

The Mountain Torch

The Newsletter of the American Civil Liberties Union of West Virginia

Spring 2003

Expansion of Intrusive DNA Database Halted

In a major victory for civil liberties this legislative session, the ACLU of West Virginia helped to kill House Bill 2693 which would have extended the state's collection of DNA samples to non-violent felons.

Unlike fingerprinting which only reveals information that can be used for identification purposes, DNA gives the government control over a great deal of personal, private information about anyone related to the sample source. Take convicted felon, former Governor Arch Moore for instance. A DNA sample taken from him could reveal personal information about

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Student's Rights Lawsuit Appealed to State Supreme Court

The ACLU of West Virginia appealed its free speech lawsuit brought against the Kanawha County Board of Education on behalf of a teenage student who was denied the right by school officials to start an anarchy club and prohibited from wearing T-shirts with hand-written political slogans.

"For our constitutional democracy to thrive, it is imperative that our public schools lead by example in teaching our youngsters to respect basic American values like free speech," said the ACLU-WV in a statement to the press. "We hope the West Virginia Supreme Court will seize this opportunity by overruling the lower court on the T-shirt and suspension issue and returning the First Amendment to the classroom."

While a Kanawha County jury decided last July that the ACLU's client, 15-year-old Katie Sierra was wrongfully denied the right to start an anarchy club at Sissonville High School, the civil jury upheld the school's decision to suspend Sierra and prohibit her from wearing T-shirts with hand-written political slogans.

In the fall of 2001, shortly after the bombing in Afghanistan, Sierra proposed starting an anarchy club as a vehicle to promote peace and tolerance. Principal Forrest Mann denied the request. She also wore a T-shirt to school that read: "When I saw the



From left to right: Katie Sierra and cooperating attorneys Jason Huber and Roger Forman

ACLU Hails Free Speech Victory for West Virginia Hospital Employees

On December 16th, U.S. District Judge Robert C. Chambers approved a settlement that ended a state hospital's gag order on its employees. The settlement was reached between Mildred Mitchell-Bateman Hospital in Huntington and six hospital employees.

The Hospital's personnel policy did not permit employees "to give reports or opinions to news media representatives or other non-Department of Health and Human Resources personnel regarding patients or controversial incidents or programs except as specifically authorized by the hospital administrator...."

"The First Amendment is based upon the belief that in a free and democratic society, the public has a right to know how its insti-

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Can Conservatives Find Happiness in the ACLU?

By Andrew Schneider
Executive Director



This past legislative session was most notable for the fact that many conservative legislators forged alliances with the ACLU on several key issues. This was not a surprising development for me since I have always known the ACLU to be, in many respects, a very conservative organization. After all, our job is to *conserve* the original values of the Bill of Rights and the Constitution.

The ACLU's support of the religious exemptions for mandatory immunization bill instantly brought us a flock of conservative Republican allies. One such conservative was Senator Andy McKenzie, R-Ohio, a sponsor of the bill, who initially had trouble saying "ACLU" and "ally" in the same breath. A reporter with The Beckley Register Herald was struck with wonder by this new working relationship. His article began with "Rare is the time you find a conservative Republican and the American Civil Liberties Union in the same camp."

The reaction to being on the same side of the religious exemption bill varied widely. Conservative Senator Russ Weeks, R-Raleigh, dismissed the alliance as an anomaly and assured me there was no hope for us joining forces on any other civil liberties issue. He was wrong. At the end of the session he was one of the conservative Senators who helped us in the Senate Judiciary to kill the bill that would expand the DNA database. Senator Lisa Smith, R-Putnam, an ally on both bills, good-naturedly identified me to others as "my ACLU friend." Senator Steve Harrison, R-Kanawha, was very receptive to working with the ACLU. He not only allied with us on the two bills already mentioned, but also became a sponsor of our post-9/11 anti-government-surveillance bill and our racial profiling data collection bill.

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PRESIDENT'S CORNER -- APRIL 2003

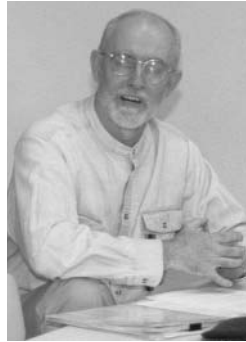
ACLU Growing Stronger in the Face of Increased Threats to Civil Liberties

By Chuck Smith

As I begin my term as board president, the ACLU of West Virginia is the fastest growing and is among the most vigorous state affiliates of ACLU. In 2002 close to 90,000

Americans joined the ACLU. In West Virginia our membership increased by 28 percent; we recruited 188 new members and 190 others were generated by the national offices' direct-mail campaign. Already in the first three months of 2003 our affiliate has signed up 84 new members and in the first three months the national office obtained 62 others from West Virginia. Unfortunately, a key reason for these jumps in membership is the government's assault on fundamental rights in the name of the war on terrorism. Attorney General John Ashcroft has led the Bush administration in an attempt to cloak government action in a veil of secrecy.

The invigoration of the ACLU in West Virginia



is more than a response to the aftermath of the terrorist attack on the World Trade Center and the Pentagon. The presidents during my tenure on the board, Bob Bastress, Harry Waddell, and Dawn Warfield, successfully built a larger, stronger, more active board. Over the past six years, through both litigation and negotiation, our affiliate has successfully pursued and won many cases to protect the civil liberties of West Virginians. At present we are litigating five cases in state or federal court.

In 2002 we exceeded our fundraising goal of \$30,000 by a bit more than \$12,000. That success brings us closer to the day when we can hire a staff attorney. Andrew Schneider, our executive director, is a fundraising and member-recruiting dynamo. Soon after I met Andrew, I began to characterize him as a zealot for civil liberties. He never tires of proclaiming the importance of protecting civil liberties. His excellent work is responsible for much of the growth of the ACLU in West Virginia. Now is the time to accelerate our efforts to build our affiliate.

Last year, the National Constitutional Center commissioned Public Agenda to

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Officers, Board Members, and Staff of the American Civil Liberties Union of West Virginia

Officers

Chuck Smith	President
Bill Denman	Vice President - Membership
Cameron McKinney	Vice President - Development
Ruth Brinker	Secretary
Lou Lieto	Treasurer

Board Members

Sonya Armstrong, Heidi Arnao, Bob Bastress, Thais Blatnik, Kevin Burgess, Debra Davis, Anna Marie Evans, Roger Forman, Jason Huber, Tom Kinraide, Dr. Elizabeth Kurczynski, Jon Matthews, Casie McGee, Trent Redman, Jeremiah Samples, Andy Waddell, Dawn Warfield, and Terry Wimmer

Staff

Executive Director	Andrew Schneider
Office Manager	Monica Neal

Legislative Report



House of Delegates debate religious exemption bill

Bill Providing Religious Exemptions for Mandatory Immunizations is Defeated

The ACLU of West Virginia sought to broaden religious freedom in the state with its support for Senate Bill 136, that would have allowed parents to exempt their children from mandatory immunizations based on religious conviction. Despite a hard-fought lobbying effort by the ACLU, the West Virginia Interfaith Council for Public Policy, the Christian Scientists, the Quakers, and West Virginians for Vaccination Exemptions that gained bipartisan support, the measure was ultimately defeated.

West Virginia and Mississippi are the only two states that do not provide religious exemptions for mandatory immunizations. Forty-eight other states do so and many of them include exemptions for those with philosophical objections as well. The experience and the record of those 48 states indicate that religious exemption laws are not harmful to children or the public.

The National Vaccine Advisory Committee found that states that offer exemptions do not have higher disease rates or lower vaccination rates. Nationally less than one percent of the population do not get vaccinated based on religious or philosophical reasons. It's a medical fact that as long as there is what's known as "herd immunity,"

ACLU-WV Wins Important Concession in Bill That Limits Open Government

A bill that would carve out exceptions to the Freedom of Information Act in the name of homeland security was modified according to ACLU concerns before its approval by the legislature.

ACLU-WV Executive Director Andrew Schneider met with officials from the state Department of Military Affairs and Public Safety who drafted and were pushing House Bill 3009. These officials agreed to ACLU requests to strike some of the overbroad exemptions to the Freedom of Information Act.

The ACLU argued that in the original bill vulnerability assessments that uncovered infrastructure weaknesses like a dangerously faulty bridge or environmental hazards from chemical plants could be withheld from the public. In the amended version that became law, it states that "any evidence of an immediate threat to public health and safety unrelated to a terrorist act" must remain an open record and be accessible to the public.

The resulting bill, while improved, was not perfect and was considered unnecessary by the ACLU since existing law already sealed from public view records pertaining to national security.

American democracy is a political system based on accountability. Our government must open itself to the public spotlight in order for the people to judge the effectiveness of their elected representatives and the propriety of their actions.



Legislature and Governor Enact Biased Counseling Law Curtailing Women's Equality

The ACLU and the women of West Virginia suffered a major setback with the passage of Senate Bill 170, misleadingly referred to as an "informed consent" law, but which is really nothing more than a form of discrimination against women. Of all surgical procedures, it mandates that abortion be singled out for obstacles like a 24-hour waiting period and a state-imposed biased counseling lecture which will make access to quality reproductive health care more difficult and expensive. The burden of such a waiting period will undoubtedly be felt most acutely by poor women from rural counties who would be forced to stay overnight in Charleston where West Virginia's only two clinics are located. Similar impediments are not applied to male-oriented procedures like vasectomies and prostate surgery.

The mandated delay for abortion implies that women who seek abortions do so without adequate reflection and are incapable of making reasoned moral decisions regarding their health and future. Implicit in the requirement of a biased lecture is the assumption that women do not adequately think through their abortion decision and that the State must do their thinking for them.

For many women, the issue of abortion is correctly seen in terms of sexual equality. One cannot avoid the reality that women

Legal Briefs



Cooperating attorneys Jason Huber (left) and Chris Cooper (right) immediately following Cooper's arguments before the State Supreme Court.

ACLU Calls For Fundamental Fairness in West Virginia Prisons

ACLU Cooperating Attorney Chris Cooper argued before the State Supreme Court on Wednesday, April 9th, that the State cannot take away prisoners' unearned good time credit without denying them their constitutionally protected due process rights.

The ACLU lawsuit, in which Jason Huber is also cooperating attorney, was filed on behalf of Randy Bailey, an inmate at Huttonsville Correctional Center. The ACLU filed the lawsuit after administrative remedies within the Division of Corrections proved unsuccessful. Bailey is serving a one to three year sentence for third offense DUI. He accrued 156 days of good time credit in both the Denmar and Huttonsville prisons when he was disciplined by prison authorities for bad behavior and had his good time reduced by eighteen months. This punishment amounted to not only the 156 days of earned good time but also all the remaining unearned good time that could be granted over the duration of his sentence.

The ACLU is seeking a court order that immediately restores all good time credits improperly revoked from their client and seeks the appointment of a special magistrate to investigate whether or not the Division of Corrections improperly revoked credits from other inmates.

Under West Virginia statute, an inmate is rewarded with one day of good time credit that is subtracted from his/her maximum sentence for each day of good behavior. For misconduct, the statute provides that "any part or all of the good time which has been granted to such inmate... may be forfeited and revoked by the warden or superintendent of the institution in which the violation occurred."

Clearly, the Division of Corrections violated the statute which limits the amount of good time that may be revoked to the amount which the inmate has earned. At the very least, prison officials should recognize that taking away unearned good time removes

ACLU Sues West Virginia Police For Conducting Illegal Drug Stop

The American Civil Liberties Union of West Virginia filed a lawsuit against the West Virginia State Police and the Barbour County Sheriff's Department for operating a drug roadblock near a political rally called "Freedom Festival" which was organized by the West Virginia chapter of NORML, the National Organization for the Reform of Marijuana Laws.

The authorities established this roadblock without cause and in clear violation of the fundamental Fourth Amendment right of all Americans to be free from arbitrary government intrusion. The state officials who authorized this roadblock apparently chose to ignore a U.S. Supreme Court ruling from only a few months prior to this incident which found that such roadblocks were unconstitutional.

The lawsuit was filed on behalf of Thomas Thacker and Brett Gasper, both of whom were subject to a roadside random search on their way to the festival on July 28, 2001. The lawsuit asserts that "by establishing the checkpoint to disrupt the lawful associational, ideological, and political activities of NORML," their First Amendment rights were also violated.

On the weekend of July 28, 2001 two state police canine units specially trained to detect drugs were employed on the only road leading to the festival grounds. The festival was both a musical and a political event with more than two dozen bands and speakers that included representatives from NORML and a former state Libertarian gubernatorial candidate.

In two separate incidents law enforcement officials detained Thacker and Gasper at the roadblock without individualized suspicion that either of them had engaged or were engaged in any criminal activity. "I was asked if

ACLU-WV Asserts That State Grant Committee Violates Separation of Powers

On February 18th, the ACLU of West Virginia filed an amicus brief in support of the West Virginia Citizen Action Group's appeal of the constitutionality of the state Economic Development Grant Committee.

"If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers," James Madison once said. "If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices."

The West Virginia legislature ignored Madison's caution when it created the state Economic Development Grant Committee. While establishing this Committee to dole out \$200 million in public funds, the legislature usurped the Governor's power of appointment by allowing itself to have virtual control over six of the nine appointees.

For the Framers like James Madison, the concentration of power in the hands of one branch of government was anathema to liberty. They so strongly identified separation of powers with the protection of individual liberty, that they initially

considered a Bill of Rights unnecessary.

Under this law, the Governor must make three appointments to the Committee from a list of five names submitted by the president of the West Virginia Senate and another three appointments from a list of five names submitted by the speaker of the West Virginia House of Delegates. As a result, six out of the nine appointees come from the legislature.

While the State contends that the Senate President and the Speaker do not control the entire power of appointment, but

simply present the Governor with a list of names from which he can choose, ACLU cooperating attorney Robert Bastress disagrees. "That process effects a virtual legislative takeover of the appointment power, and it would be sophistry to contend otherwise," Bastress said.

Robert Bastress argued the ACLU's case on March 11th before the West Virginia Supreme Court. A decision is expected some time this spring.



Bob Bastress talks to reporters following his arguments before the State Supreme Court.

Student's Rights Lawsuit *continued from page 1*

dead and dying Afghan children on TV, I felt a newly recovered sense of national security. God Bless America." Sierra was suspended for passing out fliers about the club and wearing political T-shirts.

Sierra's lawsuit echoes a case that led to a landmark U.S. Supreme Court decision in 1969. The High Court ruled that year in *Tinker v. Des Moines* that students could not be punished for wearing armbands to protest the

Vietnam War. The Court's opinion stated that students do not "shed their rights to freedom of speech or expression at the schoolhouse gates."

In the ACLU's appeal, cooperating attorney Roger Forman wrote, "The suspension of Katie Sierra was clearly a suppression of free speech and clearly unconstitutional under *Tinker*. Mr. Mann was censoring unpopular opinion and speech when he suspended Katie. The Court should reverse."

Fundamental Fairness *continued from page 4*

the main incentive an inmate has to improve his behavior. Most importantly though, the denial of future good time credit to which he is entitled deprives Randy Bailey of his liberty interest as protected by the Due Process Clause of the West Virginia Constitution.

The relationship between fair procedures and liberty is a crucial one. Justice William O. Douglas articulated this principle well when he said "It is procedure that spells much of the difference between rule of law and rule by whim and caprice."

Chapter News

High School ACLU Chapter Makes a Difference

By Rachel Weaver
President, Midland Trail High School chapter of the ACLU-WV

From a high school student's perspective, the world isn't exactly open to your opinions. Indeed, as teenagers, we are often times looked down upon. But with the formation of the ACLU chapter at Midland Trail High School other students and I have come to realize that we have our rights, and our say when it comes to civil liberties issues that affect us.

We have been in existence less than a year so far, but even now, it is obvious that students are becoming more and more aware of their rights, and the events that shape our lives. From the informative literature we distributed on the freedom to read during Banned Books Week, to our activism regarding recent issues of separation of church and state within our public education system, students have awakened to the reality that, as United States citizens, they have the right to stand up for themselves, and voice their opinions regarding decisions that will change their futures.

I was surprised to find just how many students were interested in joining the new chapter. Classmates of mine were interested in finding an organization that challenged opinions, improved knowledge of the American system of government, and provided information that empowered them.

At first, the news of a new organization promoting (of all things) civil liberties, was greeted with some wary animosity. Students whose families looked down upon groups that promoted freedom of speech, freedom of religion, and freedom in general, were instantly biased in their views regarding our chapter. After they realized that we weren't out to get them, however, classmates began to

The Art of Activism

By Brooke Thomas
President, WVU Chapter of the ACLU-WV

"Some art's a pedigree whitewash, a cryptic clean cover-up. My art don't need no ivory badge to back what's in its gut."
-Alix Olson

As part of Gay Pride Week, the WVU chapter of the ACLU worked with other local organizations to sponsor a variety of events to promote diversity awareness and acceptance on campus. The highlight of the week was a performance by Alix Olson, a nationally renowned slam poet and outspoken lesbian, feminist, and civil libertarian. Olson delivered a dynamic performance addressing a variety of political issues ranging from economic inequality to gay rights. A poetry contest open to all university students was held a few days prior to Olson's performance. Two representatives from the WVU ACLU chapter were members of the judging panel, along with affiliates from the Bi Gay and Lesbian Mountaineers and the Female Equality Movement. The top three contestants were given the opportunity to open for Olson.

The WVUACLU chapter is also currently working to promote R.U.L.E.S. (Resolution Upholding Liberties for Everyone's Sake). R.U.L.E.S. is a pro-civil liberties resolution that outlines grievances in the USA PATRIOT ACT. R.U.L.E.S. was a collaborative effort between the undergraduate and law school chapters at WVU. Our chapters are currently launching educational campaigns and petitioning the student government to adopt the resolution. A copy of the resolution and online petition will soon be appearing on www.wvejc.org.

ACLU Chapter at WVU Law School Gearing Up For Next Year

By Michael Johnson
WVU School of Law chapter representative to the ACLU-WV Board of Directors

As the school year comes to a close, the West Virginia University College of Law chapter of the ACLU will begin to lay the foundation for a successful upcoming year. During the spring term, elections for the 2003-2004 year will take place. Additionally, our chapter will work with the College of Law chapter of the Federalist Society, a conservative student organization, to hold monthly lunch-hour debates on relevant issues. The goal is to invite engaging speakers from across the state and nation to speak at the debates. The College of Law chapter began to solidify our relationships with other ACLU chapters in the area and local student organizations. This semester, we helped the ACLU chapter at WVU to write a resolution regarding the USA PATRIOT Act. The WVU College of Law chapter also helped the Black Law Students Association (BLSA) to organize a trip to Washington D.C. on April 1, 2003 to attend the March on Washington in support of the University of Michigan's affirmative action cases. The WVU College of Law chapter of the ACLU hopes to build upon this year's successes and looks forward to working with its fellow ACLU members next year.



Northern Panhandle ACLU chapter holds its first official meeting on April 8, 2003.

Charleston Metro Chapter Holds Successful First Meeting

By Tina Totten King
Charleston ACLU
Chapter Officer-at-Large

The Charleston Metro chapter of ACLU-WV held its first meeting on March 26, 2003. While there were about 40 members in attendance, the officers are hoping that attendance will grow with every meeting.

After chapter Treasurer Amara Chaudry welcomed the members and visitors, the meeting began with a speech by ACLU-WV Executive Director Andrew Schneider about the function of the ACLU in West Virginia and its accomplishments and goals.

Chapter officers followed that with information regarding various issues, concerns and plans of action. Chapter Secretary, John Doyle, spoke about the PATRIOT Act, about its implications and consequences, and about the potential

for a resolution by the Charleston City Council opposing the Act.

Co-president Margaret Chapman spoke about reproductive rights and recent legislation affecting those rights passed by the West Virginia Legislature in 2003. Margaret proposed not only an educational campaign but also a film festival focusing on reproductive freedom.

Chapter Officer-at-Large Tina Totten King presented a speech focusing on the racial profiling not only of African-Americans but also of Latinos and (post 9/11) Arab-Americans. Tina proposed a largely educational campaign aimed at eliminating the biases which support racial profiling as a crime-fighting tool and informing the public about the real consequences of using such methods.

Co-president John Street spoke about the upcoming anniversary of the landmark Supreme Court decision in West

Virginia Board of Education v. Barnette (1943) that stated that compelling Jehovah's Witness children to salute the American flag against their religious beliefs was unconstitutional. John proposed the organization of an event to mark the occasion. The official meeting closed with a few words from Vice-President Trent Redman and the group remained for some time enjoying refreshments and further discussion of the topics.

The first meeting was a great success and we hope to see even more of our Charleston Metro members at the next meeting. Watch for your invitations in the mail. Questions or other requests for information can be directed to the ACLU-WV office or to any of the officers mentioned above. (Their contact information can be obtained from the ACLU-WV office.)

Huntington Chapter Mobilizes Members and Supporters to Keep Huntington Safe and Free

By Dr. Elizabeth Kurczynski
Huntington chapter representative to the
ACLU-WV Board of Directors

The Huntington Regional ACLU Chapter has been working on a city council ordinance to safeguard the freedoms that have been under attack by the Federal Government since the war on terrorism. Councilman Rev. William Patterson will introduce the measure at the May 12th Council meeting. The ordinance secures on a local level many of the constitutional rights that have been targeted by measures like the USA PATRIOT Act. Another purpose of the ordinance is to send a message to Washington that people in Huntington value their rights.

The USA PATRIOT Act, a law that Americans were told would keep them safe, has given the government unnecessary expanded power. Under the Act, the

government now has the power to invade law-abiding citizens' privacy, imprison Americans without due process, and punish political dissenters.

As part of the ordinance introduction, the chapter and the City of Huntington sponsored a public forum on the PATRIOT Act at City Hall in Huntington on Saturday, March 29. The speakers were Rep. Nick Joe Rahall, Mayor David Felinton, Andrew Schneider, Cabell County Library director Judy Rule and Councilman Rev. Patterson. The forum lasted for one and a half hours, and was very well attended. The City Council chamber was full. Each speaker described from their point of view how the PATRIOT Act could interfere with individual rights. There was a nice article about the forum on the front page of The Huntington Herald Dispatch the next morning.

Chapter members are meeting with council



members to try to gain support for the ordinance prior to its introduction.

The chapter is also planning to hold a fundraiser this spring at a local theater. We want to show a double feature including "Bowling for Columbine" and another film about ACLU related issues.

Sixtieth Anniversary of Landmark Decision

Decision in Flag salute Case From West Virginia Set Constitutional Standards for Religious Liberty



The daughters of Walter Barnette who were expelled from school for refusing to salute the flag.

By Chuck Smith

Flag Day - June 14, 1943 - the U.S. Supreme Court struck down a West Virginia regulation requiring school children to participate in flag-salute ceremonies. That landmark decision, *West Virginia State Board of Education v. Barnette*, is legally significant for several reasons. It expanded constitutional protections for the free exercise of religion. It was a rare reversal by the court of one of its own decisions, in this instance a decision made less than three years earlier. It effectively terminated the legal controversy over compulsory flag-salute ceremonies in American schools, and it diminished the accompanying nationwide persecution of Jehovah's Witnesses. Finally, in this case Justices Black, Douglas, Murphy, and Rutledge formed, for the first time, a voting bloc that served as the Court's core for protecting individual rights and liberties throughout the rest of the 1940s.

This case arose out of the controversy over the refusal of Jehovah's Witnesses children to participate in school flag-salute ceremonies. The sect adopted this view in 1935; soon local school districts and state boards of education began adopting policies that punished the children who refused to salute the flag. In 1940 a challenge to such policies from Minersville, Pennsylvania worked its way up through the federal courts, which found that such regulations violated the First Amendment provision for free exercise of religion. In its decision in

Minersville School District v. Gobitis (1940), however, the U.S. Supreme Court reversed the lower courts' decisions. Only Justice Harlan F. Stone voted against the decision.

Writing for the Court, Justice Frankfurter relied on the "secular regulation" rule - a balancing test that weighs a clearly nonreligious government regulation against the religious practice that it makes illegal or burdens. He identified the Minersville regulation as an intrinsically secular policy adopted to encourage patriotism among school children. Weighing the circumstances in the case, he ruled that the need for social conformity with the requirement was more important than the individual religious liberty claims of the Jehovah's Witnesses. The Court expected that Frankfurter's extensive opinion would definitively settle the flag-salute question.

The ruling, however, contributed to an escalation of confrontations between the

nonconformist sect and its adversaries. In the months following *Gobitis*, hundreds of violent attacks occurred against Jehovah's Witnesses. Ten were carried out in West Virginia towns with the complicity of government officials. Across the nation, thousands of children were expelled from school for refusing to salute the flag; including children in Barbour, Hancock, Kanawha, Nicholas, Upshur, and Wood Counties, West Virginia.

In an unusual special dissenting opinion in 1942, Justices Black, Douglas, and Murphy repudiated their stand in *Gobitis* and declared that the case was wrongly decided. The national legal office of the Jehovah's Witnesses decided that West Virginia offered the best case for challenging *Gobitis* because the state board of education rather than local school districts had adopted the flag-salute policy. Challenges to statewide policy can be brought to special three-judge federal district courts, from which an appeal can be taken directly to the U.S. Supreme Court. The sect's legal office chose three parents, Walter Barnette, Lucy McClure, and Paul Stull, who lived near Charleston, to bring a class action suit.

The Federal District Court convened in Charleston with U.S. Court of Appeals Judge John J. Parker and District Judges Ben Moore and Harry E. Watkins sitting on the bench. Even though appellate procedure requires that lower federal courts conform their rulings to those of the U.S. Supreme Court, the three judges discounted the *Gobitis* precedent and enjoined the West Virginia school system "from requiring the children of the plaintiffs, or any other children having religious scruples against such action, to salute the flag." The court took this action based on clues it perceived coming from the national Supreme Court.

Hayden C. Covington, chief counsel for the Jehovah's Witnesses, argued the case on appeal before the Supreme Court. His brief was a lengthy, haphazardly organized collection of Jehovah's Witnesses theology, appeals to the First

Quotation from Justice Jackson's opinion of the court in West Virginia State Board of Education v. Barnette (1943)

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

- West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943)

Historic ACLU Event

In June 2003 the ACLU Charts New Course by Hosting Inaugural Biennial Membership Conference

From June 11th to June 15th, 2003, the ACLU is inviting its rank and file "card carrying" members to convene in Washington, D.C. at the Omni Shoreham Hotel to participate in its inaugural 2003 Biennial Membership Conference entitled "Safe and Free."

The mission of the conference is to educate, enlighten and inspire conference attendees to continue the important and critical work of defending liberty in a time of crisis, as well as the ongoing work of the ACLU. The conference will offer members, delegates and staff the opportunity to hear from and interact with a distinguished roster of political figures, leading scholars, and in-house experts from an array of disciplines and fields. A prominent and diverse list of highly respected individuals has been invited as keynote speakers, panelists, facilitators, special celebrity guests and honorees including United States Supreme Court Justice Ruth Bader Ginsburg. They are scheduled to address the critical issues that the ACLU faces in defending freedom in these troubled times.

The 2003 Biennial Membership Conference promises to capture and celebrate the spirit and passion of our membership who have vigilantly voiced their concerns and joined the campaign to keep America "Safe and Free." The conference will take place in a welcoming and conducive working environment where attendees will have the chance to network, engage in stimulating and informative dialogues, participate in thought-provoking debates, share best practices, and gain a comprehensive understanding of the issues.

Your commitment and participation will be vital in making this inaugural membership conference a landmark event for the ACLU.

For more information and to be included on our mailing list, please email to mem_conf@aclu.org or call Edwin Rosado at 212-519-7810 or Connie Harshman at 212-549-2505.

Attendees will have the opportunity to participate in:

- Lobbying Day on Capitol Hill
- Topical Workshops
- Relevant Plenaries
- An Interactive Town Meeting
- Celebrating the 2003 recipient of The Roger N. Baldwin Medal of Liberty Award
- Enjoying ACLU's legendary cast of characters at the "infamous" Freedom Follies
- Shopping for ACLU memorabilia at the Freedom Fair
- Spending free time visiting renowned monuments in our nation's capital

DNA Database continued from page 1

innocent people like his daughter, Congresswoman Shelly Moore Capito.

Initially, these DNA storehouses were created to house information about convicted sex offenders exclusively. The argument was that sex offenders were especially prone to recidivism, typically left DNA evidence at the crime scene, and hence, were important to identify. Whether or not that argument was sufficient, we were assured at the time that only convicted sex offenders would have their DNA collected, and the information gleaned from these samples would be used by law enforcement officials strictly for identification purposes.

But it is so often the case that information initially collected for one, limited purpose is before long used for many other purposes. Slowly and inexorably, the pool of people whose DNA was being collected, and the range of uses for the data, has been expanding, raising grave concerns for personal privacy. Additionally, this bill would have permitted DNA records to be maintained even if a conviction was overturned.

DNA provides information about ethnicity, family relationships, family history and the likelihood of getting some 4000 genetic conditions and diseases. This information belongs to the individual, not the government. Geneticists are constantly increasing the database of information that can be gleaned from DNA - some even claim that there are genetic markers for "criminal tendencies," sexual orientation, substance abuse, etc. The possibilities and thus the dangers are endless.

Today, the growing law enforcement databases raise the immediate specter of widespread discrimination. Given the over-targeting of African-Americans, Latinos and now especially Arab-Americans within our criminal justice system nationwide, the government will have a disproportionate power to track millions of people of color.

There is a long and unfortunate history of despicable behavior by governments toward people whose genetic composition was considered "abnormal" under the prevailing societal standards of the day. While the State would assure us that information would be used for limited forensic purposes, the history in our country is that information compiled for one purpose will be used for another. For example, Social Security numbers were initially intended only for use as an aid in tracking social security payments but are now a universal identifier. And census records created for general statistical purposes were used to round up innocent Japanese-Americans and place them in internment camps during World War II.

Working with our ally on this issue, Public Defender Services, the ACLU was able to muster a bipartisan coalition of State Senators to kill this bill in the Senate Judiciary Committee.

ACLU-WV Announces New Officers and Introduces Newly Elected Board Members

By Margaret Chapman

The ACLU-WV proudly announces the newly elected officers to the Board of Directors. Serving his first term as President is WV State College Political Science professor Chuck Smith. Also newly elected to the position of Vice President for Development is Charleston consumer rights attorney Cameron McKinney. Bill Denman, a professor of Communications at Marshall University, will be serving as the newly elected Vice President for Membership. Ruth Brinker was re-elected as Secretary and Lou Lieto was re-elected as Treasurer.

We are also pleased to introduce the newly elected members of the ACLU-WV Board of Directors for the 2003 - 2006 term.

After a five-year sabbatical from the board, Roger Forman has relit his ACLU torch. Roger is a longtime civil rights activist and practices law in Charleston. Even during his absence from the board, Roger took up ACLU-WV cases, such as the Katie Sierra

case and a case challenging the National Guard's prohibition against a hemp rally. The ACLU-WV is happy to have Roger's passion, knowledge and expertise back on board.

Homegrown in Alum Creek, West Virginia, a new member of the board is Charleston attorney, Jon Matthews. A young progressive who is a member of the National Lawyers' Guild and WV FREE, Jon works for the Grubb Law Group, which specializes in consumer advocacy and worker rights. Jon was very active with the ACLU-WV during his schooling at WVU College of Law where he wrote the ACLU's position paper on the University's Free Speech Zone policy. A vigilant defender of personal liberties, Jon is sure to be an asset to the ACLU-WV.

A continuing board member is Andy Waddell from Clay County. Andy is a printer and publisher by trade and is deeply committed to the protection of civil liberties. Andy is a former ACLU-WV client who challenged the secret meetings of the Clay

County Commission. Andy runs a progressive paper and tirelessly fights for accountability in government on behalf of his readership.

Another continuing ACLU-WV board member is WVU College of Law Professor, Bob Bastress. Having taught constitutional and employment law courses since 1978, Bob's areas of expertise have proven invaluable to the ACLU-WV. Bob has litigated civil liberties issues in state and federal courts and has served the ACLU in various capacities over the years, from national board member to president of the state board.

Finally, the ACLU-WV welcomes back its favorite archaeologist, Ruth Brinker, as she returns to her position on the Board as Secretary. Ruth lives in Elkins and is a dedicated fundraiser for the ACLU. She works diligently to protect civil liberties, and her passion lies most staunchly with issues surrounding the First Amendment, illegal search and seizure, and reproductive freedom.

Illegal Drug Stop continued from page 4

my car could be searched, and when I said no, the drug dogs were brought on the scene to pressure me to waive my constitutional rights," said Gasper, a former United States Marine. I don't like drugs, and I especially don't like big German Shepherds in my face, or dirty looks from policemen, or insinuating remarks from the same."

Unlike sobriety checkpoints that are

designed to assure traffic safety, drug roadblocks serve the primary purpose of investigating criminal activity and thus require individualized suspicion. In the U.S. Supreme Court case *Edmonds v. Indianapolis*, Justice Sandra Day O'Connor wrote for the majority: "Without drawing the line at roadblocks designed primarily to serve the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life."



Brett Gaspar

President's Corner continued from page 2

conduct a July 2002, telephone poll of 1520 adults. These people were asked about the United States Constitution and its meaning. The survey revealed that 66 percent of Americans consider it "absolutely essential for ordinary Americans to have a detailed knowledge of their constitutional rights and freedoms."

The poll asked respondents to identify "the biggest threat to the constitutional rights and freedoms of Americans." Thirty-six percent identified "more and more government power intruding on our rights and liberties"; 31 percent identified "foreign enemies trying

to attack our country and our way of life"; and 30 percent identified "ordinary citizens taking their rights and freedoms for granted."

The survey respondents were asked to assess the current threat to the right to privacy; 41 percent consider it "is currently under serious threat," 34 percent think it "is basically safe," and 24 percent believe it "has already been lost."

These and other data from the survey indicate that the ACLU resonates with the core constitutional values held by most Americans. One of our tasks is to invite more and more of them to join us in the defense of civil liberties.

Mandatory Immunizations continued from page 3

that is, enough of the population or a critical mass getting inoculated, these diseases will not reemerge to threaten the population. Herd immunity is equal to 80-85% immunization coverage. Accommodating the small minority of parents who object to immunizations on religious grounds in no way threatens the herd immunity.

After overcoming some initial hurdles, the bill sailed through the Senate with unanimous approval. But it was unexpectedly defeated in the House where it garnered only 28 out of 100 votes.

Conservatives continued from page 2

Senator Harrison also introduced me to Kevin McCoy, Executive Director of the West Virginia Family Foundation, a conservative Christian organization. McCoy and his organization had been responsible for killing the State Attorney General's sponsorship of an anti-bullying program in the public schools. He did so by sharing with the media his delusion that it promoted a homosexual agenda and therefore must have been the product of the ACLU. However, given all of our new conservative friends, I felt I would be negligent in my responsibilities if I didn't try to line up McCoy's support on the two bills of ours that dealt with religious freedom.

While in person he seemed receptive to my overtures, a week later he sent me an e-mail with his final answer which was not the one I hoped for. He said, "The reason [that we cannot support you] for this is not necessarily based upon our opposition to your endeavor, but rather an opinion by our Board of Directors and me that the ACLU is diametrically opposed to both the mission and purpose of our organization and its members."

In this year's legislative session, McCoy's response was a surprise. I had finally found one conservative who could not find happiness in the ACLU.

Woman's Equality continued from page 3

are still expected to bear the major responsibility for child care. A woman's ability to decide whether to bear a child is crucially related to her ability to control and plan her life; to maximize her freedom of choice in other areas; to decide when, whom, and whether to marry; and to pursue economic, educational, or political opportunities.

Much of the opposition to the right to choose abortion has come from those who would like nothing better than to keep women "in their place," and who remain uncomfortable with the prospect of sexual equality as many white Southerners were once with racial equality.

In testifying against this bill, ACLU-WV Executive Director Andrew Schneider quipped, "a hundred years ago during Victorian times, this bill might have been called 'The Protection of the Frail and Hysterical Creatures Act.'" The anti-choice forces rushed this bill through under the deceptively named "Women's Right to Know Act."

Despite the dedicated efforts of ACLU, WV FREE, Planned Parenthood and other pro-equality organizations and activists, the House passed S.B. 170 with only 15 out of 100 delegates voting no and the Senate passed it with only three opposed out of 34. Sadly, Governor Wise let this become law without a veto.

Sixtieth Anniversary continued from page 8

and Fourteenth Amendment, and searing attack on Frankfurter's Gobitis opinion. A main thrust of Covington's argument was that Gobitis was defective because of the effect it produced: the wave of persecution against Jehovah's Witness that swept the country. In his oral argument, he labeled Gobitis as "one of the greatest mistakes the court has ever committed."

The ACLU filed an amicus curiae brief written by William G. Fennell and signed by him, Osmond K. Fraenkel, Arthur Garfield Hays of the national ACLU office and Howard B. Lee from West Virginia. The brief pointed out that a majority of the justices still on the court who participated in Gobitis no longer agreed with the decision. It also emphasized the flood of prosecutions against expelled students and their parents. The brief thoroughly rejected the notion that the flag-salute regulation was merely an issue of educational policy. The regulation, it argued, required children to perform an act that violated their religious scruples and thereby violated the protection of free exercise of religion and free speech provided in the First and Fourteenth Amendments.

In *Barnette* the Court further committed itself to a course of examining laws that burden the free exercise of religion, and to especially assess if prejudice against noticeable and insular religious minorities creates a special situation, which should restrict the legislative process that is ordinarily depended upon to protect minorities. The opinion, however, retained a balancing test that weighed the liberty to freely exercise religion against the secular purpose of government regulation.

In *Shebert v. Verner* (1963) the court adopted a strict scrutiny test, which required that laws touching on free exercise must have more than a neutral rational basis, they must serve a "compelling state interest." The court used this test in ten cases; six times ruling for the religious claimant and four times for the government. In *Oregon Employment Division v. Smith* (1990), however, the Court rejected the strict scrutiny standard and adopted a test that allows a law to burden free exercise of religion so long as it is a "neutral law of general applicability."



Hospital Employees
continued from page 1

tutions are being conducted," said Andrew Schneider, ACLU of West Virginia Executive Director. "And our plaintiffs have a right to tell the public what it has a right to know."

This policy effectively denied employees the fundamental right of discussing matters of public concern. In court documents asking that the hospital's policy be ended immediately, the ACLU maintains that "the intimidating impact on employees of a requirement that they must ask the top officer of the agency for permission to exercise a basic privilege creates a chilling effect that can safely be described as an arctic blast."

Hospital officials contended that the policy allowed for employees to talk to the media if they initiated the contact, however if the

media contacted them, hospital employees would have to first notify a hospital administrator.

The agreed-upon settlement sets forth an interim policy in which the hospital will not discipline or retaliate against employees who report accurate non-confidential information or state opinions as long as they are not speaking on behalf of the hospital. The hospital will also negotiate a redraft of the policy to meet ACLU approval.

The lawsuit was filed in United States District Court for the Southern District of West Virginia on behalf of Mitchell-Bateman Hospital employees Jeffrey N. Watson, Todd Jenkins, Teresa Jenkins, Melissa Parker, Kara Anderson, and Derrick Vanoy. Robert Bastress, a professor of constitutional law at West Virginia University School of Law, served as the ACLU's cooperating attorney.

High School
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become curious about their rights, and the rights of students, especially within the school system.

Although there are still some who have a negative view of our high school chapter, it is apparent we have had our effect upon those around us. Students have personally thanked us for providing them with information about their rights that, otherwise, they would have known little, if anything, about. Especially now, with so much turmoil present regarding the war in Iraq, our presence has suddenly taken new meaning. Now students are not afraid to speak out or to voice their opinions. They have a better idea of what they legally can and can't do. We have changed the minds of teenagers and opened the eyes of adults.



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