The First Amendment's Robust Protection of Speech on Political and Social Issues

August 12, 2009

> The vitality of civil and political institutions in our society depends on free discussion. . . . [I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

Terminiello v. Chicago, 337 U.S. 1, 4 (1949) (citation omitted).

* * * * * * *

Throughout our nation's history, Americans have used their freedom of speech to express their viewpoints on important social issues of their day. While the venues have evolved over time—from soapbox oratories on the village green to blogs and email blasts—the First Amendment's protection of issue advocacy has remained robust.

Citizen participation in town hall meetings and similar events to discuss social issues and legislative proposals pre-dates our Nation's founding and continues to the present day. When such meetings are opened up for citizen questions or comments, members of the public should feel free to ask difficult questions and make their opinions known. This form of non-disruptive participation in the government decision-making process is fully protected by the First Amendment. "There is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

"[I]nteractive communication concerning political change"—such as citizen feedback at a town hall meeting—is "core political speech" for which the First Amendment's protection is "at its zenith." *See Buckley v. Am. Const. Law Found*., 525 U.S. 182, 186-87 (1999) (citing *Meyer v. Grant*, 486 U.S. 414, 422, 425 (1988)). Americans have the freedom to speak out for or against legislative proposals or other government action at town hall meetings and elsewhere without fear of retribution or surveillance by the government. As the Supreme Court has noted, "[t]he purpose of the Constitution and Bill of Rights . . . was to take government off the backs of people." *Schneider v. Smith*, 390 U.S. 17, 25 (1968).

Public officials should support and encourage citizen involvement in the government decision-making process through participation in town hall meetings, petition drives, and grassroots issue advocacy. Recently, however, the White House has launched a troubling speech-monitoring program through which people who speak out in opposition to the President's health care proposals are "flagged" for government tracking. This surveillance program must end immediately because it poses a serious threat to the kind of open and robust debate on matters of public importance that the First Amendment was designed to protect.

This memorandum explores the First Amendment issues raised by the White House surveillance program. It also notes inconsistencies between the program and President Obama's stated commitment to openness in government.

I. Background

On August 4, 2009, Macon Phillips, the White House Director of New Media, wrote a post on the White House Blog about the public debate surrounding President Barack Obama's health care reform positions. Mr. Phillips stated that "[s]cary chain emails and videos are starting to percolate on the internet, breathlessly claiming, for example, to 'uncover' the truth about the President's health insurance reform positions." He noted that "[t]here is a lot of disinformation about health insurance reform out there" and that the "rumors often travel just below the surface via chain emails or through casual conversation." He concluded the post by explaining that "[s]ince we can't keep track of all of them here at the White House, we're asking for your help. If you get an email or see something on the web about health insurance reform that seems fishy, send it to flag@whitehouse.gov."

This citizen reporting program raises significant First Amendment concerns. For what purpose is this information being gathered? To whom will the information be disseminated? Is the intent of the program to stifle free and open debate on the serious policy issues raised by health care reform? Will the White House flag media outlets that publish articles critical of the health care reform plan? The name of the reporting email address itself raises questions—for what purpose are these individuals being "flagged?" The surveillance program's chilling effect on free and open discourse becomes more apparent in light of House Speaker Nancy Pelosi's recent statement that those who strongly oppose the Democrats' health-care plan at town hall meetings are "un-American."[1]

To some, the White House surveillance program harkens back to COINTELPRO. COINTELPRO (the Counter Intelligence Program) was a secret program administered by the FBI to monitor groups and individuals, including Martin Luther King, Jr., that were believed to pose a national security threat. The FBI's actions were ultimately investigated by the Church Committee, a Senate Committee named for its Chairman, Frank Church. The Committee found that "[t]oo many people have been spied upon by too many Government agencies and [too] much information has been collected. The Government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even when those beliefs posed no threat of violence

[1] *See* Nancy Pelosi & Steny Hoyer, *'Un-American' attacks can't derail health care debate*, USA TODAY, Aug. 10, 2009, http://blogs.usatoday.com/oped/2009/08/unamerican-attacks-cant-derail-health-care-debate-.html.

or illegal acts on behalf of a hostile foreign power."[2] This new reporting program, like COINTELPRO, appears to target innocent, non-violent actors based on their political beliefs.

II. First Amendment Analysis

The White House's invitation to the public encouraging citizens to report "fishy" speech opposing the President's health care policies is an egregious form of viewpoint-based government surveillance of private political speech.

A. The First Amendment's Protection of Issue Advocacy

"The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369 (1931).

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

The Supreme Court has noted our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). "The First Amendment . . . 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.'" *Id.* (citation omitted).

> Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

Terminiello, 337 U.S. at 4-5 (citations omitted).

[2] S. REP. NO. 94-755, book II, at 5 (1976).

B. Problems Posed by Government Surveillance

The White House's monitoring of private speakers who express a viewpoint in opposition to the President's position regarding health care is a troubling form of government surveillance. The Supreme Court has noted that "[o]fficial surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech." *United States v. United States Dist. Ct.*, 407 U.S. 297, 320 (1972). Formal or informal government monitoring of individuals or groups due to the viewpoint of their political message strikes at the heart of the First Amendment's protection of the freedoms of speech and association. "[I]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

The Supreme Court has observed:

> "Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power." History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. . . .
>
> The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.

United States Dist. Ct., 407 U.S. at 313-14 (citation omitted).

> A recognition of the government's interests, even those that are compelling, does not make the employment by Government of . . . surveillance a welcome development—even when employed with restraint and under judicial supervision. There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens. We look to the Bill of Rights to safeguard this privacy.

Id. at 312-13.

The Court has noted in cases involving national security concerns that the President and other Executive Branch officials must act in a manner consistent with the First Amendment:

> Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most

> cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.

United States v. Robel, 389 U.S. 258, 264 (1967). The White House's justification for engaging in a surveillance program of private expression is *much weaker* in this situation because, unlike the President's interest in the protection of our national security, his interest in intimidating or monitoring his critics is not compelling.

Government surveillance or other government actions that deter or chill constitutionally protected expression harm the speaker, the intended audience, and the entire society. "Many persons . . . will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).

In *Bridges v. California*, 314 U.S. 252 (1941), the Court reversed contempt convictions arising from newspaper editorials that were critical of judges for decisions they had made in past cases or were expected to make in pending cases. The Court explained:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

Id. at 270-71. Similarly, while the President may criticize his opponents' arguments or encourage Members of Congress to enact legislation that he supports, he may not, consistent with the First and Fourteenth Amendments, use his position and authority to intimidate private speakers who disagree with him through the threat of government surveillance.

III. President Obama's Openness Policy

The White House reporting program runs counter to President Obama's own policies on openness and transparency in government. On January 21, 2009, one day after the Inauguration, President Obama made remarks welcoming senior staff and Cabinet Secretaries. The remarks were posted on the *Talking Points Memo* webpage. In his remarks, President Obama stated:

> [T]he American people deserve more than simply an assurance that those who are coming to Washington will serve their interests. . . . They deserve a government that is truly of, by, and for the people. As I often said during the campaign, we need to make the White House the people's house. . . .

> Let me say it as simply as I can: Transparency and the rule of law will be the touchstones of this presidency.
>
> Our commitment to openness means more than simply informing the American people about how decisions are made. It means recognizing that government does not have all the answers, and that public officials need to draw on what citizens know. And that's why, as of today, I'm directing members of my administration to find new ways of tapping the knowledge and experience of ordinary Americans —scientists and civic leaders, educators and entrepreneurs—because the way to solve . . . the problems of our time, as one nation, is by involving the American people in shaping the policies that affect their lives.[3]

That same day, President Obama issued a memorandum to the heads of executive departments and agencies on "Transparency and Open Government." In the memorandum, he stated that his Administration "is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration." President Obama declared that "[g]overnment should be participatory" and that

> [p]ublic engagement enhances the Government's effectiveness and improves the quality of its decisions. Knowledge is widely dispersed in society, and public officials benefit from having access to that dispersed knowledge. Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in Government.

Creating a program that asks individuals to report on their neighbors, co-workers, family members, and friends who express personal opinions in opposition to the Administration's policy choices is not the way to encourage openness and transparency. It is tantamount to policing ideas. Such a program will only stifle free and open debate among the citizens of this country.

IV. Conclusion

The First Amendment provides broad protection for citizen issue advocacy at town hall meetings and in various forms of grassroots issue advocacy. The White House's ill-advised citizen surveillance program runs counter to the core principles upon which this country was founded and raises serious constitutional concerns. President Obama should rescind and withdraw Mr. Phillips's program and assure the public that the White House welcomes a healthy, robust debate on the President's health care reform policies.

---

[3] *Remarks by the President Welcoming Senior Staff and Cabinet Secretaries*, Jan. 21, 2009, *available at* http://www.talkingpointsmemo.com/news/2009/01/remarks_by_the_president_welcoming_senior_staff_an.php.