CONSTITUTIONAL RIGHTS FOUNDATION

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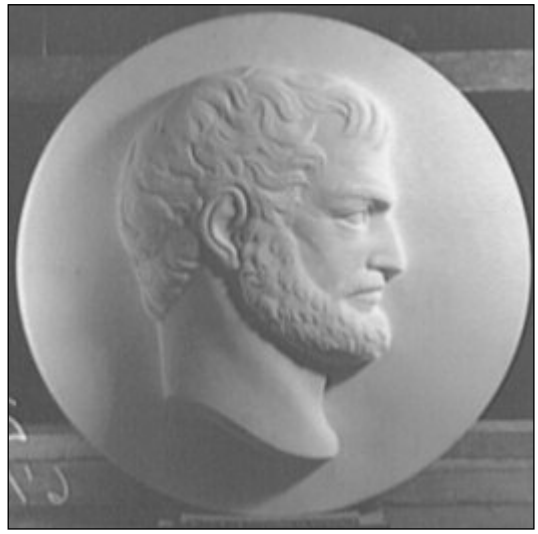
Solon Put Athens on the Road to Democracy

In ancient Athens, hatred between the rich and poor threatened the city-state with civil war and tyranny. Into this dangerous situation stepped Solon, a moderate man the Athenians trusted to bring justice for all.



This sculpture of Solon (c. 630–560 B.C.) hangs over the door of the gallery of the House of Representatives in Washington, D.C. (Library of Congress)

During the 600s B.C., Athens was a small city-state. It had no great fleets of ships, extensive foreign trade, or network of colonies. Instead, its economy depended on its surrounding farms, especially the large estates owned by rich noble families, the aristocracy.

WORLD HISTORY

The aristocracy ruled Athens. Nearly all government decisions and operations were in the hands of a half-dozen leaders called *archons* and lesser officials called magistrates. An assembly of nobles, most from wealthy landowning families, elected these leaders each year.

The aristocrats ruled Athens to benefit themselves. They often formed violent factions to gain advantage over one another. They also used the courts to discriminate against the common people, mostly poor farmers, laborers, artisans, and a growing class of merchants. A long history of hatred had grown between the lower classes and their aristocratic rulers.

Sometimes, the poor and powerless of Athens rebelled and backed a tyrant, a sort of dictator who ruled in the name of the common people (*demos* in Greek). But the aristocrats always regained power.

About 620 B.C., an *archon* named Draco produced the first written code of laws for Athens. It provided some protections for the common people. But his laws required severe punishments, often death, for most crimes. Today, we call harsh laws "Draconian."

During this period, the problem of debt magnified the hatred of the commoners against the aristocrats. Typically, a poor farmer had to borrow seeds and livestock from a rich landowner to plant his crops. The farmer was supposed to pay back this debt with a percentage of his harvest.

Overworked soil and drought, however, often limited the farmer's harvest to barely enough to feed his family. If the indebted farmer failed to deliver the required portion of his crop to the rich landowner, the landowner could seize the farmer's land. In this way, the aristocrats grew richer as they extracted every bit of grain and land they could from the poor farmers.

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The Rule of Law in Dangerous Times

This issue of *Bill of Rights in Action* looks at questions of the rule of law in dangerous times. The first article examines how Solon (c. 638–559 B.C.) prevented a civil war in ancient Athens by producing a just code of laws. The second article analyzes the law of seditious libel, meant to protect government officials from criticism and ridicule, and the famous colonial case of Peter Zenger challenging such laws. The last article explores the current controversy surrounding the National Security Agency's wiretapping program.

World History: Solon Put Athens on the Road to Democracy
U.S. History: John Peter Zenger and Freedom of the Press
Current Issues: The National Security Agency's Warrantless Wiretaps

Those without land frequently had to work as tenants, renting farm plots from the rich estate owners. Many of the farmers often could not grow enough food to both feed their families and pay the rent they owed. If the tenant could not pay his rent, the landowner could seize the farmer and his family and sell them into slavery. To avoid slavery, indebted persons sometimes fled Athens to other Greek city-states or even foreign lands.

As more poor farmers fell into debt and slavery, their hatred of the aristocracy grew. The poor and landless demanded that the large estates be broken up and redistributed to them. Civil war and the rise of another tyrant threatened the peace of Athens.

Solon Elected Primary *Archon*

Seeing disaster looming, both the aristocracy and common people of Athens supported the election of Solon as primary *archon* in 594 B.C. The Athenians granted Solon, then about age 35, nearly unlimited powers to write new laws to end the conditions that had caused all the hatred and fear.

Solon was the son of an Athenian aristocrat, but apparently his father had lost the family fortune. As a result, the young Solon became a merchant to support himself and his family. He led a modest life and never sought great wealth. Solon also became the first noted poet of Athens. Much of what we know today about his ideas and views come from his poetry.

The Athenians chose Solon to mediate their crisis for several reasons. The aristocrats liked that he was of noble birth. The commoners trusted him as an honest man who worked for a living. He was also known as a patriot who had rallied Athenians to defeat another city-state for possession of the nearby island of Salamis. Above all, Solon had the reputation of being moderate in his views.

Solon blamed much of the turmoil in Athens on the greed of the aristocratic estate owners. He charged they were about "to destroy a great city by their thoughtlessness." Yet he did not embrace democracy, which would have meant turning Athens over to the common people. In other words, he refused to take sides and looked for a middle way out of the crisis.

Solon rejected the notion that a god, a king, a tyrant, a single class, or even he himself could save Athens. Instead, he believed that all citizens, rich and poor, were responsible for achieving the common good of the city. Solon's idea about the meaning of citizenship was new.

Solon's Social and Political Reforms

Solon's first priority was to provide debt relief for the poor, which he called "shaking off the burdens." By decree, Solon cancelled all debts. There is debate about what this actually meant. But most historians agree that Solon restored the land the poor farmers had lost to their aristocratic creditors.

Solon also released those in debt slavery and banned offering one's own body or those of family members as security for a loan or rent. In addition, Solon granted amnesty to those who had fled into exile because of their indebtedness. He rejected, however, seizing the great estates of the aristocrats and redistributing their land to the poor.

Next, Solon turned to reforming the government of Athens. He believed there was a "right order" for governing the city. First, he reorganized Athenians into four new classes based on their wealth. Noble birth alone had been the basis of the old aristocracy.

Under Solon's plan, only members of the two wealthiest classes could become *archons* or magistrates. For the first time, however, he opened up membership in the assembly to all Athenian citizens, even the poor.

Under Solon's plan, the assembly chose nine *archons* and the magistrates by lot each year from the wealthy classes. The assembly also passed laws proposed by the *archons*.

Thus Solon's new government was not a democracy controlled by the *demos,* the majority of the people. Rather, it was an attempt to balance political power among the economic classes. He explained his purpose in one of his poems:

> To the people I have given such honor as is sufficient,
> neither taking away nor granting them more.
> For those who had power and were great in riches,
> I greatly cared that they should suffer nothing wrong.
> Thus I stood, holding my strong shield over both,
> and I did not allow either side to prevail against justice.

Solon's Code of Laws

Solon replaced most of Draco's code of laws with one less severe and fairer for all. "Laws I wrote, alike for

noblemen and commoners, awarding straight justice to everybody," he said in a poem.

Many of Solon's laws concerned family matters. One prohibited dowries to stop marriages based on economic gain. Marriage, he wrote, should be for "pure love, kind affection, and birth of children." He introduced wills that allowed a person to leave property to anyone instead of only to relatives.

Other civil laws regulated the water supply to farms and even the distance between beehives for honey production. To prevent shortages of food, he banned the export of all farm produce except olive oil.

Solon reduced the number of crimes punished by the death penalty. He permitted, however, a husband to kill an adulterer caught in the act. He made penalties for theft heavier if committed at night or in a public place. In addition, he forbade publicly speaking evil of either the living or the dead.

Solon also attempted to make the court system fairer to the lower classes. He made it possible for any citizen to step forward and seek justice for someone legally wronged. Before only the actual victim of wrongdoing could make a complaint. Under the old system, the powerful could easily threaten weak and poor victims to discourage them from complaining.

Most important, Solon gave the assembly, made up of all the classes, the authority to act as an appeals court. This was a check on the power of judges elected by the wealthy classes.

After he finished writing his new code of laws for Athens, Solon reflected on his achievement:

> I did those things with my power,
>
> bringing into harmony force and justice,
>
> and I finished them as I promised;
>
> and I made the laws equal for the poor man and the powerful
>
> fitting impartial justice on each.

Athens publicly displayed Solon's code of laws on wooden rectangular beams, each with four sides, so the reader could rotate them. Solon's laws remained in force for more than 100 years.

On the Road to Democracy

Many Athenians criticized Solon's reforms and laws since neither the aristocrats nor the *demos*, the common people, got everything they wanted. Some asked Solon to remain in power as a tyrant to explain and perhaps change what he had decreed. But he believed that it was now up to the Athenians, not him, to make the new system work. Thus, Solon reinforced his idea about citizen responsibility. He then left Athens and traveled outside Greece for 10 years.

The Athenians grudgingly accepted Solon's social, political, and legal reforms, seeing no other way to avoid civil war. The annually elected *archons* took an oath to observe Solon's laws. But conflicts among aristocratic factions continued.

About 560 B.C., a smooth-talking Athenian named Pisistratus wanted to become tyrant. Solon, now an old man, spoke to the assembly, warning against this man's ambition. Most dismissed his words as the ravings of a mad man.

One day Pisistratus entered the assembly wounded. He claimed his enemies had attacked him. He had actually wounded himself to gain the sympathy of the Athenians. The assembly appointed 50 armed men to protect him. Pisistratus used this force to seize power and make himself tyrant with the support of the poor people.

Solon blamed the Athenians for the "wretched servitude" they brought upon themselves by permitting the tyranny of Pisistratus. "Every one of you has an empty mind!" he exclaimed. Soon after, Solon died.

Pisistratus and his sons ruled Athens on and off for the next 50 years. Rival factions overthrew him two times, but he managed to regain power. One time he dressed a young girl as the goddess Athena who publicly proclaimed Pisistratus as the true leader of the city. The people of Athens fell for the trick.

To his credit, Pisistratus benefited Athens in some ways. The poor farmers gained more rights at the expense of the aristocracy. Athens began to grow as a center of commerce and the arts. Although Solon's government reforms withered, his law code remained in force. After Pisistratus died, however, the tyranny became more abusive under his sons.

Finally, Sparta attacked Athens and overthrew the last tyrant son in 510 B.C. The aristocrats resumed fighting

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for political power. In 508 B.C., however, another reformer, Cleisthenes, further weakened the nobility and prepared the way for greater participation in government by all Athenian citizens.

The reforms of Cleisthenes led to the full flowering of Athenian democracy during the Age of Pericles a half-century later. Solon never intended for the *demos* to rule. Even so, he introduced a new idea about broad citizen participation that put Athens on the road to democracy.

For Discussion and Writing

1. What do you think was Solon's greatest personal quality as a reformer?
2. What was Solon's new idea about citizenship? Why is this important for democratic nations today?
3. Compare tyranny and democracy in ancient Greece. What do tyranny and democracy mean today?

For Further Reading

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A C T I V I T Y

Participating Citizens

Today, we expect citizens in a democracy to participate in elections. But, what else should participating citizens do to ensure a strong democracy?

1. Meet in small groups and make a list of five activities, aside from voting, American citizens should participate in to keep our democracy strong.
2. Each group should decide which one of the five activities is the most important and why.
3. Each group should identify its top-rated activity and explain to the rest of the class why it is the most important one.

Standards Addressed

Solon

National World History Standard 8: Understands how Aegean civilization emerged and how interrelations developed among peoples of the Eastern Mediterranean and Southwest Asia from 600 to 200 BCE. Level III. (1) Understands the political framework of Athenian society (e.g., the influence of Athenian political ideals on public life; major changes made to the Athenian political organization between the initial monarchy and the governments of Solon and Cleisthenes . . .). Level IV (1) Understands the legacy of Greek thought and government . . . .

California History-Social Science Content Standard 6.4: Students analyze the geographic, political, economic, religious, and social structures of the early civilizations of Ancient Greece. (2) Trace the transition from tyranny and oligarchy to early democratic forms of government and back to dictatorship in ancient Greece, including the significance of the idea of citizenship . . . .

California History-Social Science Content Standard 10.1: Students relate the moral and ethical principles in ancient Greek and Roman philosophy, in Judaism, and in Christianity to the development of Western political thought. (1) Analyze the similarities and differences in Judeao-Christian and Greco-Roman views of law, reason and faith, and duties of the individual.

Zenger

National U. S. History Standard 4: Understands how political, religious, and social institutions emerged in the English colonies.

National Civics Standard 18: Understands the role and importance of law in the American constitutional system and issues regarding the judicial protection of individual rights.

Understands how the individual's rights to life, liberty, and property are protected by the trial and appellate levels of the judicial process and by the principal varieties of the law (e. g., constitutional, criminal, and civil law)

California History-Social Science Content Standard 8.3: Students understand the foundation of the American political system and the ways in which citizens participate in it. (7) Understand the functions and responsibilities of a free press.

California History-Social Science Content Standard 12.2: Students evaluate and take and defend positions on the scope and limits of rights and obligations as democratic citizens, the relationships among them, and how they are secured. (1) Discuss the meaning and importance of each of the rights guaranteed under the Bill of Rights and how each is secured (e.g., freedom of religion, speech, press, assembly, petition, privacy).

California History-Social Science Content Standard 12.5: Students summarize landmark U. S. Supreme Court interpretations of the Constitution and its amendments. (1) Understand the changing interpretations of the Bill of Rights over time, including interpretations of the basic freedoms . . . articulated in the First Amendment . . . .

NSA

National Civics Standard 5: Understands the major characteristics of systems of shared powers and of parliamentary systems. (1) Understands the major characteristics of systems of shared powers (e.g., in the United States and Brazil the executive, legislative, and judicial branches each have primary responsibility for certain functions and share some of the powers and functions of the other branches).

National Civics Standard 18: Understands the role and importance of law in the American constitutional system and issues regarding the judicial protection of individual rights. (1) Understands how the rule of law makes possible a system of ordered liberty that protects the basic rights of citizens. (2) Knows historical and contemporary practices that illustrate the central place of the rule of law (e.g., . . . executive branch compliance with laws enacted by Congress).

California History-Social Science Content Standard 12.2 Students evaluate and take and defend positions on the scope and limits of rights and obligations as democratic citizens, the relationships among them, and how they are secured. (1) Discuss the meaning and importance of each of the rights guaranteed under the Bill of Rights and how each is secured (e.g., freedom of religion, speech, press, assembly, petition, privacy).

California History-Social Science Content Standard 12.4: Students analyze the unique roles and responsibilities of the three branches of government as established by the U.S. Constitution.

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John Peter Zenger and Freedom of the Press

Should someone be prosecuted for criticizing or insulting a government official even if the offending words are the truth? Should a judge or a jury decide the case? These were the key questions argued in the colonial New York trial of John Peter Zenger.

The most famous trial lawyer in the American colonies, Andrew Hamilton addressed the court. He was defending publisher Peter Zenger against the criminal charge of seditious libel. (New York State Library)

As early as 1275, the English Parliament had outlawed "any slanderous News" that may cause "discord" between the king and his people. Slander, however, only referred to the spoken word. Published works became a much more serious threat to kings and parliaments after the invention of printing greatly enhanced communication in the 1400s.

By the 1500s, King Henry VIII of England required all writing be censored and licensed by royal officials before being printed. Known as "prior restraint," this heavy-handed control over the printed word resulted in prosecutions of authors and printers who published unlicensed writings.

US HISTORY

In England, a powerful royal council known as the Star Chamber controlled the licensing of printed works. (The council got its name because stars covered the ceiling of its meeting room.) The Star Chamber created a new crime regarding printed works called libel. Libel included any published material that defamed the Church of England, had obscenity that offended public morality, or attacked the reputation of private individuals.

"Seditious libel" was the most serious crime involving the printed word. Various Star Chamber rulings defined this crime as insults to the government and its laws and malicious criticism of government officials that could cause people to disrespect them. Kings and parliaments were fearful that such attacks on their reputations might lead to public disorder or even revolution.

The Star Chamber ruled that the truth of printed words did not matter. Truth was not a defense in libel cases. In fact, the Star Chamber considered truthful statements that libeled the government or its officials as even more dangerous than false ones. People would more easily dismiss false statements.

Parliament abolished the Star Chamber in 1642, and the last licensing laws expired by 1695. Even so, trial courts continued to enforce the Star Chamber libel laws and procedures. Judges decided whether printed words were libelous as a matter of law. Juries decided only if a defendant had published the words in question.

Thus, by 1700, "freedom of the press" in England only meant no government licensing ("prior restraint"). Once authors and printers had published their writing, English officials could still prosecute them for seditious libel in the courts. As for "freedom of speech," only members of Parliament had the right to speak their minds without fear of arrest by the king.

War of Words Against the Governor

The American colonies followed English law and court precedent on seditious libel. Royal governors and their councils were always on guard against insults in newspapers and political pamphlets.

In 1732, William Cosby arrived in New York as that colony's newly appointed royal governor. He was quick-tempered, arrogant, and greedy. Among his first acts was to demand half the salary paid to Rip Van Dam, the colonial official who had acted as governor when the previous one suddenly died.

When Van Dam refused to give up half his salary to Governor Cosby, Cosby decided to sue Van Dam. Fearing that jurors would find against him, Cosby wanted to avoid a jury trial. Without the approval of the colonial assembly, Cosby appointed a special court of three justices to hear the case without a jury. In April 1733, Van Dam's lawyer argued that the special court was illegal. The chief justice, Lewis Morris, agreed. But the other two justices, James DeLancey and Frederick Philipse, sided with Governor Cosby.

Cosby dismissed Morris and elevated DeLancey to chief justice. Morris along with Van Dam launched a campaign to get the governor recalled by King George II.

Among other tactics, Morris and his friends established a newspaper, *The New York Weekly Journal*, to attack Governor Cosby in print. They hired a print shop owner, John Peter Zenger, to publish their writing. Zenger operated the printing press while James Alexander, a lawyer friend of Morris, served as editor. Alexander and others belonging to the Morris faction produced all the newspaper's content.

For several months, *The New York Weekly Journal* published a wide range of materials criticizing and ridiculing Governor Cosby. These included essays by writers using the names of Roman statesmen as pen names that implied Governor Cosby was a tyrant. Morris and his friends also wrote letters to the editor (all under pseudonyms), attacking the royal governor. One excerpt from a letter became a key piece of evidence for seditious libel:

> We see men's deeds destroyed, judges arbitrarily displaced, new courts erected without consent of the legislature, by which it seems to me trial by juries are taken away when a governor pleases. . . .

The newspaper also printed satirical drinking songs with Cosby as the target. The songs accused the governor of aiding the enemy French, depriving New Yorkers of their liberties, and plotting to reduce them to slavery. The newspaper also ran phony advertisements (an early form of political cartoons), ridiculing the governor. One described him as a monkey.

Cosby fought back. He tried to silence Zenger's press by seeking a grand jury indictment against him for seditious libel. The grand jury refused to indict Zenger.

Cosby then asked the New York colonial assembly to prosecute him. It refused. The regular courts also declined to take any action against Zenger.

In November 1734, Cosby turned to his own council, which included Chief Justice Delancey, to issue an arrest warrant against Zenger. Bail was set at an enormous amount, assuring Zenger would remain in jail pending his trial. But Zenger's wife continued to operate his press and turned out more issues of the *Weekly Journal.*

Governor Cosby still failed to get a grand jury indictment against Zenger. Cosby's attorney general, Richard Bradley, then issued an "information" against the printer. This is a way for a public prosecutor to accuse someone of a crime without a traditional grand jury indictment. Bradley charged Zenger with printing items that were "false, scandalous, malicious, and seditious."

Zenger on Trial

The only court that would try the case against Zenger was the one created by Governor Cosby and now headed by Chief Justice DeLancey. James Alexander (editor of the *Weekly Journal*) and another lawyer appeared to defend Zenger when the court convened in April 1735.

The two defense lawyers immediately claimed that the court was illegal and biased. DeLancey disbarred both lawyers for contempt of court. He appointed an inexperienced young lawyer to defend Zenger.

The clerk of the court, another Cosby ally, attempted to rig the selection of the jury members against Zenger, but Zenger's defense attorney challenged the clerk's action. Chief Justice DeLancey, confident that the case against Zenger was open and shut, ordered the normal selection process to proceed, which resulted in an impartial jury.

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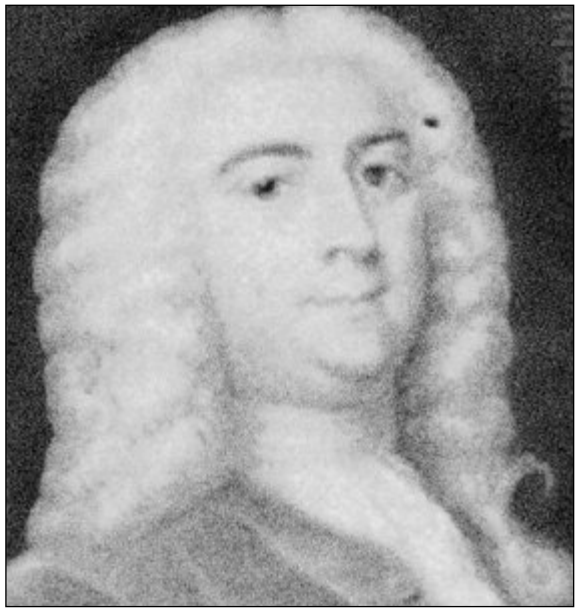
When Zenger's trial finally began in August 1735, he had been in jail nine months. Attorney General Bradley in his opening statement accused Zenger of being "a seditious person" who had printed "a certain false, malicious, seditious, scandalous libel entitled *The New York Weekly Journal*." He had done this, said Bradley, "to the great disturbance of the peace." Bradley presented various issues of the newspaper as evidence of seditious libel against Governor Cosby.



Royal Governor of New York William Cosby. He was criticized and ridiculed in print by The New York Weekly Journal. *Cosby responded by getting criminal charges brought against its publisher, Peter Zenger. (New York State Library)*

Under English court precedent, all Bradley had to prove to the jury was that Zenger printed the newspaper. Chief Justice DeLancey would then decide if it was libelous.

Then, the unexpected happened. From the audience rose Andrew Hamilton, the most famous trial lawyer in the American colonies. The disbarred defense lawyers had arranged for him to take over the case. Zenger's youthful appointed attorney quickly withdrew.

Starting with legal arguments developed by James Alexander, Hamilton admitted that Zenger had printed *The New York Weekly Journal*. But Hamilton went on to argue that Zenger had the right to do this as long as the publication "can be supported with truth."

Hamilton pointed to the charges against Zenger accusing him of printing things that were "false." Hamilton said that if Attorney General Bradley could prove the printed words were not true, Hamilton would agree they were libelous.

Shocked at this "truth defense," Chief Justice DeLancey said Hamilton could not continue with it. Under English law, said DeLancey, the truth did not matter in libel cases. "No, Mr. Hamilton," DeLancey ruled, "the jury may find that Zenger printed and published these papers, and leave it to the court to judge whether they are libelous."

Hamilton, however, ignored the chief justice and boldly made his arguments directly to the members of the jury. He asked them, "Are we to believe that truth is a greater sin than falsehood?" If we leave the matter of libelous words up to judges, he continued, this would "render juries useless."

Hamilton told the jurors, "it is you that we must now appeal for witness to the truth." Foreshadowing the American Revolution, Hamilton argued that telling the truth did not cause governments to fall. Rather, he argued, "abuse of power" caused governments to fall.

Hamilton concluded by telling the jurors that if Zenger printed the truth, no libel had taken place, and they should find him not guilty. "Truth ought to govern the whole affair of libels," he said.

But Chief Justice DeLancey instructed the jury only to decide if Zenger printed the newspaper. Whether it contained libels, he told the jurors, would be a matter for the judges to decide.

Twelve men deliberated a short time and then announced Zenger was not guilty of printing and publishing libels. Thus, they went over the head of DeLancey and decided for themselves that there was truth in what Zenger had printed. The crowd in the courtroom cheered as Chief Justice DeLancey left in disgust.

Freedom of the Press in the U.S.

The Zenger jury verdict did not establish a court precedent since only the rulings of judges do that. But accounts of the trial were widely published in the colonies and England. On both sides of the Atlantic, the trial sparked debates about the meaning of freedom of the press.

After the trial, royal officials in the colonies brought few seditious libel prosecutions. They were afraid that juries would refuse to convict. Colonial assemblies, however, continued with prosecutions.

After the American Revolution and the writing of the Constitution, the Bill of Rights was adopted. The First Amendment to the Constitution guaranteed that "Congress shall make no law . . . abridging the freedom

of speech, or of the press . . . .” Yet Congress in 1798 passed the Sedition Act, which prohibited printing most criticism of the U.S. government or its elected leaders. This law expired in 1801, and its constitutionality was never tested in court.

But even the Sedition Act deferred to the Zenger decision. The law enabled juries to decide in favor of the defendant if the printed words were true or were without malice.

Prosecutions for seditious libel by government officials eventually died out in the United States. Today, Americans consider it a basic right to be able to criticize government officials without fear of punishment. The U.S. Supreme Court cited the Zenger case in its landmark 1964 free-press decision of *New York Times v. Sullivan*: “The American Colonists were not willing, nor should we be, to take the risk that ‘[m]en who injure and oppress the people under their administration [and] provoke them to cry out and complain’ will also be empowered to ‘make that very complaint the foundation for new oppressions and prosecutions.’ ”

For Discussion and Writing

1. What was seditious libel? What was its purpose? Why did English law say that the truth did not matter in prosecutions for seditious libel?
2. What did “freedom of the press” mean under English law in 1700? Do you think English law protected freedom of the press? Why or why not?
3. What did the Zenger case decide? Why was the case important?
4. What does the quote at the end of the article mean? Do you agree with it? Explain.
5. Today some people argue that elected government officials should never be able to sue for libel even in cases where false information about them is published intentionally and maliciously. Do you agree or disagree? Why?

For Further Reading

Levy, Leonard W. *Emergence of a Free Press.* New York: Oxford University Press, 1985.

Putnam, William Lowell. *John Peter Zenger and the Fundamental Freedom*. Jefferson, N.C.: McFarland & Co., 1997.

ACTIVITY

What Is Libel Today?

Today in the United States, the crime of seditious libel is gone. But government officials can file lawsuits for libel against individuals and win money damages. These lawsuits, however, can only succeed when someone publishes something about an official with “actual malice.” Actual malice in this context does not mean ill-will. It means the libelous statement was published “**with knowledge that it was false or with reckless disregard of whether it was false or not.**” This rule was set forth in the 1964 case of *New York Times v. Sullivan*.

The court in *Sullivan* explained that it was not enough to allow truth as a defense to libel cases involving public officials. Proving the truth of statements is difficult and expensive. If defendants had to prove their statements were true, many people would refrain from criticizing officials even though their criticism “is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.” Requiring defendants to prove the truth of their statements “thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.”

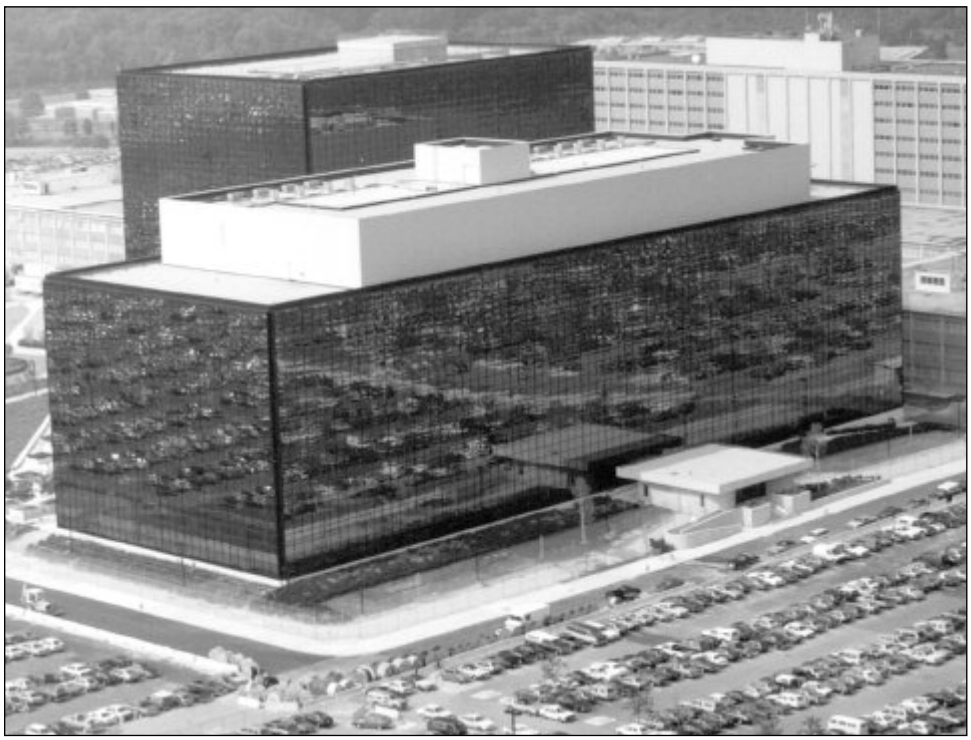
Form groups that will role play juries. Using the rule from *New York Times v. Sullivan*, each jury should review the following cases and decide whether actual malice existed. Each jury should then report and explain the reasons for its decisions.

1. Rumors are circulating that a city councilman is a child molester. A newspaper prints the rumors without checking them. They turn out to be false. The councilman sues the newspaper for libel.
2. A radio talk show host accuses a member of Congress of taking bribes. She admits accepting campaign contributions from certain organizations, but says they did not affect her votes. There is no evidence that these were bribes for her legislative votes. The congresswoman sues the radio host for libel.
3. A political candidate runs a campaign ad on TV that accuses the incumbent of being a “traitor” for opposing the Iraq War. The incumbent sues her challenger for libel.
4. A blogger posts an article on a candidate for president from one of the major political parties, calling him “a paranoid religious nut.” The candidate sues the blogger after losing the election.

The National Security Agency's Warrantless Wiretaps:

Legal Terrorist Surveillance or Illegal Domestic Spying?

In 2005, the press revealed that President George W. Bush had authorized government wiretaps without a court warrant of U.S. citizens suspected of terrorist links. A national debate arose over whether such electronic eavesdropping was legal terrorist surveillance or illegal domestic spying.



National Security Agency headquarters in Fort Meade, Maryland. Established by presidential order in 1952, the intelligence agency has always been headed by a general or admiral. (National Security Agency photo)

U.S. intelligence services have conducted secret electronic surveillance since the First World War when they intercepted telegrams from foreign governments and agents. The Cold War, however, presented new national security and technical challenges to American spy efforts. In 1952, President Harry Truman issued a top-secret order that created the National Security Agency (NSA). It was so secret that the few who knew anything about it jokingly said NSA meant "No Such Agency." The NSA became expert at intercepting telephone, microwave, and other electronic communications, especially those to and from the Soviet Union.

US GOVERNMENT

During the Vietnam War years, however, the Nixon White House used the NSA and other government intelligence agencies to collect information on anti-war protesters and political opponents. The NSA created "watch lists" and files on thousands of American citizens and organizations. This domestic spying went far beyond the mission of the NSA, which was to gather and analyze foreign intelligence.

A congressional investigation revealed the political abuses of the NSA. In 1978, Congress passed and President Jimmy Carter signed the Foreign Intelligence Surveillance Act (FISA) to remedy these abuses.

Under the Fourth Amendment, the government, with rare exceptions, must get a court-approved warrant based on "probable cause" before wiretapping or using other forms of electronic surveillance on a U.S. citizen. FISA created a special court to review NSA and Federal Bureau of Investigation requests for search warrants when American citizens may be involved in foreign espionage.

The FISA court consists of 11 judges picked by the chief justice of the U.S. Supreme Court. Since NSA operations are top secret, FISA court proceedings are kept secret, and the court is not open to the press or public. The FISA court requires the NSA to base its warrant applications on "probable cause," strong evidence that the targeted U.S. citizen is involved in espionage.

The law establishing the FISA court made it the "exclusive means" for permitting electronic surveillance of citizens on American soil in foreign intelligence cases. The law allows the NSA to eavesdrop up to three days without a FISA warrant. In addition, FISA allows electronic surveillance without a warrant for up to 15 days after a declaration of war. These FISA rules attempted to balance national security needs with the Fourth Amendment's right of privacy.

The NSA's Warrantless Wiretap Program

The National Security Agency uses the world's most powerful computers to screen, intercept, and analyze electronic communications. Called SIGINT ("signals intelligence"), the NSA surveillance system scans tens of millions of telephone calls, e-mails, faxes, instant messages, web sites, and similar communications outside the United States each day. Listening posts in West Virginia and the state of Washington forward streams of data to NSA's headquarters at Fort Meade, Maryland.

Before the terrorist attacks on September 11, 2001, the NSA went to the FISA court for warrants to eavesdrop on American citizens within the United States. Since the FISA court began meeting in 1979, it has approved almost 20,000 government requests for these electronic eavesdropping warrants and has rejected about five. The NSA does not need a warrant to eavesdrop on communications outside the country.

Shortly after September 11, President Bush issued an executive order granting new authority to the NSA. This order allowed the NSA to monitor without a warrant the international telephone calls and e-mails of American citizens suspected of having terrorist links. In doing this, Bush authorized NSA officials to bypass the FISA court if they believed it was necessary. The NSA continued to go to the FISA court for warrants to eavesdrop on communications conducted entirely inside the United States.

Under President Bush's order, the NSA's own officials, not FISA court judges, could authorize a wiretap (or other forms of electronic surveillance) of an American citizen in the United States. Moreover, the NSA only had to have a "reasonable basis" rather than "probable cause" to believe Al Qaeda or an affiliated terrorist group was involved.

The Bush administration kept the NSA warrantless wiretap program secret because, it later said, it wanted to avoid tipping off Al Qaeda about America's intelligence capabilities. Only a few in the government, including eight members of Congress, knew of the president's order. Except for the judge in charge, even the FISA court was not aware of it.

NSA Secret Program Revealed

In December 2005, the *New York Times* published a news story revealing the NSA's warrantless surveillance program. This caused a firestorm of criticism in the country and Congress.

Critics of the program charged that President Bush had violated the FISA law and the Fourth Amendment in secretly giving the NSA the authority to go around the FISA court. The president stated that he decided not to ask Congress to change the FISA law because he feared public disclosure of NSA warrantless eavesdropping would undermine the effort of tracking terrorists. Critics, however, pointed out that Al Qaeda and similar groups are fully aware of these kinds of intercepts. Critics further charged that in not requesting a change in the law, the president was making his own law, thus violating the constitutional principles of "separation of powers" and "checks and balances."

Administration officials quickly defended the program, claiming that FISA rules made it too difficult to track terrorists in the new era of instant worldwide communications. For example, they said, if intelligence agents got possession of terrorist cell phones with hundreds of numbers on them, the NSA might not be able quickly to secure warrants on each one.

Air Force General Michael Hayden headed the NSA when it implemented President Bush's executive order in 2002. In January 2006, he met with the press to explain the need for the NSA warrantless wiretap program.

General Hayden told reporters that the NSA intercepts phone calls and e-mails "for only one purpose—to protect the lives, the liberties and the well-being of the citizens of the United States from those who would do us harm." He argued that the NSA program enabled it to track Al Qaeda activity "more comprehensively and more efficiently" than was possible under FISA court procedures.

Hayden went on to assure Americans that lawyers from the NSA and Justice Department regularly review and audit the program. It is not a "drift net" over Americans, he said, and therefore, "it is not domestic spying." He called the program successful, "a steady producer." He stressed that NSA's operations targeted only those citizens who were in contact with suspected terrorists abroad. "This is about Al Qaeda," he concluded.

The effectiveness of NSA's warrantless eavesdrops is unclear. In its original news story, the *New York Times* estimated that the NSA monitors up to 500 American citizens in the United States at any one time. Although government officials cite several cases where the NSA program was helpful, they say they are reluctant to talk about others for fear of disclosing too much to the

(Continued on next page)

terrorists. But most U.S. citizens targeted by the warrantless surveillance have not been charged with any crime.

The Debate

As the debate over NSA warrantless wiretaps unfolded,its defenders called it a legal "Terrorist Surveillance Program," necessary to prevent another September 11 disaster. Others referred to it as the Bush administration's illegal "Domestic Spying Program." Both sides marshaled their arguments.

Legal Terrorist Surveillance

In January 2006, the Justice Department published legal arguments, supporting President Bush's authorization for the NSA to use warrantless wiretaps. First, Justice Department lawyers pointed to the Authorization for Use of Military Force (AUMF), which Congress passed shortly before the U.S. attack on Afghanistan. In the AUMF, Congress granted the president "all necessary and appropriate military force against those nations, organizations, or persons he determines planned, authorized, committed, or aided in the terrorist attacks that occurred on September 11, 2001."

The Justice Department argued that the AUMF *implied* the power of the president to conduct electronic surveillance in ways he judged necessary to defend the nation. The Justice Department further asserted that the NSA surveillance program was a "fundamental incident of waging war" (a major part of warfare). Conducting intelligence operations during wartime, Justice Department attorneys stressed, are well within the "inherent authority" of the president as commander-in-chief of the armed forces.

In addition, Justice Department lawyers claimed that the AUMF by Congress and the president's powers as commander-in-chief in Article II of the Constitution, in effect, overrode the 1978 FISA law. Thus, President Bush broke no law, they said.

While the NSA program emphasizes "speed and agility," the Justice Department lawyers continued, the FISA process moves more slowly. They pointed out that even FISA's "emergency authorization," allowing the NSA three days to monitor without a warrant, still requires time for approvals by agency lawyers and the U.S. attorney general.

Justice Department lawyers also denied that the NSA warrantless wiretap program violated Fourth

Air Force General Michael Hayden was director of the NSA when its warrantless wiretap program began in 2002. He is currently the head of the Central Intelligence Agency. (National Security Agency photo)

Amendment privacy rights of innocent Americans. The lawyers listed several safeguards in the program to prevent constitutional violations:

- The NSA program narrowly focuses only on international calls and e-mails with a "reasonable basis" connection to Al Qaeda or other terrorist groups outside the United States.
- Government attorneys review and the president re-authorizes the entire NSA warrantless wiretap program every 45 days. NSA and Justice Department attorneys continually monitor the operation of the program for compliance with the Constitution. No one has presented any evidence that NSA's wiretaps without a court warrant have led to any abuses such as occurred during the Vietnam War era.

Illegal Domestic Spying

Shortly after the Justice Department publicly presented its arguments in support of the NSA's warrantless wiretap program, a group of 14 constitutional law scholars rebutted them. In "A letter to Congress," the

scholars pointed out that it had made the secret FISA court the "exclusive means" for conducting electronic surveillance on citizens within the United States in foreign intelligence cases.

The legal scholars rejected the government's view that Congress "implied" the president could utilize warrantless wiretaps in the Authorization for Use of Military Force. First, the scholars argued that when Congress passed the FISA law, it explicitly declared warrantless wiretapping of citizens limited to only the first 15 days of war.

The scholars also asserted that Congress would have had to repeal the "exclusive means" provision of FISA to empower the president to order warrantless wiretaps on citizens. But most in Congress did not favor granting this power to the president in the deliberations leading up to the AUMF. The scholars pointed out that the president ordered warrantless wiretaps anyway and thus violated the FISA law.

The scholars responded to the argument that the president, as commander-in-chief of the military, may order any electronic surveillance as a "fundamental incident of waging war." The scholars argued that a "fundamental incident of waging war" has to do with conducting warfare on the battlefield. It does not include "unchecked warrantless domestic spying."

Finally, the constitutional law scholars contended that the NSA warrantless wiretap program threatened fundamental protections in the U.S. Constitution:

- The NSA's warrantless wiretaps take place solely at the discretion of the executive branch of government, ignoring checks and balances by Congress and the courts.
- The NSA program permits warrantless wiretapping that requires only a minimal "reasonable basis," not "probable cause," to believe an American citizen in the United States is communicating with terrorists abroad.
- The FISA law balances the constitutional rights of citizens with the duty of the president to protect Americans from a foreign threat. FISA judges are on-call 24 hours a day to approve NSA applications for wiretap warrants. When the need to eavesdrop is immediate, NSA may go ahead and conduct wiretaps without a warrant for up to three days. The president's executive order ignores these safeguards.

The Controversy Continues

By the summer of 2006, groups critical of the Bush administration's secret electronic surveillance programs had filed lawsuits against telephone companies and the NSA itself. The government argued that the court should throw the cases out because of the "state secrets" rule. In 1953, the U.S. Supreme Court decided that courts could bar cases when there was a "reasonable danger" that evidence during the trial would expose national security matters.

In August 2006, a federal district judge ruled that state secrets were not at stake because there had been so much public discussion of the NSA warrantless wiretap program.

Then, the federal judge ruled that the NSA program of electronic surveillance without warrants was unconstitutional. In her 44-page opinion, she stated that the program violated, among other things, the FISA law, the Fourth Amendment, and the "separation of powers" principle. Attorney General Alberto Gonzales responded that he was confident the wiretapping program was legal and planned to appeal.

In Congress, some wanted to grant the president specific legal authority to continue ordering wiretaps without warrants in order to track down terrorists. Others wanted to reconfirm the exclusive authority of the FISA court to oversee electronic surveillance in foreign intelligence. A third approach called for the FISA court to decide if the president had the legal authority to order warrantless wiretaps on American citizens in terrorism investigations.

Ultimately, the president, the Congress, the courts, and the American people must decide how to reconcile fundamental constitutional rights and principles with the need to protect the nation from another terrorist attack.

For Discussion and Writing

1. What is the FISA court? Why was it created?
2. Why do you think the police and other government officials must apply to the courts for electronic surveillance warrants? Should there be an exception to this rule in terrorist investigations? Explain.
3. What are the three approaches to electronic surveillance in foreign intelligence cases currently being considered by Congress? Which, if any, do you support? Why?

(Continued on next page)

For Further Reading

Nolan, Beth *et al.* "On NSA Spying: A Letter to Congress." *New York Review of Books*. 9 Feb. 2006.

Office of Public Affairs. "The NSA Program to Detect and Prevent Terrorist Attacks: Myth v. Reality." 27 Jan. 2006. U.S. Department of Justice. URL: http://www.usdoj.gov/opa/documents/nsa_myth_v_reality.pdf

A C T I V I T Y

Legal Terrorist Surveillance or Illegal Domestic Spying?

Divide the class into three groups that will debate and decide this question: **Is the National Security Agency's warrantless wiretap program "Legal Terrorist Surveillance" or "Illegal Domestic Spying"?**

One group will defend the Bush administration's position that the NSA program is "Legal Terrorist Surveillance." A second group will argue that the program is "Illegal Domestic Spying." Each of these groups should research evidence and arguments for its position related to these parts of the controversy:

- Authorization for Use of Military Force
- Presidential Powers in Article II, Sections 2 and 3
- Foreign Intelligence Surveillance Act and FISA Court
- Fourth Amendment of the Bill of Rights
- Separation of Powers and Checks and Balances Principles of the Constitution

The third group will act as the decision-maker in the debate. Those in this group should research the issues at stake in the parts of the controversy listed above. The decision-makers should be prepared with questions to ask both sides during the debate.

Each side in the debate will present its evidence and arguments. After each side finishes its presentation, the decision-makers and the opposite side will have a chance to ask questions or rebut points.

The decision-makers will then discuss the debate question among themselves before the rest of the class. Finally, they will vote on the question. All the students should then write their own answer to the debate question with supporting evidence and arguments.

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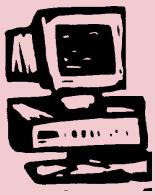

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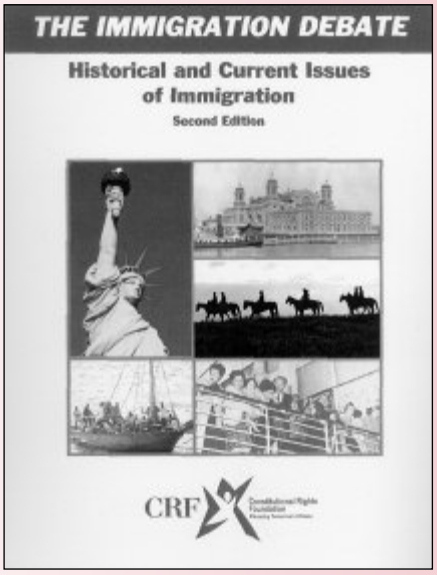

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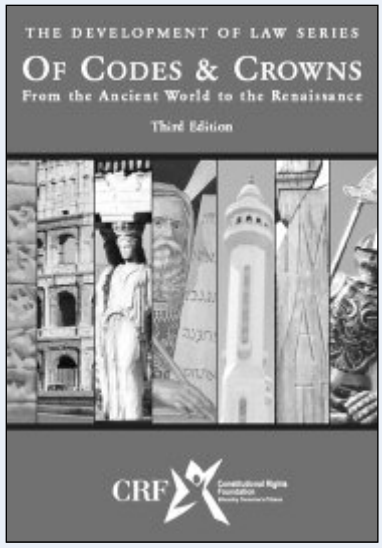

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