

## FIRST AMENDMENT WATCH

NAT HENTOFF

### First Amendment snapshots

**I**T WAS THOMAS JEFFERSON's notion that "a bill of rights is what the people are entitled to against every government on earth, general or particular." I wouldn't change a word, and if I had a car with a big enough bumper, I'd stick that right on there. But even with a Bill of Rights, what do we need to make the words actually work?

Most of our knowledge about the state of our civil liberties at any given time comes from "newsworthy" battles over certain statutes, arrests, acts of censorship, and court decisions—particularly rulings from the Nine Keepers of the Constitution. But this information only gives us a limited picture of the daily insults and injuries inflicted on citizens by their government. Such incidents infrequently become national news, and they are reported glancingly, if at all, by the local press.

Accordingly, to get a clearer view of the everyday war between liberty and the state, a range of ordinary constitutional confrontations should be explored. Most of these involve the First Amendment, but several emphasize a citizen's alleged protections from intrusive government officials. If a few of these contradictions appear frivolous, they are not at all unimportant to the citizens affected.

Take the case of two basketball teams, representing Chicago yeshiva high schools, who were told by the Illinois High School Athletic Associa-

tion they could not participate in state-regulated games unless their members removed their yarmulkes (skullcaps) on the field of play. Why? Because if these small head coverings should fall off a Jewish head onto a slippery gymnasium floor, there could be severe ecumenical accidents.

In federal district court, the yeshiva high schools produced, as an expert witness, a New York yeshiva principal who reported that in his enlightened state yarmulkes were permitted, being classified in the same category at sports events as eyeglasses and face masks. And never had there been a physical injury to a basketball player—Jewish, Christian, or other—as a



result of a loose skullcap. The judge agreed with American Jewish Congress lawyers that prohibiting these Chicago boys from wearing yarmulkes was a violation of their First Amendment right to free exercise of their religion. (Orthodox Jews must keep their heads covered at all times.)

ACLU founder Roger Baldwin once remarked that "no fight for civil liberties ever stays won." It is quite possible, therefore, that in some other federal circuit, the fight to simultaneously keep one's head covered and play basketball will have to be waged again. But surely, *some* constitutional wars do get finished for all time. The right of lonely pamphleteers, for instance, to hand out their broadsides without first receiving state permission. How would we ever have had an

American Revolution without pamphleteers?

Well, in Keene, New Hampshire, two antinuclear citizens were arrested in 1980 for distributing handbills on a public street without permission from the chief of police. A local ordinance mandated that the chief had to pass on all such matters, thereby giving him, in effect, the power to license printed speech, and to deny a license. Last year, however, the New Hampshire Supreme Court struck down that ordinance as a clear infringement on these citizens' right "to exercise their freedom to seek political change by distributing leaflets." Roger Baldwin, though, will surely be proven right when some other pamphleteers are busted in another city for taking the First Amendment too literally.

It was the New Hampshire Civil Liberties Union that stripped the Keene police chief of his royal pretensions; and it was the Massachusetts Civil Liberties Union that prevailed in another case and revealed how nearly all government officials regard the Bill of Rights as just a tool of the unruly. For some time, members of the Irish Prisoners of War Committee attempted to mount a silent, nonviolent, nonobstructive vigil in front of the Boston residence of the British consul. Each time, the vigil was disrupted by Boston cops who physically removed the silent witnesses. At last a Suffolk Superior Court judge brandished the First Amendment before the Boston police commissioner; and now, as of yore, the Crown's representative in Boston must suffer the remonstrances (in this case, voiceless) of disrespectful colonists.

**T**HERE ARE ALSO EVERY-day occasions when agents of the government seek to preserve *their* First Amendment rights against their formidable employers. Consider Wendell Young, a fifteen-year veteran of the Cincinnati police force who is also president of the Sentinels, an organization of black Cincinnati police officers.

Young had publicly criticized his superiors for alleged civil-rights violations by the police department—both within the department and outside—and was told to keep his mouth shut. Rule 1.20 of the police manual stated unequivocally that any member of the police division had to obtain prior approval before speaking in public and that anything said in public

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should not “reflect discredit on the Division” or “adversely affect morale.”

Police Officer Young felt this rule not only mugged his rights as a citizen but could prevent his appearance as a witness before the United States Civil Rights Commission—unless he was content to simply do a tap-dance. He protested the rule, publicly. For that act of provocative insubordination, he received a formal reprimand from the chief of police, a copy of which was entered into his personnel file.

son’s Bill of Rights to keep them off the state plantation. But children are also persons under the Constitution, not that most of them have any reason to be aware of such an allegation.

In the Germantown Elementary School (Anne Arundel County, Maryland), officials some months ago had to cope with a nine-year-old girl who had actually spoken out in class without being asked to. In solemn conclave, the officials decided that rather than suspend her for this arrant mis-

the community,” she says. “Before this principal came, there had been a considerable discipline problem in the school, and the parents think he’s been quite effective.”

Mello remains bemused by this particular behavior-modification technique of the principal, which is likely to flourish, as it were, if the ACLU loses the suit. “I know what the punishments are with this technique,” she says. “But what are the rewards?”

## ***In one Nebraska town, a longtime government worker was placed on probation because his wife wrote letters to a newspaper in which she criticized the town government.***

When the local American Civil Liberties Union affiliate filed suit, on First Amendment grounds, in federal district court, the city of Cincinnati removed the reprimand from Young’s file and eviscerated Rule 1.20. The case is over, and the only thing Young asked for that he did not get was \$10 in damages. He figures he came out far enough ahead anyway; but there are some who would say he only regained his birthright.

It’s disheartening enough when a government employee has to hire a lawyer just to speak his mind in public. But it gets downright depressing when he’s punished for what his wife says outside the hearth. In a Nebraska town, a longtime government worker was placed on probation because his wife wrote letters to a newspaper in which she criticized the town government. The man was accused of condoning his wife’s views, and he was further instructed that if he did not muzzle her, he would be fired.

The Nebraska Civil Liberties Union threatened to bring the local officials up before the bar of the First Amendment. The officials caved in. They were so rattled by this blow to their assumed powers that they also paid damages to the employee, as well as attorneys’ fees, and then surprisingly asked the local ACLU to help draft grievance procedures for municipal employees.

So far, we have been dealing with adult citizens calling on Mr. Jeffer-

son, they would try a more humane approach. The principal had taken a course in behavior modification.

The child was sentenced to four days in a windowless storage room. She was allowed to leave only to go to the bathroom—and then only at assigned times—and to get her meals. (But she had to eat in the storage room.) The child was just left there. There was no supervision. And she was forbidden from communicating with anyone. As an index of the intractability of her disruptive behavior, the child one day peeked out of the door of the storage room. By fortunate happenstance, she was caught, and a fifth day was added to her sentence.

The ACLU of Maryland brought suit against the school officials, charging that the punishment was harmful, degrading, and “in disproportionate response to the alleged offense.” The case is still pending, but the child’s mother has transferred her to another school. Damages being asked come to \$250,000, plus counsel fees; and the ACLU is also pushing for an injunction that will prevent the school from placing any other children in solitary confinement or “in closets or similar enclaves as a means of discipline.”

Surely the parents of kids still in the school must be applauding the ACLU for its rescue operation. Not so, says Barbara Mello, the attorney handling the case. “There’s been a generally unfavorable reaction from members of

**T**HERE ARE, OF COURSE, many everyday battles fought by youngsters over their First Amendment rights. Only a few battles center on the right to speak out in a classroom. Others concern the right of students to run their high school and college papers without prior restraint. Some of these “free-speech wars,” as the Wobblies used to call them, are won by the nation’s future, and some are lost. But I have not heard of a more instructive paradigm of the ignorance of educators in these matters than another story out of New Hampshire.

Last June, officials of Keene State College learned that some of their students were about to commit free-speech mayhem. These students were members of the Public Affairs Forum, an official campus organization. They had just invited local high-school kids to an open discussion at Keene State on the subject “Oppression in the Schools.”

Among the advertisements for this event were flyers (those damn pamphleteers again) containing the slogan “School Sucks.” The president of the Public Affairs Forum, a college student, says the slogan was chosen because it often appears as graffiti in the local secondary schools. (For those of you who have not been in a high school for some time, it’s worth noting that this particular form of graffiti is not indigenous to the Granite State.)

Certain administrators—curators of higher learning—at Keene State College were greatly offended by the slogan. One of them canceled the meeting at which the high-school students were prepared to annotate that slogan.

Then it turned out that not only the slogan was at issue. Dr. Barbara Seelye, president of Keene State College, upheld the cancellation and added that the nature of the subject to be discussed at the forum was itself “inappropriate.” Also objecting to such unalloyed free speech at the col-

lege was the assistant to the president, who also—and not incidentally—served as chairman of the Keene school board and was thereby in presumed command of these irrepressibly offensive high-school kids.

The college students involved with the Public Affairs Forum asked the New Hampshire Civil Liberties Union to be their paladins. The CLU thereupon unfolded an array of First Amendment claims. The college had violated its students' rights to free speech and association, their academic freedom, and their due-process rights. (The meeting had been canceled summarily, without consulting either the student group or its faculty adviser.)

Negotiations began between the Civil Liberties Union and the Keene State College administration. Court action could be avoided, the higher educators were told, if they simply allowed the forum on oppression in the high schools to take place on another date. No way, said the administrators. Acting as a choral accompaniment to their president, they insisted the subject matter was "inappropriate" for airing on the state college campus. Furthermore, the administrators explained, the program was not balanced. Speakers with differing points of view had not been invited. Worse yet, no "expert" speakers had been asked to come. (In this context, "expert" means adults who have learned how to function within an institutionalized line of command.)

A disrespectful student at the college noted in rebuttal that "when we had the Maryknoll nuns on campus from El Salvador, we didn't have a member of the military junta here to balance their views."

(Well, there's a certain amount of slippage at even the best-run institutions.)

Off to federal court went the New Hampshire Civil Liberties Union; but shortly after the suit was filed, the college administration decided that it would be less costly to allow the damn forum than to undertake a prolonged court case. However, in order to be let off the litigation hook, the college had to sign a consent agreement in which it promised not to interfere any more with the content, however "inappropriate," of future sessions of the student-run Public Affairs Forum.

One final example: an inspirational victory in South Carolina. Four miles outside of Edgefield, the hometown of Strom Thurmond, is the Strom Thur-

mond High School, nobly adorned by a gun turret and a battleship anchor flanking the flag poles.

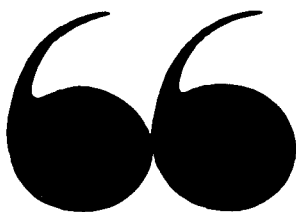
Last summer, the South Carolina NAACP and Jesse Jackson's PUSH (People United to Save Humanity) decided they'd like to have a prayer vigil at the high school as the start of a march into town to support the extension of the Voting Rights Act. (Strom considers that bill an affront to the South.) School officials refused permission for the demonstration because it would be "a disgrace to the Senator's name" to have all those ungrateful blacks holding that kind of rally at a school named for him.

The ACLU of South Carolina hied itself to a federal judge who ruled that,

even in Edgefield, the First Amendment has a mite more power than Old Strom. So on a Sunday the Reverend Jesse Jackson led the prayer vigil under the gun turret, and afterwards a thousand demonstrators marched peaceably into Edgefield—watched by the white folks, from their porches, along the route.

It turned out, ironically, that the local ACLU didn't have to do much new legal research to get the go-ahead from the judge. Practically all their arguments and case citations came from an earlier case when the ACLU's Southern Regional Office defended the right of the Ku Klux Klan to stage a rally at a public-school athletic field in Mississippi. □

# WORLDVIEW



*These are the times that try men's souls.*

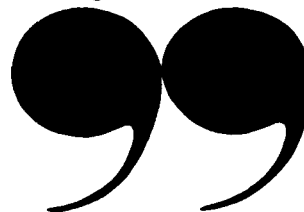
Clearly, Thomas Paine understood the nature of international affairs—the ambivalence, ambiguity, confusion. And just as clearly, what was said of 1776 can be said of 1980. Whether the revolution is in America or Nicaragua, thinking men and women must strive to evaluate, to understand, and, ultimately, to decide.

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JONATHAN MARSHALL

## NATO strikes out

**I**T HAS BEEN SAID MANY times before, but this time it really seems to be true: NATO is terminally ill. Never before have so many American Europhiles expressed such dismay at the behavior of their Western allies. American disenchantment with NATO has been brewing a long time, but after a year of European antinuclear demonstrations, and the stinging frustrations of dealing with Europe over the Polish crisis, even confirmed Atlanticists are now speaking in an isolationist tongue.

The voices threatening Europe with an imminent dissolution of the alliance come from the top of the Reagan administration and from sober, respected commentators in the media. Lawrence Eagleburger, then assistant secretary of state for European affairs, warned last June that if Western Europe reneged on its decision to accept nuclear missiles capable of striking the Soviet Union, it "would raise a doubt in the mind of many Americans who would not understand why our allies are less committed to their security than is the United States. And worst of all, we would all be profoundly uncertain of our future ability to take difficult decisions together." Arthur Burns, U.S. ambassador to Bonn, told Germans of "a growing sentiment in America to turn back upon itself and let Europe depend for its security and freedom upon its own resources or upon Soviet good will. Isolationism is by no means the alternative that my country seeks, but . . ." He left the threat dangling. Even the secretary general of NATO, the Belgian Joseph Luns, observed in October that the "risk" to NATO solidarity was "more grave than ever before" and warned

that the "synchronization of the alliance mechanism" might forever be thrown out of kilter.

The doomsayers within the administration are echoed by a chorus of media commentators. The op-ed pages of major newspapers are now filled with columns and editorials breathing dismay over our allies and calling for all manner of retribution for their sins. Irving Kristol, the neoconservative guru and *Wall Street Journal* columnist, speaks plainly of the "impending collapse of NATO." *Newsweek's* Meg Greenfield admits "The Grand Illusion Is Over." Even Henry Kissinger, for whom NATO is the bedrock of Western geopolitics, confirms sadly that "something is deeply wrong in the Atlantic Alliance."

Not since the mid-sixties, when Senator Mike Mansfield garnered fifty-one votes in the Senate to back his resolution calling for the United States to withdraw troops from Europe, has the challenge to the alliance been so widespread. Now, as never before, the fundamental divergence of interests between Europe and the United States has been exposed to view, and with it the political bankruptcy of an alliance based on massive American expenditures to protect Europe from a threat that the Europeans themselves increasingly consider remote.

The roots of the crisis can be traced back any number of years, but they stem most obviously from the breakdown of transatlantic relations that occurred during the Carter era. In a series of spats beginning with Carter but continuing with a vengeance into the Reagan administration, the United States has tested Europe's faith—often unjustifiably—and found it utterly wanting:

■ The Soviet invasion of Afghanistan in December 1979 prompted Carter's notorious admission that his "opinion of the Russians changed most drastically." Carter urged Western Europe and Japan to join the United States in boycotts of trade and the Olympic games to punish the USSR. Both were resounding failures. West German Chancellor Helmut Schmidt, who made no secret of his disdain for President Carter, said he would "not permit ten years of détente and defense policy to be destroyed." France, West Germany, Italy, and Japan jumped into the breach opened by the American embargo and pursued high-level trade talks with the Soviets.

■ The Iranian hostage crisis, a far more emotional issue for most Americans than Afghanistan, dramatically wid-

ened the chasm between Europe and the United States. In a major address delivered in April 1980, Carter declared that it was "vital that the burden of sacrifice be shared among our allies and among other nations." He proposed that Europe join the United States in a variety of trade and diplomatic sanctions against the Khomeini regime, sanctions that were mostly not forthcoming. "What the United States is requesting is that its closest allies now begin to act like allies," the *Los Angeles Times* editorialized. The *Washington Post* warned that Europe's dawdling would "affect the American outlook on other matters that may be of much more interest to the allies than are the hostages." When neither Europe nor Japan took the hint, the *New York Times* exploded that the United States "is being routinely defied by its major allies." As the hostage crisis stretched on day after day, Americans came to think they had no real friends in the world, and nursed old resentments about the ingratitude of people we had saved in two world wars.

■ After much arm-twisting from the United States, the NATO countries in May 1977 agreed to raise their real defense spending by 3 percent a year. The solemn pledges were only so much hot air. Congressman Les Aspin released a study two years later showing that more than half of NATO was ignoring the commitment. "After nearly thirty years as an alliance," he wrote, "NATO is still unbalanced. The United States continues to contribute more than its fair share. Most of the others are still not pulling their own weight."

■ Despite official claims from Washington that Libyan leader Muammar Qaddafi had dispatched assassination squads to murder the leader of the Western world, and that he was masterminding terrorism throughout Western Europe, NATO refused to join the United States in sanctions against Libya. NATO foreign ministers openly shrugged off American intelligence reports as unreliable. Secretary of State Alexander Haig practically begged for their "understanding and support" but got neither.

■ Only days after Haig made his pleas for a united front against Libya, Poland's military leadership cracked down on the Solidarity movement. Despite having had over a year to plan a response, NATO was left divided and confused. West Germany announced that it would continue to send aid to Poland, and advised the United States not to interfere in Poland's internal affairs.

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