

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-20577-CR-JORDAN

UNITED STATES OF AMERICA,)
)
 Plaintiff)
)
 v.)
)
 GREENPEACE, INC.)
 d/b/a "Greenpeace, U.S.A.)
 _____/

**AMICUS BRIEF OF THE ACLU OF FLORIDA, INC AND PEOPLE FOR THE
AMERICAN WAY FOUNDATION IN SUPPORT OF DEFENDANT GREENPEACE'S
MOTION FOR DISCOVERY ON CLAIM OF SELECTIVE PROSECUTION**

**Q: "Has the Justice Department ever gone after an advocacy
group in particular . . .?"**

**A: "We don't go after groups. We go after people who commit
criminal conduct."**

Frank J. Marine, Acting Chief of the Organized Crime And Racketeering Section of the Criminal Division of the Justice Department, *Hearing Before the Subcommittee on Crime of the Committee on the Judiciary, House of Representatives*, 105th Cong. 2d Sess. (1998) at 36.

For two hundred years, the United States government has refrained from prosecuting advocacy groups whose members occasionally engage in peaceful civil disobedience to convey a constitutionally protected message. The prosecution of Greenpeace indicates a sea change in that policy. Until now, only individual members of those groups have been prosecuted for their nonviolent, albeit unlawful, acts of civil disobedience. Greenpeace asserts, and there is reason to

believe, that the government has selectively prosecuted it because of the content of its message. Selective prosecution violates the First Amendment and equal protection rights of Greenpeace; it also threatens every advocacy group whose message may offend the government of the moment.

Interest of Amici

The American Civil Liberties Union of Florida, Inc. (ACLU) is the Florida affiliate of the American Civil Liberties Union; it has approximately 14,000 members dedicated to advancing and preserving the constitutional protections found in the Bill of Rights, and, in particular, the First Amendment. As part of that commitment, the ACLU seeks to protect the First Amendment rights of advocacy groups to convey constitutionally protected messages to the government and the people who elect it. The ACLU frequently participates in litigation involving constitutional liberty interests and regularly has been permitted to file amicus briefs in Florida's state and federal courts.

People For the American Way Foundation (PFAWF) is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civil and educational leaders, PFAWF now has over 600,000 members and supporters nationwide, including more than 40,000 in Florida, who are dedicated to the democratic tradition of liberty and freedom embodied in this country's Constitution. One of the organization's primary objectives is to educate the public on the vital importance of these principles, and to defend them through litigation and other means as necessary. PFAWF has frequently represented parties and filed amicus curiae briefs in litigation seeking to defend First Amendment freedoms in Florida and elsewhere.

The First Amendment protects the right of individuals to join in advocacy groups; individuals who do so often engage in civil disobedience to draw the public's attention to their message. Until

now, individual acts of civil disobedience have not subjected advocacy organizations to criminal prosecution. The ACLU and PFAWF seek on behalf of all advocacy groups to prevent their selective prosecution.

The government's radical departure from two hundred years of history invites the closest scrutiny. It has chosen to prosecute Greenpeace, an organization that regularly criticizes government policies, for the civil disobedience of its members. Using an arcane statute designed to deter the even more arcane practice of sailor-mongering, described *infra*, the government apparently seeks to silence Greenpeace, despite already having prosecuted and punished the individual Greenpeace "climbers" who performed the acts of protest aboard the vessel Jade. This prosecution threatens the very existence of Greenpeace, and because it appears to be based upon the content of its message, imperils the core values of the Constitution to which the ACLU and PFAWF are dedicated. This case therefore raises issues of profound importance to the ACLU and PFAWF, to their members, and to the many advocacy organizations whom, throughout their history and without regard to viewpoint, they have represented. Accordingly, the ACLU and PFAWF seek leave to file this Amicus Brief in Support of Greenpeace Inc.'s Motion for Discovery on Claim of Selective Prosecution.^{1/}

Introduction: Greenpeace's Mission – Environmental Advocacy

Greenpeace is internationally recognized as an environmental activist organization. Since 1971, its mission has been to expose global environmental problems. Greenpeace delivers its

^{1/}The ACLU and PFAWF take no position on the views held by Greenpeace or the forms of expression used by Greenpeace as an organization, or the actions of its individual members. The only position we take is that the government's apparent selective prosecution of an organization based on its political views poses a threat to the core values of the First Amendment.

message in a host of ways and through a variety of media; it lobbies, it conducts diplomacy, it conducts research, it publicizes its views through writings, in meetings, and on its web sites, it demonstrates – all fully protected speech; it also speaks through unconventional yet unerringly nonviolent confrontation.^{2/} On the latter score, its Mission Statement is unequivocal:

Greenpeace is an independent, campaigning organization that uses non-violent, creative confrontation to expose global environmental problems, and force solutions for a green and peaceful future. Greenpeace’s goal is to ensure the ability of the Earth to nurture life in all its diversity.^{3/}

Since its formation in 1971, Greenpeace and its activists have proven to be a thorn in the side of governments—foreign as well as domestic—and private corporations. Donna E. Correll, *No Peace for the Greens: The Criminal Prosecution of Environmental Activists and the Threat of Organizational Liability*, 24 Rutgers L.J. 773 (1993). That is their mission, and when individuals choose peaceful civil disobedience as a tool, they willingly pay the price for their actions. *Id.* at 781. Their lobbying, diplomacy, and their protests, with and without civil disobedience, have proven effective.^{4/} Until this indictment against the organization itself, however, only individual members of Greenpeace have been prosecuted for engaging in civil disobedience.

^{2/} Greenpeace describes itself in its Mission Statement:

In pursuing our mission, we have no permanent allies or enemies. We promote open, informed debate about society’s environmental choices. We use research, lobbying, and quiet diplomacy to pursue our goals, as well as high-profile, non-violent conflict to raise the level and quality of public debate.

“Our Mission”, (visited November 3, 2003)

http://www.greenpeace.org/international_en/extra/?item_id=4265&language_id=en.>

^{3/} *Id.*

^{4/} See “*Greenpeace Victories*,” (visited Nov. 3, 2003)

[<http://www.greenpeace.org/international_en/victory/>](http://www.greenpeace.org/international_en/victory/>).

Never in the jurisprudential history of the United States has an organization like Greenpeace that engages in a wide variety of constitutionally protected means of expression been charged with a criminal act arising from acts of civil disobedience by its members. The indictment significantly obstructs Greenpeace's constitutionally protected advocacy; the Port of Miami has refused it docking space because of the indictment. Should Greenpeace be convicted as charged, the consequences would be disastrous to its mission of nonviolent environmental activism. Although the government casts the crime charged as a "petty offense" (United State's Response to Defendant's Motion for Jury Trial at p.2), that cavalier description belies the true import of this charge. Greenpeace, if convicted, could be, through conditions of probation, forced to abandon its forum and disavow its members' actions.^{5/} Such terms would allow the government to silence Greenpeace, a result that is abhorrent to the values of freedom of speech.

Facts

On April 12, 2002, two Greenpeace activists climbed aboard the Jade, a vessel believed to be carrying mahogany illegally harvested in Brazil, allegedly being imported into the United States in violation of an international treaty to which the United States is a signatory. Their mission was simple: to alert the authorities to the presence of illegal mahogany so that the government could halt the shipment, and to unfurl a banner that read "President Bush: Stop Illegal Logging." The individuals clearly identified themselves as Greenpeace activists; their boarding vessels and clothing bore the Greenpeace name. Those activists were arrested, prosecuted, convicted of misdemeanors, and sentenced to time served. However, in July of 2003, a federal grand jury issued an indictment against "Greenpeace, Inc., d/b/a Greenpeace, U.S.A.," charging the organization with conspiracy

^{5/} A conviction may endanger Greenpeace's nonprofit status, and therefore its existence.

to violate 18 U.S.C. § 2279.

The Crime Charged

The predicate of the conspiracy indictment is a statute passed by Congress in 1872.

Whoever, not being in the United States service, and not being duly authorized by law for the purpose, goes on board any vessel about to arrive at the place of her destination, before her actual arrival and before she has been completely moored, shall be fined under this title or imprisoned not more than six months, or both.

The master of such vessel may take any such person into custody, and deliver him up forthwith to any law enforcement officer, to be taken by him before any committing magistrate, to be dealt with according to law.

18 U.S.C. § 2279 (2002).

The act has been cited in only two cases since its passage over one century ago: *United States v. Sullivan*, 43 F. 602 (D. Or. 1890), and *United States v. Anderson*, 24 F. Cas. 812 (S.D. N.Y. 1872). In *Sullivan*, the court explained this odd and obscure prohibition:

The evil which this section is intended to prevent and remedy is apparent, and in this district notorious. For instance, lawless persons, in the interest or employ of what may be called “sailor mongers,” get on board vessels bound for Portland as soon as they get in the Columbia river, and by the help of intoxicants, and the use of other means, often savoring of violence, get the crews ashore, and leave the vessel without help to manage or care for her. The sailor thereby loses the wages of the voyage, and is dependent on the boarding house for the necessaries of life, where he is kept, until sold by his captors to an outgoing vessel, at an enormous price.

Sullivan, 43 F.602, 604-05.

This statute is thus a product of the lawless shipping days of the nineteenth century, when sailors were lured from their vessels by promises of liquor and loose women. Its application to an

internationally recognized nonviolent environmental and political action group of the twenty-first century raises a red flag of suspicion that the government has targeted Greenpeace not for sailor-mongering, surely an absurd proposition, but for its political speech. That red flag should caution this Court to allow inquiry beyond the four corners of the charging document and order the government to produce the discovery Defendant seeks in its Motion for Discovery on Claim of Selective Prosecution.^{6/} Before the government proceeds, it should account for why, from among countless advocacy organizations whose members sometimes employ peaceful civil disobedience, it has selected only Greenpeace for prosecution; the government should also provide the materials Greenpeace seeks relating to the commencement of this prosecution. This Court, apprised of the nature of the crime charged in the indictment, should require the government to disclose whether, in the one hundred and thirty-one years since the passage of this act, it has prosecuted other organizations for similar actions, or whether, in fact, the application of this “sailor mongering” statute is an attempt to suppress protected expression of opposition to U.S. environmental policy.

The First Amendment Forbids the Government From Selectively Prosecuting Greenpeace For Acts of Civil Disobedience Committed by Its Members.

The individuals who peacefully boarded the Jade willingly suffered the punishment imposed. That form of nonviolent confrontation is their hallmark. *See* Correll, 24 Rutgers L. J. 773, 779-781. The only reported violence involving a Greenpeace protest occurred in 1985, when one Greenpeace member was killed when French Secret Service divers blew up Greenpeace’s nuclear test monitoring

^{6/} In its discovery request, Greenpeace has met the *United States v. Armstrong*, 517 U.S. 456 (1996) burden of establishing a prima facie case of selective prosecution entitling it to confirm its claim of selective prosecution; we will not repeat those arguments except to the extent necessary for our argument that Greenpeace members were participating in traditional nonviolent civil disobedience, and that Greenpeace is a particularly annoying thorn in the side of the government.

ship in New Zealand. *Id.* The deeply troubling issue raised by this prosecution, however, is that the target of the government's criminal prosecution is Greenpeace itself, and not just the individuals who willingly risked criminal sanctions to express their political views.^{7/}

Greenpeace's objective in boarding the Jade was simply to alert the authorities that illegally harvested mahogany was headed for the Port of Miami so that the government could halt that shipment, and to hang a banner from the side of the vessel urging: "President Bush: Stop Illegal Logging." The message was unequivocal: it sought to draw attention to Greenpeace's position that this Administration is ignoring a ban on the importation of mahogany that had been illegally harvested from the Brazilian Amazon.

"The First Amendment bars a criminal prosecution where the proceeding is motivated by the improper purpose of interfering with the defendant's constitutionally protected speech." *United States v. P.H.E., Inc.*, 965 F.2d 848, 849 (10th Cir.1992). Although the government may criminalize civil disobedience, the First Amendment forbids prosecuting a civil disobedient on the basis of the actor's viewpoint. *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972) (same).

Civil disobedience has deep roots in American history; it reaches back to colonial days and has been part of every major social movement. Yet from the earliest days of colonial America, the target governments -- first the United Kingdom, later the United States -- prosecuted individuals who engaged in civil disobedience, but until today, never prosecuted the groups on whose behalf they acted.

^{7/} We again emphasize that Amici neither condone nor condemn the acts of Greenpeace members, or of the organization.

The Government Has Never Before Prosecuted a Group for Its Political Expression.

Early resistance to British rule took the form of peaceful civil disobedience; in the Massachusetts Bay Colony, Quakers and Baptists “were hanged, banished, or whipped. Later they were fined, imprisoned, or distrained” for refusing to pay taxes in protest against the Standing Order.^{8/} Though the British reacted forcefully against early civil disobedients, they did not punish the churches who led them.

Peaceful civil disobedience against slavery was widespread from the early nineteenth century through the beginning of the Civil War. Writing in “Resistance to Civil Government”, Henry David Thoreau urged his fellow citizens to refuse to pay taxes in protest against slavery:

I know this well, that if one thousand, if one hundred, if ten men whom I could name, – if ten *honest* men only, – ay, if one HONEST man, in this state of Massachusetts, *ceasing to hold slaves*, were actually to withdraw from this copartnership, and be locked up in the county jail therefor, it would be the abolition of slavery in America. For it matters not how small the beginning may seem to be: what is once well done is done forever....^{9/}

Like the men and women of Greenpeace, Thoreau knew the price of civil disobedience was jail; he embraced it, writing that,

the true place for a just man is also a prison. The proper place to-day, the only place in which Massachusetts has provided for her freer and less desponding spirits, is in her prisons, to be put out and locked out of the State by her own act, as they have already put themselves out by their principles.^{10/}

With the enactment of the Fugitive Slave Act, civil disobedience found its national voice in

^{8/}David R. Weber, *Civil Disobedience in America* (Cornell University Press 1978) at 19.

^{9/}Henry David Thoreau, *Resistance to Civil Government*, reprinted in *Civil Disobedience in America*, at 87.

^{10/}*Id.*

Thoreau^{11/}, Charles Beecher^{12/}, Theodore Parker^{13/} and Nathaniel Hall,^{14/} and dozens of other men and women who individually and collectively advocated nonviolent disobedience to law. Though their appeals to conscience were insufficient to bring slavery to an end, they established forever the place of civil disobedience in the American polity, yet none of their *organizations* ever faced prosecution.

After the Civil War, peaceful civil disobedience emerged as the principal weapon of women in their quest for the right to vote. When quiet disobedience to law proved ineffectual, suffragists resorted to organized civil disobedience, with large numbers of women picketing the White House, burning copies of the President's speeches, and even burning the President in effigy, all in defiance of then current law.^{15/} Jailed under barbaric conditions, their suffering moved a nation; through peaceful civil disobedience, women secured the right to vote.^{16/} Yet though their mass protests were well organized, and though hundreds and perhaps thousands were jailed, there is no record of a prosecution of any of their sponsoring organizations.

With ratification of the Nineteenth Amendment, the nation turned to the great unfinished business of the Civil War – racial equality, with peaceful civil disobedience the driving force. The Civil Rights Movement dipped deep into the well of history; Dr. King explained then what the

^{11/}Slavery in Massachusetts (1854)

^{12/}The Duty of Disobedience to Wicked Laws (1851)

^{13/}The Function and Place of Conscience, In Relation to the Laws of Men (1850).

^{14/}The Limits of Civil Obedience (1851)

^{15/}Civil Disobedience in America, at 196.

^{16/}Staughton Lynd, Nonviolence in America 160-161 (Bobbs-Merrill 1966).

government overlooks today:

[T]he truth is that no one can scorn nonviolent direct action or civil disobedience without canceling out American history. The first nonviolent direct action did not occur in Montgomery. Its roots go back to the American Revolution and the boycott against British tea culminating in the Boston Tea Party. It was the favorite weapon of the suffragette movement when women had to fight for their right to vote.^{17/}

The Civil Rights Movement marked a watershed of a different sort. Stung by civil disobedience, state governments and segregationists launched legal assaults against the NAACP and other civil rights organizations in an effort to quell dissent by their members. In *NAACP v. Alabama*, 357 U.S. 449 (1958), the Court laid the groundwork for its many decisions protecting advocacy groups from state suppression:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

357 U.S. at 460-61 (overturning contempt judgment for violating state order to produce membership lists). See also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (overturning state judgment holding NAACP liable for damages caused by its secondary boycott of local merchants); *NAACP v. Alabama*, 377 U.S. 288 (1964) (overturning injunction forbidding NAACP from doing business in Alabama); *NAACP v. Button*, 371 U.S. 415 (1963) (enjoining Virginia from enforcing

^{17/}The Rev. Dr. Martin Luther King, Address to the American Jewish Committee (1965), reprinted in *Civil Disobedience in America* at 218.

criminal statute construed to prohibit NAACP from soliciting clients for civil rights suits).

The government's prosecution of Greenpeace turns history on its head. Until today, the United States has respected advocacy organizations whose members practice nonviolent civil disobedience; now it seeks to prosecute one of those organizations.

Greenpeace is but one of many organizations whose members often suffer criminal prosecution and punishment as the consequence of nonviolent civil disobedience. Those groups are diverse in their viewpoints; they include the Democracia Movement, dedicated to liberating Cuba from tyranny; Operation Rescue, committed to outlawing abortion; the Committee for the Rescue and Development of Vieques, committed to returning Vieques to civilian rule; and, because racial discrimination still stains the fabric of society, a host of civil rights organizations. Although each of these organizations practices civil disobedience for which their members have been prosecuted, the government has never prosecuted any of the organizations, even when those groups openly encourage members to violate federal law.^{18/}

This Prosecution Will Have a Chilling Effect on Protected Speech.

^{18/}Operation Rescue, for example, urges members to participate in "Rescues," which it defines:

Peacefully rescuing unborn children occurs when a group of pro-lifers sit down in front of the abortuary doors, thus physically intervening for the baby by placing their bodies between the abortionist and the mom. This helps to buy time for the sidewalk counselors to offer help and information to the mothers scheduled for abortion.

<http://www.operationrescue.org/involved/stop.asp> So defined, the conduct Operation Rescue sponsors violates the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248, yet the government has never prosecuted Operation Rescue or any of its sister organizations who oppose abortion through nonviolent and sometimes violent civil disobedience. For descriptions of Operation Rescue's tactics of civil disobedience, see, e.g., *National Org. for Women v. Scheidler*, 267 F.3d 687 (7th cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003); *Roe v. Operation Rescue*, 54 F.3d 133 (3d Cir. 1995); *National Org. for Women v. Operation Rescue*, 47 F.3d 667 (4th Cir. 1995).

Greenpeace engages in confrontational nonviolent political protest. This prosecution, if indeed it is selective, amounts to nothing more than an act of intimidation by the government, apparently directed at silencing political speech. “State action designed to retaliate against and chill political expression strikes at the very heart of the First Amendment.” *Gibson v. United States*, 781 F.2d 1334, 1339 (9th Cir. 1986), *citing NAACP v. Alabama*, 357 U.S. 449 (1958). Even if the government action may appear to be unrelated to protected liberties, that action is prohibited “when perceived to have the consequence of unduly curtailing” an activity protected by the First Amendment. *NAACP v. Alabama*, 357 U.S. at 461.

[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wise-open.'

Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 95-96 (citations omitted).

This prosecution curtails not only the protected political expression of Greenpeace; it will unduly curtail the activities of other similar activist groups. Such group activity has long been recognized as a protected First Amendment right.

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.

Id. at 460 (citations omitted).

The government should therefore explain why it is prosecuting Greenpeace. If its prosecution is impermissibly selective, and designed to thwart Greenpeace's group activities and silence its message, then this Court should ultimately dismiss the indictment. If the prosecution is instead a legitimate exercise of prosecutorial discretion, then the government should say so, and this Court should grant Greenpeace's request for discovery on the issue of selective prosecution.

Conclusion

The government's unprecedented decision to prosecute an advocacy organization for peaceful civil disobedience requires an explanation. For two hundred years the United States has honored the place of civil disobedience in American political life by prosecuting individuals who engage in civil disobedience while simultaneously respecting the advocacy groups who sponsor it. Congress has not rewritten the criminal code to target advocacy groups; instead, the government has dusted off a long forgotten statute to prosecute an environmental organization whose activities embarrass it. The inference is all but inescapable that the government is selectively prosecuting Greenpeace, Inc. because of its viewpoint. Accordingly, the Court should order discovery and if that inference is not disproved, dismiss the indictment.

WE HEREBY CERTIFY that a copy of the foregoing was mailed on November 7, 2003, to all parties on the attached service list.

Respectfully submitted,

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