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CIVIL LIBERTIES IN THE 1980's

REMARKS OF NORMAN DORSEN*

I have been asked to present an overview of the incursions on civil liberty that we may expect in the 1980's and how we may combat them. It is always risky to predict the future, especially in a field as volatile as this. Nevertheless, at least one thing is clear. Civil liberties during the coming decade will be subject to great pressures. This is true whether the government remains conservative, such as the present Reagan Administration, or changes after the 1984 or 1988 elections. The reason for my confidence in this assertion is that governments, whatever their political complexion, seek to achieve their political ends, gratify their supporters, and get re-elected. History shows that, in seeking to fulfill these goals, governments are often not reluctant to step on the toes, or close the mouths, of those who object. Some governments are more gentle, some more harsh; but they always seem to violate civil liberties in one way or another.

A brief survey of the major battles for individual rights in recent American history bears witness to what I have just said. 1920 is a useful starting point because the end of World War I ushered in the modern era, and also because it was the year of the founding of the American Civil Liberties Union (ACLU), which has played a central part in the ongoing struggle to implement the Bill of Rights. Indeed, the ACLU was the successor to an organization that during World War I worked to restrain jingoists and ordinary patriotic citizens from running amok through the Constitution in trying to eradicate dissent to the war.

Soon after its founding, the ACLU was kept busy while the Justice Department, spurred by nativist fears nurtured by the Russian Revolution, routinely violated the rights of aliens and radicals in the notorious Palmer Raids. Later in the 1920's, the ACLU defended John Scopes in his trial for violating the Tennessee anti-evolution law, and it assisted Nicola Sacco and Bartolomeo Vanzetti in their ultimately unsuccessful struggle to avoid execution.

Each succeeding decade had its share of civil liberties conflict. In the 1930's a number of groups defended the "Scottsboro Boys" against dubious rape charges and mounted efforts to have their convictions

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reversed and sentences reduced.[1] Civil libertarians suffered a major defeat in the 1940's when the Supreme Court upheld a decision, claimed to be necessitated by national security, to evacuate over 100,000 Japanese-Americans—citizens as well as aliens—from their West Coast homes and confine them in concentration camps.[2] Another major battle of that decade—this time a victory—established the right of school children (and presumably adults) not to salute the American flag when this action would violate individual conscience.[3]

The 1950's were darkened by the exploits of Senator Joe McCarthy and others responsible for blacklists, loyalty oaths, and the ruined careers and reputations of thousands of Americans. That decade also witnessed one of the most important court decisions in the nation's history, *Brown v. Board of Education*,[4] which announced the unconstitutionality of de jure segregation in public schools. The 1960's were characterized by civil rights struggles and protests of the war in Vietnam. Major advances included the decisions in *Gideon v. Wainwright*,[5] establishing the right of indigent criminal defendants to state-appointed counsel; *Baker v. Carr*[6] and *Reynolds v. Sims*,[7] the "one-person, one vote" decisions; and *Griswold v. Connecticut*,[8] establishing the initial elements of a right to sexual privacy. The 1970's saw battles accompanying the escalation and finally the end of the Vietnam War, the scandals of Watergate, and the effort to impeach Richard Nixon. The Supreme Court decided *Roe v. Wade*[9] and *Doe v. Bolton*,[10] which declared unconstitutional state laws criminalizing abortion, and *New York Times Co. v. United States*,[11] which upheld the right of newspapers to publish the Pentagon Papers.

This brief summary underscores the range and importance of the threats to civil liberties and, correspondingly, the need for constant vigilance by all who would protect constitutional rights. The Bill of Rights is not self-enforcing. Today, some of the personalities and the conflicts are new, but the underlying issue is old: will the Constitution provide the protection it promises?

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[1] *See* Patterson v. Alabama, 294 U.S. 600 (1935); Norris v. Alabama, 294 U.S. 587 (1935); Powell v. Alabama, 287 U.S. 45 (1932).

[2] Korematsu v. United States, 323 U.S. 214 (1944).

[3] Taylor v. Mississippi, 319 U.S. 583 (1943).

[4] 347 U.S. 483 (1954).

[5] 372 U.S. 335 (1963).

[6] 369 U.S. 186 (1962).

[7] 377 U.S. 533 (1964).

[8] 381 U.S. 479 (1965).

[9] 410 U.S. 113 (1973).

[10] 410 U.S. 179 (1973).

[11] 403 U.S. 713 (1971).

At present there are an unusual number of serious threats to civil liberties, as recently catalogued in a two year report of the ACLU.[12] The causes are varied and include the decline in the national economy, the rise of the evangelical right as a political force, concern for national security, and the emergence of single-issue politics.

The anti-civil liberties lobby has offered, among other things, school prayer initiatives, legislation requiring the teaching of "scientific creationism," and efforts to restrict freedom to have an abortion. The President himself has proposed a constitutional amendment to allow "voluntary" prayer in public schools,[13] although it is obvious—and the Supreme Court has recognized—that there is no such thing as "voluntary" prayer in schoolrooms filled with children.[14] Religious and civil liberties groups are fighting the amendment and other attempts to authorize what in effect would be an official Christian religious exercise. Advocates of so-called "scientific creationism" were dealt major defeats recently in ACLU challenges to state creationism statutes in Arkansas[15] and Louisiana,[16] and other states considering similar legislation may now be dissuaded from proceeding. Anti-abortion zealots have thus far been unable to enact a "human life" statute[17] or constitutional amendment which would reverse *Roe v. Wade*.[18] The fight continues over such proposals as well as other attacks on abortion rights such as federal funding restrictions,[19] mandatory waiting periods,[20] restriction of minors' rights to abortion without parental consent,[21] and mandatory notification of husbands.[22]

There are also dangerous initiatives involving national security issues and the public's right to know, as well as the right to be free from government spying. The recently enacted Intelligence Identities

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[12] American Civil Liberties Union, Civil Liberties in Reagan's America: A Special Two-Year Report on the ACLU's Defense of the Bill of Rights Against the Attacks of the Administration and its Allies (October 1982) (A copy of this report is on file with the Antioch Law Journal.)

[13] Message to the Congress Transmitting Proposed Legislation, 18 Weekly Comp. Pres. Doc. 664-666 (May 24, 1982).

[14] *See* Abington School District v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); *See also* McCollum v. Board of Education, 333 U.S. 203, 227 (1948) (Frankfurter, J., dissenting) ("The law of imitation operates, and nonconformity is not an outstanding characteristic of children.").

[15] McLean v. Arkansas, 529 F. Supp. 1255 (E.D. Ark. W.D. 1982).

[16] Aguillard v. Treen, N.Y. Times, Nov. 23, 1982, at 23, col. 1 (E.D. La. Nov. 22, 1982).

[17] *See, e.g.*, S. 158, 97th Cong., 1st Sess., 127 Cong. Rec. S287-88 (daily ed. Jan. 19, 1981).

[18] 410 U.S. 113 (1973).

[19] *See generally* Harris v. McRae, 448 U.S. 297 (1980).

[20] *See, e.g.*, City of Akron v. Akron Center for Reproductive Health, Inc., 651 F.2d 1198 (6th Cir. 1981), cert. granted, 102 S. Ct. 2226 (1982) (argued November 30, 1982).

[21] *See* H.L. v. Matheson, 450 U.S. 398 (1981).

[22] *See* Scheinberg v. Smith, 659 F.2d 476 (5th Cir. 1981).

Protection Act[23] makes it a crime to publish information identifying FBI or CIA agents, including information which is concededly public. Not to be outdone, President Reagan has signed an executive order which authorizes intelligence agencies to spy on American citizens not even suspected of breaking the law.[24] Efforts are also being made to weaken the Freedom of Information Act,[25] making it easier to prevent the public from receiving information about its own government's activities.

We are also witnessing more frequent attempts to censor books in the name of "community values" and preservation of the family. Incredibly, the book banners have targeted such classics as *The Adventures of Huckleberry Finn*, as well as other important works including *The Best Stories of Negro Writers* and *Slaughterhouse Five*. In addition to such attacks on the first amendment, the radical right has singled out certain groups for special attention: in its view of America, the rights of women, gays, racial minorities, children, prisoners, and aliens must be subordinated to a particular moral and religious code.

Despite these threats, we are far from helpless. Not only are the ACLU and other groups challenging all these initiatives, but Americans in greater numbers are becoming aware of the disastrous consequences which would follow if the opponents of the Constitution were to succeed.

It is vital to recognize that new approaches may be necessary. As you know, the struggle to secure civil liberties has relied heavily on the courts; most of the victories referred to earlier were won in the federal courts, often in the Supreme Court. ACLU lawyers have argued more cases before the Supreme Court than any organization other than the United States government. Last year, ACLU staff and volunteer lawyers handled more than 6,000 matters, and courts will continue to play an indispensible role in the effort to protect constitutional rights.[26]

Nevertheless, significant changes require new tactics. First, the complexion of the Supreme Court has changed drastically in little more than a decade. The Burger Court has been highly uneven in its civil liberties decisions. In particular, it has been notably unsympathetic to the rights of the poor, it has contracted the state action concept, it has reduced the rights of criminal defendants, and it is usually supine when the government makes claims of national security

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[23] Pub. L. No. 97-200, 96 Stat. 122 (1981).

[24] Exec. Order No. 12333, 46 Fed. Reg. 59,941 (1981).

[25] *See, e.g.*, H.R. 5861, 96th Cong., 1st Sess. (1980).

[26] *See* Ennis, *A.C.L.U.: 60 Years of Volunteer Lawyering*, 66 A.B.A. J. 1080 (Sept. 1980).

to justify incursions on the constitutional. Even in fields where it has been relatively sympathetic to individual rights, the Court's unpredictability gives reason to pause before choosing it as a forum.

Second, state courts and state constitutions are assuming increasing importance. In instances in which the Supreme Court has construed the Constitution narrowly, identical or similar clauses in state constitutions have been read more broadly by state courts.[27] Under normal circumstances, state constitutions would be a promising weapon in the arsenal of civil libertarians. Today, the Reagan Administration's preference for state rather than federal regulation, combined with the limitations of the Supreme Court, will surely result in more constitutional law adjudication in state forums.[28] For example, the Louisiana creationism case was won on state constitutional grounds.[29]

Third, lawyers often do not have the luxury of taking an all or nothing stance when appearing before an unsympathetic bench. Counsel sometimes must seek a limited victory and leave broader issues for another day, rather than risk losing in a big way and establishing unfavorable precedent. By the same token, more care must be exercised in the selection of plaintiffs and the development of sound factual records in test cases. The creationism case in Arkansas was won only after an extraordinary effort to develop a compelling factual showing of the religious nature of a creationist view of history and the consequences of teaching the subject in science rather than religion classes.[30]

The critical role that federal courts must continue to play in protecting constitutional rights depends of course on their continued jurisdiction. Some who are dissatisfied with federal court decisions have advocated the radical approach of stripping the federal courts of jurisdiction to hear abortion, school prayer, or certain school desegregation cases. More than 40 such jurisdictional bills have been introduced in Congress;[31] although none has been enacted, the threat remains and must be countered whenever it appears.

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[27] *See, e.g.*, Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (upholding California Supreme Court interpretation of state constitution to permit access to a private shopping center, finding a broader right of access than under the first amendment).

[28] *See generally Special Section: the Connecticut Constitution*, 15 CONN. L. REV. 7 (1982).

[29] Aguillard v. Treen, N.Y. Times, Nov. 23, 1982, at 23, col. 1 (E.D. La. Nov. 22, 1982).

[30] McLean v. Arkansas, 529 F. Supp. 1255 (E.D. Ark. W.D. 1982).

[31] *See, e.g.*, S. 1005, 97th Cong., 1st Sess. (1981) (busing); S. 481, 97th Cong., 1st Sess., 127 Cong. Rec. S 1284 (daily ed. Feb. 16, 1981) (school prayer); S. 158, 97th Cong., 1st Sess., 127 Cong. Rec. S 287-88 (daily ed. Jan. 19, 1981) (abortion).

Even when courts can be relied on to protect individual rights, an effective civil liberties program should include a comprehensive legislative strategy. When the courts are unsympathetic, such a strategy is essential. Civil libertarians have become more sophisticated in working with Congress and the state legislatures, but more must be done. Since 1960, when the ACLU first appointed a Washington Legislative Director, it has provided research and testimony before committees and has helped to organize major lobbying efforts. These activities are expensive, and the ACLU is at a financial disadvantage when opposing state governments and well-financed single issue groups. Grass roots involvement in lobbying is often essential if we are to prevail in tough legislative issues. The ACLU tries to achieve this involvement by the publication of a legislative newsletter and the organization of a nationwide "Bill of Rights Lobby."

Legislative programs also involve difficult tactical questions that sometimes divide allies who are all devoted to civil liberties. One illustration arose in the period after Watergate, when there was strong congressional support for reform of the intelligence agencies. One bill that was introduced would require the FBI, before conducting electronic surveillance of persons suspected of being a threat to national security, to obtain a judicial ruling that the target had some connection with, or was controlled by, a foreign power. By ACLU lights, this was not a reform but a virtual invitation to surveillance under a porous legal standard. Nevertheless, the case law was against us since judicial decisions generally did not require *any* prior approval for "foreign intelligence" surveillance. In order to make the bill a clear improvement over existing law, some members of Congress offered an amendment to limit surveillance to circumstances in which the government has solid information that the individuals being investigated are engaged in *criminal* conduct. That amendment, if enacted with the bill, would sharply reduce the proposed wiretapping. What should the ACLU have done? ACLU policy at the time opposed *all* electronic surveillance. Nevertheless, we eventually decided to support the amendment, making it clear throughout that our first preference was to end all wiretapping. The bill eventually passed,[32] with the amendment, and the ACLU received some criticism from those who claimed we compromised our principles. Nevertheless, I continue to believe that our tactics here are correct given the realities of the problem.[33]

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[32] Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (1978).

[33] The problem of legislative tactics is discussed more fully in Dorsen, The American Civil Liberties Union: An Institutional Analysis (George Abel Dreyfous Lecture delivered at Tulane Law School, March 18, 1982) (unpublished).

The 1980's promise to be a time when the usual pressures on civil liberties are intensified by a recidivist political climate, a retrenching Supreme Court, a measure of xenophobia, and an evangelical fundamentalist movement that has moved boldly into politics. Defense of civil liberty will require a strong and unified strategy to limit government encroachments. This will take commitment and resources. On behalf of the American Civil Liberties Union, I can pledge that every effort will be made to continue the commitment and muster the resources that are necessary for this vital task—the preservation of the rights of the American people under the Constitution.