

August 31, 2004

BY MAIL, FACSIMILE & EMAIL (kondrackie@cityoflacrosse.org)

Edward N. Kondracki, Chief of Police
City of La Crosse Police Department
400 La Crosse St.
La Crosse, WI 54601

Re: Investigation of Visit by President Bush

Dear Chief Kondracki:

I write to express the ACLU of Wisconsin's concerns about certain conduct of the La Crosse Police Department and your response to complaints made by citizens in connection with a campaign visit to La Crosse by President George W. Bush on May 7, 2004.

As set forth in more detail below, we believe that it was improper for one of your officers to suggest that the use of sound equipment was illegal and that this suggestion may have suppressed legitimate protest activity. We are also concerned about the potentially chilling effects of your department's videotaping of peaceful protesters and asking protesters to stop displaying "offensive" signs.

While these actions are troubling and should be prevented from recurring, we are more alarmed about your response to citizen complaints about these and other incidents. Your letter and investigative report of August 12, 2004, rather than using the citizen complaints as an opportunity for constructive dialog about improving police response to protest activities, appears to be a barely concealed threat to seek prosecution of individuals who exercised their First Amendment right to petition the government for redress of grievances. While isolated police overstepping on the scene of an evolving demonstration may be excusable, your letter and report of August 12th, which could and should have been produced in a state of cool and objective reflection, appears to be a calculated effort to silence criticism by distorting the investigative findings of Captain Jeffrey Wolf, of the La Crosse Sheriff's Department, and levying *ad hominem* attacks on protest organizers. We ask that you withdraw your letter and engage your critics, and the public, in meaningful discussions about how the competing demands of legitimate protest activities and the need for effective security can be better accommodated by the La Crosse Police Department in the future.

In this letter, I will assume that the basic factual findings of Capt. Wolf's report are accurate. Although I do not always agree with Capt. Wolf's inferences from the basic facts or with his legal or policy analysis, he appears to have made a sincere effort to investigate the complaint and to make suggestions for improvement where warranted.

Chilling of Legitimate Protest Activity

Suppression of Use of Sound Equipment

It appears to be undisputed that Captain Gary Uting approached a group of the protesters who were congregating at the north end of Copeland Park, over a city block away from the northernmost check-point for admission to the Bush campaign event, prior to President Bush's arrival. The protesters were setting up sound equipment in a park shelter so that opponents of President Bush and his policies could speak to the assembled demonstrators. Capt. Uting presented the protest organizers with excerpts (the first page and the last two pages) from an article from the June 1961 issue of the Missouri Municipal Review. He apparently had multiple copies of these excerpts to distribute and had prominently highlighted a reference to a 1949 Supreme Court decision upholding a ban on "sound trucks or similar amplifying devices emitting 'loud and raucous' noises."¹ Wolf Rep't at 6, Attach. 5. As Capt. Wolf concluded, "The fact that the documentation was handed out may have conveyed that [the protesters'] activities were unlawful and dictated how they would protest." Wolf Rep't at 6.

There is a dispute about what Capt. Uting said when he handed out these documents, but there is no dispute that he did not hand similar documents to the marching band that was warming up a short distance away. Nor did Capt. Uting present the protesters with a copy of the City of La Crosse sound ordinance, which applies a decibel level test to determine whether noise is excessive, regardless of whether that noise is made by a marching band or a political dissident with a microphone. City of La Crosse Ordinance 7.02(G). Instead, he handed out portions of an article approximately 40 years old, selectively edited and highlighted to suggest that making noise was unlawful. Unlike the ordinance, the article Capt. Uting handed out is not enforceable by the La Crosse Police Department. Indeed, it is not legal authority of at all. It is not, as it was characterized by the Wolf report, "a court ruling." Wolf Rep't at 6. It could have served no purpose other than to silence the protesters.

Capt. Wolf exonerates the Police Department from responsibility for this incident because Capt. Uting claimed he was given the article by the City Attorney's office. I would be very surprised if the La Crosse City Attorney's office suggested to Capt. Uting that he distribute this highly dubious and deceptively excerpted and highlighted article to protesters, but not to other potential noisemakers (*e.g.*, the marching band or the chanting soldiers) in the park. Most lawyers know that, although a content-neutral noise ordinance, like the one duly adopted by the City of La Crosse, is enforceable, an article written by an assistant professor of political science

¹The fact that Capt. Uting had multiple copies of this anachronistic document, pre-highlighted for the edification of protesters, appears to undercut Lt. Mix's assertion that "the La Crosse Police Dept. was not aware of any protest activity being planned." Wolf Rep't at 4.

and published in an obscure periodical in 1961 is not only unenforceable, but unhelpful. Most lawyers also know that it is unconstitutional to apply a noise ordinance in a content-based manner, as Capt. Uting did when he distributed his article to protesters but not the marching band or soldiers. *See, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972). The ACLU urges the La Crosse Police Department and the La Crosse City Attorney's office to take Capt. Wolf's advice and have the City Attorney "review case law pertaining to protesting and educate [police officers] if he so chooses with accurate and current information." Wolf Rep't at 6.

Videotaping of Protest

When protesters moved their demonstration from the north end of Copeland Park to a space across the street from the baseball stadium in which the Bush rally occurred, Capt. Uting videotaped the demonstration, occasionally zooming in for close-ups of individual protesters. The individuals in the close-ups do not appear to be engaged in any activity different from that of other protesters, but some had been identified as protest organizers. Wolf Rep't at 7.

As Capt. Wolf noted, the videotaping of peaceful protesters raises First Amendment concerns, because such videotaping can be intimidating and thus chill the exercise of the rights to speak and assemble. Protesters may wonder, and not without reason, whether their images are being compiled into law enforcement "dossiers" or black-lists that will be used against them. Indeed, it is well known that J. Edgar Hoover's FBI engaged in just such tactics against civil rights leaders in the 1960s and 1970s, and it has been alleged that the Denver Police were engaged in similar activities as recently as a two years ago. *See* Gina Barton, "Police Video Ready to Roll Again for Bush Protests," *Milw. Journal-Sentinel* (Oct. 2, 2003).

While there is no general expectation of privacy in public places, government surveillance of public events may in some cases cross the line and impermissibly chill the exercise of first amendment rights, including not only the rights to association and speech, but the right to exercise religion. *See, e.g., Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989).

Although Capt. Wolf recognized the need to review policies on videotaping peaceful protesters, he again exonerated the La Crosse Police Department from any culpability, on the grounds that the protesters were violating the trespass law. As discussed more fully below, the protesters did *not* violate the City's trespass ordinance or the state trespass statute. Moreover, it appears from the videotape itself that the taping continued after the protesters moved from private property onto St. James Street, just east of Copeland Avenue. This taping could have served no evidentiary purpose in any subsequent trespass prosecution.

Suppression of "Offensive" Sign

The First Amendment reflects 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 v. Sullivan*, 376 U.S. 254, 270-71 (1964). The terms of such robust

debate can sometimes be offensive to some members of the public. However, unless the offensive terms are intended and likely to provoke an immediate and violent breach of the peace or are imposed on a captive audience, they cannot be punished. For example, in the seminal case of *Cohen v. California*, 403 U.S. 15 (1971), the Supreme Court invalidated a breach of the peace conviction of a man who wore a jacket reading “Fuck the Draft” in a Los Angeles courthouse. In general, the Court said, the government cannot “shut off discourse solely to protect others from hearing it.” *Id.* at 21.

When the Bush protesters congregated along the east side of Copeland Avenue, two officers responded to a complaint from one protester about another protester’s sign that included the word “fuck.” The officers then asked Guy Wolf, one of the protest organizers, to intervene with the person holding the offending sign. Mr. Wolf apparently did so, and the sign was voluntarily removed from view. Wolf Rep’t at 10-11.

While the protester’s sign may have been protected speech under the First Amendment, it appears that the police officers reacted in a measured and reasonable manner. The resolution of the incident was accomplished without direct police intervention, such as an arrest or physical seizure of the sign. The ACLU has no objection to a police officer relaying a complaint by one private individual to another and asking for voluntary sensitivity to the complainant’s sensibilities. However, had the protester insisted on his right to use provocative speech to make his political point, the police would have been unjustified in confiscating the sign or making an arrest. Indeed, had the police suggested that the protester’s sign subjected him to legal penalty, this may have impermissibly chilled legitimate protest. Because Capt. Wolf’s report and your letter seem to endorse such action, we think it would be useful for the City Attorney to instruct police officers about the protected status of potentially offensive speech.

Threatened Retaliation for Exercise of the Right to Petition

The First Amendment expressly protects the “right of the people . . . to petition the Government for a redress of grievances.” The right to petition is a core political right in a democratic society and traces its lineage to the Magna Carta of 1215 and the English Bill of Rights of 1689, which stated: “[I]t is the right of the Subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.” 1 Wm. & Mary, Sess. 2, Ch. 2. “The right to petition is ‘among the most precious of the liberties guaranteed by the Bill of Rights’ . . . and except in the most extreme circumstances citizens cannot be punished for exercising this right ‘without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions.’” *McDonald v. Smith*, 472 U.S. 479, 486 (1985) (Brennan, J., concurring).

On or about May 19, 2004, protesters wrote to you and asked for an investigation into police conduct during the May 7, 2004 demonstration. This request for an investigation into grievances is a paradigmatic act of petitioning the government. Your response of August 12, 2004, was both unnecessary (inasmuch as the La Crosse Sheriff’s Department had already conducted an investigation) and counterproductive, and any further threats to prosecute

protesters would almost certainly run afoul of the prohibition on punishing exercise of the right to petition.

Your letter repeatedly accuses of “trespassing” those individuals who signed the request for an investigation. Kondracki Ltr at 5-7. You make what appears to be a veiled threat of prosecution, singling out those who signed the complaint. *Id.* at p. 8.

However, the protesters do not appear to have violated the City’s trespass ordinance or state law. First, it should be made clear that an ordinance that forbids entry onto the property of another for an innocent purpose and without an express oral or written command from the owner to the would-be trespasser not to enter would likely be unconstitutional. *See Martin v. City of Struthers*, 319 U.S. 141, 148 (1943) (“Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more. We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away.”).

Fortunately, the City ordinance and State statute do not forbid entering private property, unless the person entering has reason to know that they are doing so without the owner’s consent and have fair warning that their presence is unacceptable. La Crosse Ordinance 7.04(D)(3) indicates that “a person has received notice . . . within the meaning of this subsection if he has been notified personally, either orally or in writing, or if the property is posted.” Similarly, Wis. Stat. § 943.13 forbids entry onto land without “express or *implied* consent,” and describes a multi-factored test to determine whether a landowner has given implied consent. This test includes whether the owner has previously acquiesced in entry, how the land is customarily used, whether the owner has publicly stated that the land may or may not be entered, and the arrangement or design of structures on the land. Accordingly, if the land were posted with a “no trespassing” sign or enclosed with a fence, a person entering would have fair notice that their entry was unlawful. Here, however, it appears that the property in question included two vacant lots and a business location, neither fenced and neither posted.

Although your letter indicates that the owners of the private property in question did not give permission and wish to press charges, it does not appear that they ever gave notice to the protesters that they were not permitted to enter the property for an innocent purpose, such as protesting. Accordingly, they should not be subject to prosecution for trespass. Nor did your officers warn the protesters that they would be subject to trespass citations or prosecution if they did not remove themselves from the property. Indeed, Sgt. J.D. Smith stated that he thought “the demonstration was peaceful and there were no problems with the protesters with no action taken towards them.” Wolf Rep’t at 5. “Lt. Mix also described the protesting on Copeland Ave.,” where the alleged trespassing took place, “as a win-win situation and that the protesters and police cooperated together.” It appears that the notion of charging protesters with trespass arose only after they had petitioned your office for an investigation into their grievances.

Even more disturbingly, you characterize the filing of the complaint itself as “hindering and obstructing” the La Crosse Police Department, “by filing allegations which they knew or should have known were either unfounded, unsubstantiated or blatantly false, resulting in a substantial loss of police manpower and resources necessary to interview and investigate the activities of over fifty police officers.” Kondracki Ltr at 8, 4. Any attempt to prosecute any of the complainants for filing their request for an investigation would surely founder on the shoals of the petition clause. As long ago as 1689, the people of England could petition their tyrant/king without fear of being punished. Our Founding Fathers would surely be surprised that an offended police chief could instigate the prosecution of a few protesters who ask for nothing more than an investigation.

Moreover, your repeated characterizations of the complainants’ allegations as “false” and “blatantly false” clearly overstate the findings of Capt. Wolf’s investigation. Although he concluded that all of the complaints were “unfounded,” he actually confirmed many of the factual assertions made by the protesters. For example, Capt. Wolf found that Capt. Uting did distribute the Missouri Municipal Review article and concluded that this article may have misled protesters about the law and dissuaded them from using a sound system they had every right to use. Wolf Rep’t at 6. He also found that there was “miscommunication as to if the shelter could be used.” *Id.* In addition, he confirmed that the police were videotaping peaceful protesters and found that the “close up [videotape] images taken of Wolf, Freedland, and Zumach does [*sic*] appear to be inappropriate.” *Id.* at 8. The report also confirms that officers asked for the removal of a protester’s sign on the grounds it contained a common obscenity. *Id.* at 11.

Indeed, most, if not all, of the essential factual allegations made by the complainants appear to have been confirmed by Capt. Wolf, although their perceptions of and inferences from those facts remain contested. What protesters perceived as a neglectful lack of police presence and unequal treatment, the police viewed as a reasonable allocation of limited and over-extended police resources to cover a complex and far-flung event. What protesters perceived as a threat of arrest for using sound equipment, police saw as a reasonable effort to lay down ground rules for protest. What protesters viewed as entanglement of religion and law enforcement, police saw as a reasonable means of augmenting their regular force to deal with a large event. What protesters saw as collusion between the police and the Republican party, the police say was simple coincidence. Such differences in perception are commonplace, not criminal.

By labeling the protesters’ perceptions as falsehoods, your letter creates conflict, where dialog is what is needed. Wisconsin is a “battleground” state in this year’s presidential election. President Bush, Vice-President Cheney, and candidates Kerry and Edwards will likely be making future stops in La Crosse to seek votes. The people of La Crosse have a right to demonstrate against any and all of these candidates. Your department will be called upon again to balance the rights of protesters and the need to provide security. This is not an easy task. Your letter of August 12, 2004, will only make the task more difficult by engendering a confrontational atmosphere.

The ACLU asks that you withdraw your letter of August 12, 2004, and commence a meaningful and respectful public discussion about how the La Crosse Police Department can

best protect safety and freedom at future events in this election season. Please feel free to call me at (414) 272-4032, extension 12.

Sincerely,

Laurence J. Dupuis
Legal Director

cc: John Medinger, Mayor of La Crosse, metingerj@cityoflacrosse.org
Mark Johnsrud, Pres. of La Crosse City Council, 2823 Quarry Pl, La Crosse, WI 54601
Pat Houlihan, City Attorney of La Crosse
Scott Horne, La Crosse County District Attorney