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Courting disaster

Big Brother may not be able to stop citizens from speaking, but he'll be listening to us, watching us, and searching us

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TWO DECISIONS RELEASED on June 17 by the Supreme Court give us a preview of how the "war on terrorism" is likely to impact our civil liberties — and how it's not. The bottom line? Attorney General John Ashcroft probably won't succeed in muzzling us, even when we're highly critical of the government. But law-enforcement officials will almost certainly receive something akin to carte blanche when it comes to invading our privacy. Big Brother, in other words, may not be able to stop citizens from speaking, but he'll be listening to us, watching us, and searching us.

Ashcroft, you'll recall, threw down the gauntlet during his December 6 appearance before the Senate Judiciary Committee when he warned that criticism of the administration's anti-terrorism initiatives bordered on treason. "To those who scare peace-loving people with phantoms of lost liberty, my message is this," he said. "Your tactics only aid terrorists — for they erode our national unity and diminish our resolve. They give ammunition to America's enemies, and pause to America's friends. They encourage people of good will to remain silent in the face of evil."

This performance by the nation's highest law-enforcement official aroused reasonable fears among civil libertarians. Although the Supreme Court has been notably protective of free speech in recent decades — an unusually strong coalition of liberal and conservative justices has produced a number of unanimous and near-unanimous pro-free-speech decisions —

observers wondered if the government's attempt to play the public-safety card would erode the Court's enthusiastic support of the First Amendment.

FIRST, THE GOOD news. In *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, the Court ruled 8-1 in favor of a challenge to a local ordinance requiring registration to conduct door-to-door solicitations. In doing so, it rejected arguments that, in these dangerous times, the government should know who is walking around neighborhoods, going from house to house. While it's true that the government did not argue explicitly that the war on terrorism justified the ordinance, it did try to defend its position on general public-safety grounds. And Chief Justice William Rehnquist, the lone dissenter in the case, cited "the very real safety threat that canvassers pose." In short, the decision indicates that the Court may be willing to hold the line when it comes to free speech — even in the face of purported threats to public safety.

In 1999, Jehovah's Witnesses sued the Village of Stratton, Ohio, to challenge the village's ordinance requiring door-to-door canvassers and solicitors to obtain a municipal permit. Jehovah's Witnesses objected, claiming that their duty to proselytize was commanded by God, and, since they derive their authority to preach from Scripture, the Village of Stratton had no power to approve or disapprove of such solicitations. "For us to seek a permit from a municipality to preach we feel would almost be an insult to God," they argued in their brief.

Civil libertarians believed that free speech was particularly vulnerable in this case. First, the ordinance did not give the municipality power actually to*deny* a permit; rather, it merely required registration. Second, permits were required for an all-inclusive variety of door-to-door solicitations, without targeting any particularly unpopular group or cause. So the "viewpoint discrimination" that frequently underlies such permitting ordinances — long frowned upon by the Supreme Court — was absent. Indeed, when such ordinances and statutes proceed under the principle of "content neutrality," they enjoy a greater presumption of constitutionality.

Nonetheless, the justices decided the case in favor of unrestricted free speech. Six of the justices did so specifically on the ground that to require a solicitor to obtain such a permit before going door-to-door to peddle an ideological position would adversely affect the look and feel of a free society:

It is offensive — not only to the values protected by the First Amendment, but to the very notion of a free society — that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.

It's important to note that Rehnquist's dissenting argument, which focused on the societal benefits of the government's keeping tabs on such solicitation, was rejected. Rehnquist pointed

to the recent double murder of Half and Susanne Zantop in Hanover, New Hampshire. The two young murderers had gone door-to-door, pretending to do an environmental survey as they looked for easy targets to rob. While Rehnquist admitted that it was unlikely that the two murderers would have sought a solicitor's license, he opined that if they lacked such a permit, some resident might have reported them to police before they killed. It is encouraging, to say the least, that Rehnquist's notion that neighbors should report unlicensed strangers to the police did not resonate with the other justices.

Of course, *Watchtower Bible* involves a type of speech very different from that likely to arise in a governmental attack on speech related to the war on terrorism. Such speech is more likely to be deemed subversive, rather than merely annoying or unpopular (as was the speech in *Watchtower Bible*). Still, *Watchtower Bible* shows that the Court's liberal-conservative coalition on behalf of free speech is alive and well, undaunted by assertions of public-safety requirements.

NOW FOR THE BAD news. The Fourth Amendment's protection against "unreasonable searches and seizures" is under successful attack. In *United States v. Drayton*, the Court dealt a blow to the privacy of every citizen — in part, it appears, because of the perceived need to do so in the face of the threat of domestic terrorism.

The case involved a long-distance Greyhound bus on which two friends were riding. The driver allowed three police officers to board at a rest stop in Tallahassee, Florida, as part of what the officers described as a "routine interdiction" inspection for drugs and weapons. One of the officers approached the two friends, Christopher Drayton and Clifton Brown, and asked if he could check their luggage and pat down their clothes. The officers did not inform Drayton, Brown, or any of the other passengers that they had the right to refuse such a search (as there were no grounds to believe that any of the passengers possessed contraband). Packets of cocaine were found on Drayton and Brown during the search.

The Court ruled that the searches were lawful because the two men "voluntarily" consented, even though they could have refused. Justice Anthony Kennedy, writing for himself and Justices Rehnquist, Sandra Day O'Connor, Antonin Scalia, Clarence Thomas, and Stephen Breyer, concluded that there was no element of coercion in how the police officers approached the two passengers. The armed officers, he noted, spoke "in a polite, quiet voice" and "did not brandish a weapon or make any intimidating movements." Nor did it matter, they ruled, that the officers did not bother to inform the passengers that they had a right to refuse to be searched. What the majority did not explain, of course, was why two young men carrying packets of cocaine taped to their bodies would voluntarily agree, without any element of coercion, to be searched by three police officers — especially if the young men understood that they had a legal right to

just say "no" to the cops. This obvious point was remarked upon by the three dissenters — Justices David Souter, John Paul Stevens, and Ruth Bader Ginsburg.

The Department of Justice argued in its brief that "in the current environment," police officers need the authority to approach and question those who "travel on the nation's system of public transportation," thus equating various forms of ground transportation with air travel in their vulnerability to terrorism.

If officers were required to inform citizens of their right to refuse being searched, the DOJ argued, then such "authority to approach and question" would yield fewer acquiescent citizens among both the innocent and the guilty. The subtext, of course, is that in this war on terror, society cannot afford to inform citizens of their constitutional right to be free of searches in the absence of evident grounds to justify such an invasion of privacy.

The majority agreed: "In [Officer] Lang's experience, however, most people are willing to cooperate. Some passengers go so far as to commend the police for their efforts to ensure the safety of their travel." The Court continued: "Bus passengers answer officers' questions and otherwise cooperate not because of coercion but because the passengers know that their participation enhances their own safety and the safety of those around them."

Even the three dissenting justices recognized that the constitutional landscape has changed since September 11. Their dissent begins with this observation:

Anyone who travels by air today submits to searches of the person and luggage as a condition of boarding the aircraft. It is universally accepted that such intrusions are necessary to hedge against risks that, nowadays, even small children understand. The commonplace precautions of air travel have not, thus far, been justified for ground transportation, however, and no such conditions have been placed on passengers getting on trains or buses. There is therefore an air of unreality about the Court's explanation that bus passengers consent to searches of their luggage to enhance their own safety and the safety of those around them.

The dissenters simply were not convinced that passengers view ground travel as quite as dangerous as air travel — so far. However, even the dissenters appear to miss the real point: the "air of unreality" in the majority's opinion emanates from its notion that travelers carrying cocaine would readily consent to a search "to enhance their own safety and the safety of those around them."

The only optimistic element of this whole analysis is that citizens, assuming that they *know* their rights, still retain the right to refuse the officer's request. That said, one

suspects that if too many citizens begin to learn and exercise that prerogative, the right to refuse such searches might itself be eroded by an increasingly terror-wary Supreme Court.

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