, PATRIOTISM LITE: Incredibly, officials on some campuses even try to control expressions of patriotism. Right after the 9/11 attacks, some librarians at Gulf Coast Community College in Fort Myers, Fla. were asked by their bosses not to wear “I’m proud to be an American” stickers because they might offend foreign students. Howard Simon of the ACLU of Florida came to their defense, saying, “If some people are offended by another person’s speech, that’s the price of freedom in this country.”

POSTER PROBLEMS IN DURHAM: A.J. Brown, a freshman at Durham Technical College, almost jumped out of her skin when agents from the Raleigh, N.C. office of the U.S. Secret Service and an investigator from the Durham Police Department knocked on her apartment door on Oct. 27, 2001. They were responding to an anonymous report about an “anti-American” wall poster. Terrified, Brown, 19, phoned her mother before opening the door.

Did she have any information about Afghanistan? they asked. No. The Taliban? No. At their request, she filled out a form providing her full name, race, phone number and other identifying information but, on her mother’s advice, stopped short of inviting them in.

The poster, opposing the death penalty, showed George W. Bush holding a rope against a backdrop of lynch victims, with the text, “We hang on your every



A.J. Brown's poster prompted a visit by Secret Service agents and a police investigator.

word." Texas executed 152 people while Bush was governor, it said. Brown never did find out which of her classmates or neighbors made the call that brought her under suspicion.

BEHIND CLOSED DOORS IN MARYLAND: The ACLU of Maryland and a private Washington law firm filed a lawsuit March 6, 2003 on behalf of students at the University of Maryland at College Park, challenging unreasonable restrictions on outdoor public speaking and leafleting on the university's 1,500-acre campus. Public speaking is currently limited to the Nymburu Amphitheater stage and prohibited elsewhere. The overly broad rules apply to all "speech directed to a general audience or non-specific persons" and limit the distribution of literature "to designated sidewalk space outside the Stamp Student Union."

"I came to College Park for a great education but I also expected a free exchange of ideas outside and inside the classroom," said Daniel Sinclair, a junior

and one of the plaintiffs. "I would like to get out the word about student activities that I am involved in but the University's policies stand in the way – and also frustrate my ability to hear what others have to say."

"Not only is the university's policy blatantly unconstitutional, but it is also unworthy of this great institution," summed up Anthony Epstein, lead attorney for the plaintiffs.

PROTECTED SPEECH IN MICHIGAN: The ACLU of Michigan filed a friend-of-the court brief Oct. 10, 2002 in sup-

port of a pro-Palestinian group's efforts to hold a conference on the University of Michigan's Ann Arbor campus. The university defended the Palestine Solidarity Movement against attempts to stop it, saying it would have been "unlawful as well as a violation of the university's policies on freedom of speech and expression" to do so. Two students claimed in a lawsuit that conference organizers sought to promote terrorism and anti-Semitism. Kary Moss, executive director of the ACLU of Michigan, said the case "strikes at the heart of freedom of speech... We may not agree with what all people have to say, but we need to defend their right to say it." The rally was allowed to proceed, and ACLU provided legal observers to ensure that no civil rights were violated.

EXCESSIVE FORCE IN ALBUQUERQUE: The ACLU of New Mexico is looking into complaints that police used excessive force in breaking up a March 20, 2003 anti-war demonstration at the University of New Mexico. Seventeen protesters, arrested on

charges ranging from public nuisance to refusing to obey a police officer, said they were tear-gassed or beaten with batons before being taken into custody. ★

IN THE MALL

PEACE OFFENSE IN NEW YORK: Oddly, a T-shirt promoting “Peace” brought out the cavalry at a mall in upstate Guilderland, N.Y., where Stephen Downs, a 61-year-old lawyer, was arrested for refusing to leave or remove a shirt he’d bought there. The New York Civil Liberties Union on March 11, 2003 wrote the operators of the Crossgates Mall after Downs was led away in handcuffs on a trespassing charge. “Give Peace a Chance,” his shirt said on one side, and “Peace On Earth” on the other. Downs was accompanied by his 31-year-old son Roger, who also wore an anti-war T-shirt, but was allowed to leave after removing it.

The mall operators later asked the Guilderland Police Department to drop the trespassing charge but the news coverage made Downs a local hero and the NYCLU erected a billboard in protest near the entrance. “Welcome to the mall, you have the right to remain silent,” it said. The security officer who called police was way out of line, NYCLU Executive Director Donna Lieberman said; decades earlier, at the height of the Vietnam War, the Supreme Court had even upheld the right of a protester (in *Cohen v. California*) to wear a jacket emblazoned with “Fuck the Draft” in a county courthouse.

“While the issue of free speech in shopping malls came to a head with Mr. Downs’ arrest at Crossgates, it remains an issue at malls across the country,” Lieberman said. “When, as here, the mall replaces Main Street as a center of commercial and social activity, the censorship of expression has a devastat-

ing effect on the freedom and diversity that is at the heart of a free society.”

IN SEATTLE, A CHILLY RECEPTION: On March 11, 2003, a week before the war in Iraq started, the ACLU of Washington asked Mayor Greg Nickels to investigate a “crackdown on free speech” at the Westlake Mall, in the heart of downtown Seattle, which includes a monorail station. On Feb. 15, the day of a major downtown protest march, a woman waiting to board the Monorail was asked to lower a protest sign she was holding over her shoulder; when she refused, she was asked to leave the building. On March 6, a person trying to purchase a meal at the food court was ordered by a security officer to remove a small, black-and-white 1.5-inch “No War” pin or exit the building.

These were violations of Seattle’s Open Housing and Public Accommodations Ordinance, which bars denying any person “directly or indirectly...the full enjoyment of ...any place of public accommodation because of the person’s political ideology,” the ACLU said.

“As our nation stands on the brink of war, Seattle needs your leadership in standing up for civil liberties,” Kathleen Taylor, executive director of the ACLU of Washington, wrote the mayor, urging him to “use your good office to ensure that Seattle remains a vibrant and tolerant place to live.”

“If Seattle learned anything from the WTO protests,” she added, “it is the need to respect peaceful exercise of free speech and to distinguish between disruptive and non-disruptive conduct.” ★

ON THE WATERFRONT

FIRING OFFENSE IN OAKLAND: Police using rubber bullets, wooden pellets and tear gas opened fire at an anti-war protest at the Port of Oakland, Calif. April 7, 2003, injuring several demonstrators and longshoremen and sending at least one to the hospital. It was “a display of force that would have made Bull Connor blush,” according to *San Francisco Chronicle* columnist Chip Johnson (referring to the notorious Birmingham, Ala. official who turned police dogs and water hoses against civil rights demonstrators in the 1960s).

In a letter to the chief of police, the ACLU of Northern California and three civil rights groups asked for an explanation of police procedures and training, saying that the “flagrant disregard” for people’s rights, safety and lives demanded a swift response.

Protest organizers had targeted the port because it handled war supplies, but even the dockworkers saved their anger for the police. “They shot my guys. We’re not going to work today,” said Trent Willis, a business agent for the International Longshore and Warehouse Union, as the dockworkers stomped off the job. “The cops had no reason to open up on them.”

“It was very scary,” longshoreman Kevin Wilson told the Associated Press, after watching police try to clear 500 protesters from an entrance to the docks. “All of that force wasn’t necessary.”

VIGILANCE IN BALTIMORE: Responding to a series of complaints about free-speech restrictions in Baltimore’s Inner Harbor, the ACLU of Maryland on April 10, 2003 sued the city on behalf of five women participating in a silent vigil to protest the war.

City police had told eight members of their group, Women in Black, on April 4 that they needed a permit to stand silently at the southeast corner of Pratt and Light streets in the Inner Harbor, holding signs, as they had done on a weekly basis since December.

The ACLU challenged the city’s practice of requiring permits for small groups of demonstrators, on the grounds that speech that does not trigger crowd control cannot be burdened by government regulation. Its unnecessarily long advance-notice requirement – up to eight weeks – also stifles timely responses to current events.

“The Inner Harbor is the quintessential public square,” said ACLU Staff Attorney Rajeev Goyle. “It is the most visible spot in downtown Baltimore and the natural place for people exercising their free speech rights to gather and voice their ideas.”

The suit has already resulted in a preliminary victory for Women in Black; upon learning of the suit, Baltimore City Solicitor Thurman W. Zollicoffer, Jr. agreed to the ACLU’s request to suspend for 180 days the permit requirement for all demonstrations with 25 or fewer people, making it possible for Women in Black to stand in their customary spot without fear of arrest. ★

ON THE SIDEWALKS

WESTMINSTER RECONSIDERS: The ACLU of Maryland persuaded another Maryland city to ease unreasonable restrictions on demonstrators in 2003 after intervening on behalf of women and girls conducting similar vigils. Members of Women in Black and a Girl Scout had been holding silent peace vigils on the sidewalk in front of the Westminster city library. They were threatened with arrest under an

POPULAR FRONT:

FDR Pounced on Critics, While Courting the Press

The “credibility gap” had its roots in the administration of a popular president waging a popular war. Though Attorney General Francis Biddle set a high standard for tolerance of free speech under President Franklin D. Roosevelt, he was the first to use the Smith Act, passed in the anti-Communist hysteria of 1940, to punish dissent. Five months before Pearl Harbor, his Justice Department indicted 29 Minneapolis teamsters who belonged to the Trotskyite Socialist Workers Party, at the request of Teamsters president Dan Tobin who, as Samuel Walker recounts in *In Defense of Liberties: A History of the ACLU* (1990, Southern Illinois University Press) “wanted to be rid of his critics.” The ACLU argued that none of the Teamsters’ speeches or publications met the “clear and present danger” test of the Act, which made it illegal to advocate or abet the overthrow of government by force or violence, but a circuit court upheld the convictions and the Supreme Court refused to hear an appeal.



Attorney General Francis Biddle (left), shown with J. Edgar Hoover, chief of the FBI (center), and Byron Price, Director of Censorship. The only blight on his record was using the Smith Act to punish dissent in the '40s.

After Pearl Harbor, Roosevelt gave conflicting signals – on Dec. 14, 1941 warning that “some degree of censorship is essential at war time,” and the next day declaring, “We will not, under any threat, or in the face of any danger, surrender the guarantees of liberty our forefathers framed for us in our Bill of Rights.” He pushed for prosecution of fascists and other right-wing extremists for speeches and pamphlets criticizing the war effort, and created an Office of Censorship to control the flow of news to and from abroad, winning voluntary media compliance. Over ACLU protests, major news organizations suppressed news of racial disturbances at home and battlefield news from abroad. This “unofficial censorship,” begun in the climate of a popular war, had the most corruptive influence – spurring later administrations to conclude that “national security” was sufficient to curtail serious criticism. Or simply to lie.

ordinance requiring a permit for any speech or expressive conduct on public property, no matter how small, plus up to 60 days advance notice, at the discretion of the Common Council of the City of Westminster, without any meaningful standards. After being contacted by the ACLU, the Common Council voted April 21, 2003 to suspend enforcement of the ordinance for groups of less than 25, reduce the advance-notice requirement to two days, include a 24-hour exigency provision, and vest discretion in the city clerk. It also agreed to work with the ACLU and cooperating counsel to draft a constitutional statute. ★

IN THE PARK

FULL EXPOSURE IN FLORIDA: A U.S. District Court judge in West Palm Beach, Fla. prohibited officials from blocking a nude anti-war demonstration in a state park. The ACLU of Florida went to court on behalf of T.A. Wayner, a Fort Pierce naturist who planned to choreograph the creation of a peace symbol on Singer Island using nude bodies, and videographer George T. Simon, who planned to observe. Randall Marshall, legal director for the ACLU of Florida, said the intent was “not mere nudity, but political protest against the government’s plans for war.” For these demonstrators, he said, “nudity is an essential part of their political expression.”



A Florida judge agreed with the ACLU that this act of protest was protected by the First Amendment.

Judge Donald M. Middlebrook agreed, calling it “well within the ambit of the First Amendment.” (He added that the state was free to put up signs notifying the public that the Feb. 14 demonstration would be taking place, or to erect screens around it.)

SHOW OF FORCE IN ST. LOUIS: Eight youthful protesters carrying anti-war signs were arrested and dozens injured in a confrontation with police March 30, 2003 following a large peace rally in the city’s Forest Park. Some 60 youths, who had attempted to march out of the rally together, said police blocked off the street, ordered them onto the sidewalk and pushed one participant off her bicycle. Some were thrown to the ground or against squad cars, and one suffered a concussion and had to go to the hospital. Some said they were handcuffed, and then maced after the cuffs were on, and that the arresting officers hurled epithets – “traitor,” “anti-American,” “unpatriotic” – at them for opposing the war. ★

IN THE PUBLIC SQUARE

EQUAL TIME IN CHICAGO: Open public spaces, such as Federal Plaza in downtown Chicago, that traditionally serve as a venue for discussion of public issues, should be able to accommodate more than one point of view at a time, the ACLU of Illinois told the federal General Services Administration. As a result of an ACLU lawsuit, the plaza, a longtime center of prayer vigils and protests, now is accessible to a range of voices. The ACLU had filed the suit in May 2001 in a case of police brutality, but amended it to more broadly challenge GSA restrictions after the 9/11 terrorist attacks, when the government closed the plaza to demonstrations and activities altogether. Under a 2002 court-sanctioned agreement, GSA may not deny a permit to use the plaza solely because another group holds a permit for the time requested, protecting the rights of all persons, including counter-demonstrators, to make their voices heard about critical public policy matters. The ACLU lawsuit also contributed to the GSA's March 2002 decision to lift the closure of the plaza. ★

AT PRESIDENTIAL APPEARANCES

OUT OF SIGHT IN ST. LOUIS: If the president didn't see it, did it happen? A favorite tactic of the Bush administration has been to herd protesters at presidential appearances into "designated protest zones," out of sight of his motorcade, and to arrest people who refuse to be moved. The policy, applied only to those with dissenting views, has been used to suppress dissent nationwide, and ACLU lawyers around the country are working to get charges dropped against people arrested for nothing more than wanting to voice their opinion during a presidential visit.

"There is nothing more sacred," said Matt LeMieux, executive director of the ACLU of Eastern Missouri. "Herding dissenters into far-away zones, while supporters are allowed to get within earshot of the president, serves absolutely no purpose other than to suppress certain viewpoints. Free speech rights are simply meaningless if they can only be exercised in an area far away from the intended audience."

The ACLU of Eastern Missouri is considering legal action in several St. Louis cases:

- During a Nov. 4, 2002 Bush visit, activists Bill Ramsey and Angela Gordon were arrested after refusing to move to a gravel parking lot a quarter-mile away from the president's entourage.
- On Jan. 22, 2003, Andrew Wimmer was arrested for refusing to take his "Instead of war, invest in people" sign to a designated protest zone more than three blocks away and down an embankment; however, a woman with a "Mr. President, we love you" sign was allowed to remain. Police also barred reporters from entering the protest zone to interview dissenters.
- When Bush visited the local Boeing plant on April 16, 2003, authorities attempted to herd protesters into a designated protest zone a quarter-mile away and off the main road, in a field. But the 20-square-foot roped-off area was too small to contain all the protesters – among them, Christine Mains and her 5-year-old daughter. When Mains, standing several hundred feet away with an anti-war sign, refused to move, she and her tearful child were hauled away in separate squad cars. Mains charged that authorities also treated her roughly and set her bond so high she couldn't be released until the ACLU intervened, hours later.

CAUGHT ON FILM:

Cops Took Liberties in the '60s and '70s

In the late 1960s, with the Vietnam War dividing the country, protest found its voice – and was largely upheld by the courts. But there were so many complaints of police brutality that the New York Civil Liberties Union began sending observers to film police actions at peace marches and rallies – and in that way discovered and recorded rampant violations of defendants' rights.



Dissent reached a peak during the Vietnam War years, but there were many complaints of police brutality.

Police were too busy to record the names of those arrested, so others were arbitrarily assigned to be the arresting officers of record later on. Unable to truthfully testify they had seen specific offenses, cops perjured themselves in court – until the ACLU began using film footage to prove that this or that officer wasn't even around when an arrest was made. After a handful of such cases, former ACLU Executive Director Aryeh Neier writes in his memoir, *Taking Liberties* (Public Affairs, 2003), "We found prosecutors eager to dismiss the remaining cases from those demonstrations rather than endure continuing embarrassment."

That observation came in handy again a few years later in Washington, when police rounded up some 13,000 anti-war demonstrators in what still stands as the largest mass arrest in U.S. history. Overreacting to statements by Vietnam War protesters in May 1971 that their purpose was to tie up the city, police acted under what then-Assistant Attorney General William Rehnquist, who had not yet been appointed to the Supreme Court, creatively termed "qualified martial law."

After watching officers at Washington's RFK Stadium assign themselves at random to groups waiting to be booked, ACLU lawyers were able to get almost all the charges against protesters dismissed and to win damages for many of them.

“While a security buffer may be appropriate, one that regulates based on viewpoint is indefensible on security and First Amendment grounds,” said Denise Lieberman, legal director for the ACLU of Eastern Missouri.

SIDELINED IN PITTSBURGH: In Pittsburgh, where people with pro-Bush signs lined the streets for a Labor Day visit in 2002, police moved those “critical” of the president, under what they said were orders from the Secret Service, to a protest zone one-third of a mile away. Among those arrested was William Neel, a 65-year-old retired steelworker with a sign declaring: “The Bushes must love the poor; they’ve created so many of us.” The ACLU of Pittsburgh got all the charges against him dismissed.

ACLU HEAD ARRESTED IN PHOENIX: There had been complaints of police misconduct at demonstrations in Phoenix in the past, so on Sept. 26, 2002, when President Bush attended a dinner there, the head of the ACLU of Arizona went to the protest site as a legal observer – and was herself arrested. The protesters had only just gathered, Executive Director Eleanor Eisenberg said, when suddenly, with no apparent provocation, mounted police and officers in full riot gear charged into the crowd. She was across the street taking pictures of them beating a young man when she was arrested. Eisenberg spent nine hours in custody, most of it incommunicado. She was “bruised and shaken, sore from being in handcuffs for more than an hour with my hands behind my back in a police car. It was a horrible experience,” she said afterwards. The only charge against her, resisting arrest, was dropped four months later.

TROUBLE SIGNS IN TAMPA: The ACLU of Florida also sued the city of Tampa in 2002 for wrongful arrest of two Florida grandmothers and a gay activist

during a 2001 rally for President Bush and his brother, Florida Gov. Jeb Bush. “We weren’t exactly 20-year-old rabble rousers,” said Jan Lentz, who was forcibly hauled away in handcuffs with her two companions for refusing to ditch her “Investigate Florida VoterGate” sign demanding an investigation of Florida’s 2000 election fiasco. They were accused of trespassing even though all three had tickets to the rally. “Lose the sign and you can stay,” they were told, but they wanted Bush to see their message. The charges against the three were eventually dropped, but the pending lawsuit seeks damages and other sanctions against the city. “The protestors were entitled – just like the hundreds of other people at the rally – to lawfully exercise their free speech rights, but they were arrested in an attempt to silence them and shield the government from criticism,” said ACLU cooperating attorney W.F. “Casey” Ebsary, Jr. of Tampa. ★

AT VICE-PRESIDENTIAL APPEARANCES

1ST AMENDMENT FLOUTED IN INDIANA: The ACLU of Indiana defended an environmentalist arrested for protesting Vice President Dick Cheney’s appearance at a Feb. 6, 2002 fundraiser in Evansville with a sign reading: “Cheney – 19th c. Energy Man.” “What happened to John Blair should not happen in a free country,” John Krull, executive director of the ACLU of Indiana, said after the filing of a lawsuit Jan. 10, 2003 against the City of Evansville. “When police officers are given the power to arbitrarily waive or ignore a citizen’s First Amendment rights, we no longer really have a First Amendment. The freedom to speak one’s mind about the government is one of the things that makes this country special, and it must be defended.”

The charges against Blair were dropped two weeks later but the lawsuit remains in force as the City of Evansville has refused to acknowledge that it had no right to ignore Blair's constitutional rights. ★

ON MILITARY BASES

MARCH HALTED AT BENNING: The ACLU of Georgia filed a lawsuit Nov. 13, 2002 challenging a plan by the City of Columbus, Ga. to search more than 10,000 marchers before allowing them to gather at the entrance to Fort Benning.

Gerry Weber, legal director for the ACLU of Georgia, called a mass search of non-violent protesters "completely unconstitutional" and Father Roy Bourgeois, a protest organizer, said it would have taken 80 hours to complete. To Debbie Seagraves, executive director of the ACLU of Georgia, it looked like the city was trying to make an "end-run" around a court order favoring organizers in an earlier dispute.

An annual tradition in Columbus, the march to protest the training of Latin American soldiers at Fort Benning had been held every November without interference until 2001, when the city tried to bar it, citing post-9/11 security concerns. Federal Magistrate G. Mallon Faircloth ordered the city to allow it then, in accordance with President Bush's charge to Americans to get on with their lives; but in the current case, Judge Clay Land said he would allow minimally intrusive searches. The ACLU has appealed to the Eleventh Circuit. ★

IN THE SCHOOLS

CENSORSHIP IN ALBUQUERQUE: On April 18, 2003, cooperating attorneys for the ACLU of New Mexico filed suit against the Albuquerque Public Schools on behalf of two teachers and a guidance counselor who were suspended without pay for displaying posters, artwork and other materials that expressed opinions about the war on Iraq. Attorney Jane Gagne said the schools had violated employees' rights to freedom of speech and equal protection under the law by censoring anti-war expressions, though officials actively promoted pro-war expressions by allowing recruitment and pro-war posters to be prominently displayed.

Rio Grande High School teacher Carmelita Royal was suspended for refusing to remove a "No War Against Iraq" sign she had placed behind the blinds in her classroom (facing outward), following an anonymous complaint. Students protested her suspension, according to ACLU of New Mexico Executive Director Peter Simonson, who said she had "made every effort to encourage their independent thought and expressions of opinions about the possible war in Iraq." Her suspension was political, having "nothing to do with the educational process," he said.

Another staffer, Albuquerque High School student counselor Ken Tabish, was suspended for posting in his office a speech by Senator Robert Byrd, anti-war articles, and flyers for peace rallies, after someone complained that if Rio Grande teachers couldn't express anti-war sentiments, neither should he. And at Albuquerque's Highland High School, teacher Alan Cooper was suspended for refusing to take down students' posters that his principal, Ace Trujillo, termed "not sufficiently pro-war."



Bretton Barber refused to back down after school officials objected to his T-shirt message.

T-SHIRT TROUBLE IN DEARBORN: Bretton Barber, 16, was sent home from school in Dearborn Feb. 17, 2003 after refusing to turn his T-shirt (with an image of President Bush and the words “International Terrorist”) inside-out. Barber, an A student who has been a “card-carrying member” of the ACLU since the 10th grade, then called the ACLU of Michigan.

School officials contended that Barber’s shirt “might have stirred up emotions ... controversy.” But as the U.S. Supreme Court ruled famously (in *Tinker v. Des Moines Independent Community School District*) in 1969, schools can stop students from speaking out only if they can show that their actions significantly disrupt the work and discipline of the school. Students are “persons” under the Constitution, it said, and their right to free speech does not end “at the schoolhouse gate.”

John Tinker, now 52, the lead plaintiff in that suit, had been suspended for wearing a black armband to school to protest the Vietnam War. It is frustrating, he says, to see students fighting the same battles all over again.

“It’s a gutsy thing for a high school student to take on a school administration this way,” said Kary Moss, executive director of the ACLU of Michigan, which filed a lawsuit March 27. The local ACLU had hoped to resolve the issue without going to court,

she said, but said the school’s refusal to allow students the right of expression left them no choice.

PRE-EMPTIVE STRIKE IN PITTSBURGH: In March 2003, members of the musical group Anti-Flag alerted the Greater Pittsburgh ACLU to the possibility of violations of free speech rights at an upcoming rally, at which fans who opposed the mili-

FREEDOM UNDER FIRE: Dissent in Post-9/11 America

tary action in Iraq planned to wear white armbands to class or to work. The ACLU helped to draft a “know-your-rights” section for the group’s Web site in advance of the March 28, 2003 event, advised students about the law and offered practical suggestions for resolving problems on their own. The Greater Pittsburgh ACLU reports that youths were questioned by officials in some schools but after stating that they were being advised by the ACLU, were allowed to proceed. ★

IN THE MARKETPLACE

FLAG FRACAS IN COLORADO: Flag-waving is not just for hawks in Colorado, thanks to an intervention by the ACLU of Colorado with police in tiny Alamosa. Store owner John Fleming ignited tempers in that small San Luis Valley community (pop. 9,000) by displaying the American flag upside-down in his store window – a signal that, according to the Boy Scout manual, communicates distress. Fleming said he believed the war in Iraq was a sign that our country was in distress, but Alamosa’s Chief of Police said the display violated a Colorado statute – and threatened to charge Fleming with a crime unless he took it down.

The threat of prosecution silenced Fleming, who did as he was told. But he then contacted the ACLU, which threatened a lawsuit to protect his right of expression if officials did not back down. “This kind of flag display is peaceful symbolic expression that is fully protected by the First Amendment,” said Mark Silverstein, legal director of the ACLU of Colorado.

The local law, making it unlawful to “mutilate, deface, defile, trample upon, burn, cut or tear” the flag did not even apply in Fleming’s case, he noted. And “the Supreme Court has recognized on numerous occa-



An upside-down flag displayed in Alamosa was used as a symbolic expression of dissent.

sions that the First Amendment protects the right of individuals to use the symbolism of the American flag in a manner intended to communicate ideas and opinions. That is exactly what Mr. Fleming did.”

LOST LICENSE IN JERSEY CITY: A Jersey City, N.J. deli owner’s license to sell lottery tickets was

suspended in October 2001 because he made favorable remarks about Osama bin Laden. The ACLU of New Jersey came to the assistance of the man – who asks that his name be withheld for fear of further reprisals – after a customer told the Lottery Commission that he had made “anti-American statements.” The ACLU of New Jersey filed a friend-of-the-court brief with the commission, arguing that revocation based on his statements would violate his First Amendment rights. In March, the commission revoked his license anyway. The owner did not appeal. ★

UNDER SURVEILLANCE

SPYING CURTAILED IN COLORADO: The ACLU of Colorado on April 17, 2003 announced the settlement of a landmark lawsuit challenging the Denver Police Department’s practice of monitoring and recording the peaceful protest activities of local residents.

The Denver police, who for decades had kept files on peaceful critics of government policy with no connection to criminal activity, agreed to end the political spying in what the ACLU called an “enhancement” of their professionalism and a First Amendment and civil liberties victory for people in Denver. It is “particularly significant at a time when the White House falsely claims that Americans must sacrifice their civil liberties if they are going to be safe from terrorism,” said Mark Silverstein, legal director of the ACLU of Colorado. The litigation, which sought changes in policies and practices rather than monetary damages, began shortly after the ACLU revealed the existence of the files in March 2002.

Under this agreement, subject to approval by the court, the Denver police will focus on catching criminals instead of tracking how individuals choose to

exercise their First Amendment rights. It forbids the collection of intelligence on activists without specific evidence of serious criminal activity, limits dissemination of information from intelligence files and provides for internal safeguards and review.

Plaintiffs in the lawsuit are Sister Antonia Anthony, Vicki Nash, Stephen Nash, and three organizations: the American Friends Service Committee, Chiapas Coalition, and End the Politics of Cruelty. ★

AT THE AIRPORT

BAGGAGE CHECK IN SEATTLE: Seth Goldberg, who packed two “No Iraq War” signs in his suitcase in March 2003 before boarding a flight in Seattle, discovered a nasty surprise when he arrived in San Diego. Nestled among his personal belongings were a card from the Transportation Security Administration, notifying him that his bags had been opened and inspected at Seattle-Tacoma International Airport – and a handwritten admonishment: “Don’t appreciate your anti-American attitude!”

“I found it chilling and a little Orwellian,” said Goldberg, 41, a New Jersey resident who planned to put up the signs at his house. He described himself as “not a political activist, but... distressed by the way the country was rolling off to war.” Davis Oldham, a friend who teaches college in Seattle, wrote Sen. Maria Cantwell (D-Wash.) about the incident, and was advised by a spokesman that the senator also found it “completely inappropriate.”

The ACLU of Washington asked the TSA to investigate, and on April 10 a TSA official wrote Goldberg that the agency recognizes the right of individuals to freely express their political or personal views. “Rest assured that infringement on that right by TSA

employees is not condoned nor will be tolerated,” wrote the TSA’s Robert Blunk. He said the message would be sent to all TSA employees at Sea-Tac and incorporated into their training. ★

CONCLUSION

As the Bill of Rights makes clear, the values and principles embodied in the United States Constitution are not subject to shifts in the political climate. Wary of government excesses abroad, and seeing the importance of informed debate, the authors made the protection of dissent their first order of business.

Congress “shall make no law...abridging the freedom of speech, or of the press, or of the people peaceably to assemble, and to petition the Government for a redress of grievances,” the First Amendment declares. The health of the fledgling democracy depended on it. It encouraged Americans

to participate fully in their democracy and speak their minds, without fear or favor.

Refusing even to draw lines between acceptable and unacceptable speech, assembly or worship, the Bill of Rights affirmed that no future government of the United States would be empowered to make such determinations, under any circumstance. Not even if confronted with threats from abroad or challenges to their control.

The responses to dissent by many government officials, as described in this report, so clearly violate the letter and the spirit of the supreme law of the land, that they threaten the underpinnings of democracy itself.

Hostility toward dissent should alarm us all. Government officials and political leaders must not be allowed to chill the free and robust debate that has made our way of life the envy of nations and our Constitution a beacon to the world. ★

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