



October 15, 2012

The Honorable Hillary Rodham Clinton
Secretary of State
United States Department of State
2201 C St. NW
Washington, DC 20520

Re: “Innocence of Muslims” and Free Expression

Dear Madam Secretary:

We write to thank you for your support for basic constitutional principles in the ongoing controversy over the “Innocence of Muslims” video (the “Innocence video”). We also hope to offer the State Department a few thoughts, written for a global audience, on why we protect even offensive speech under the First Amendment, and why safeguarding the fundamental human right to free expression in many Muslim countries would serve as a bulwark against the type of oppression faced by the Arab Spring protesters, and would dramatically improve the lives of many.¹

The controversy over the Innocence video raises some of the most difficult legal and moral questions in our political system. There is no question that the bigoted, hateful and ignorant statements in the video—directed at individual Muslims—are, in the words of President Obama, “crude and disgusting.”² But, in America, we protect even the most offensive speech to ensure that all speech is protected.

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¹ The ACLU has long had as one of its central mandates the protection of free speech, which often requires us to defend unpopular, and even repugnant, speech (because we believe that the defense of unpopular speech is necessary to meaningfully protect all speech). This focus dates back to our founding in the aftermath of World War I, when laws against sedition were used to persecute and imprison loyal Americans who merely disagreed with American involvement in the war, which was, at the time, an extremely unpopular position. We also advocate for free expression as a universal human right, and have challenged past attempts to use the government’s foreign relations power to censor foreign ideas. See *Palestine Information Office v. Shultz*, 674 F. Supp. 910 (D.D.C. 1987), *aff’d*, 853 F.2d 932 (D.C. Cir. 1988); Samuel Walker, *In Defense of American Liberties: A History of the ACLU* 373 (2d ed. 1999).

² President Barack Obama, Remarks by the President to the UN General Assembly (Sept. 25, 2012).

Below we attempt to explain, in non-legal terms and for an international audience, precisely what the First Amendment protects, and why we have it. We hope it is of use in your excellent work.

I. What is the First Amendment?

Much like in the Arab Spring countries, America's political system was formed as a reaction to the abuses of an autocratic government (in our case, a dictatorial British king and parliament). Our founders agreed to write down, as "amendments" to our central governing document, the Constitution, certain basic human rights that could not be violated by the government. By preserving these rights, the hope was that the government would never again be able to oppress the American people. The First Amendment is the American vehicle for ensuring the long-recognized universal human right to freedom of opinion and expression.

The first amendment to the Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances." This means six things for Americans:

- We all have the right to religious belief and expression, as well as the right not to follow any religious tradition or believe in god ("free exercise");
- The government may never prefer religion over non-religion, or favor particular faiths over others ("establishment of religion");
- We have the right to "freedom of speech," meaning that the government cannot censor Americans, even Americans engaged in offensive speech like the Innocence video, because the government disagrees with what is being said;
- Our media cannot be controlled or censored by the government ("freedom of the press");
- We may associate with whomever we like, and may engage in peaceful protest that may not be restricted because of the message being conveyed ("freedom of assembly");
- We have the right to ask the government to change things we don't like ("freedom to petition").

All of these protections serve three basic purposes.

First, under the British monarchy, colonists couldn't publicly criticize the king without risking severe punishment (or they were simply denied the ability to criticize the government at all). All of the First Amendment freedoms, but especially the rights of free speech, press, assembly and petition, permit us to criticize the government without fear of retaliation. Hypothetically, if the Arab Spring protests happened in the United States, the government would not be able to, for instance, shut down mobile communications, arrest people for carrying placards critical of the government or investigate people because they belong to a particular religious community. All of these repressive tactics are prohibited by the First Amendment.

Second, by giving Americans the absolute right to debate and consider different points of view free from government interference, the First Amendment grants Americans “freedom of conscience,” meaning we can think and believe whatever we want without fear of government repression. The government may not police private thoughts, nor may it censor speech.

And, third, all of these rights combine to control our government. There are certain things that the government simply cannot do under the rule of law. For instance, the government cannot censor the Innocence video because it disagrees with the message it conveys. That said, the government can, and should, express America’s national revulsion with religious bigotry and discrimination. It simply cannot block peaceful expression because it might offend.

These rights extend from the theory that the creation of a free “marketplace of ideas,” in which different arguments and beliefs—some good, some bad, some even deplorable—are allowed to compete with one another, will result in the best arguments and beliefs winning. By permitting absolute freedom of conscience, individuals are forced to persuade others of the worth of their ideas through reason and conviction, and not coercion.

America and Americans have benefited greatly from these freedoms. For instance, freedom of conscience, as protected by the First Amendment, was instrumental in the success of the civil rights movement during the 1950s and 1960s. Many of the most important First Amendment court cases arose in the context of this movement, and turned on the notion that unpopular speech must be protected so that all speech can be protected. Without that protection, peaceful civil rights protesters would have suffered far more persecution by the government simply for arguing lawfully that African-Americans should have equal rights.³

II. Is the Right to Free Expression Unique to the United States?

No, it is not. As noted above, the values that underlie the First Amendment are far from unique to the United States. The First Amendment reflects a universal ideal that has long been formally accepted as a human right under international law.

Article 19 of the Universal Declaration of Human Rights recognizes the right of all persons to hold opinions without interference, and the right to impart and receive information and ideas

³ For example, in *NAACP v. Alabama*, 357 U.S. 449 (1958), the Supreme Court struck down a demand by the State of Alabama for lists of members in the National Association for the Advancement of Colored People (“NAACP”), the preeminent African-American civil rights group, which was meant to intimidate the NAACP into stopping its work in Alabama. The Court found that the NAACP had a constitutional right to be free of government harassment and intimidation under the First Amendment, and that its members had a right to remain anonymous. In *New York Times v. Sullivan*, 376 U.S. 254 (1964), the *New York Times* ran an advertisement criticizing the state police chief in Alabama for civil rights violations against Martin Luther King, Jr. The police chief sued, claiming that he had been defamed by the advertisement. The Supreme Court, ruling for the *Times*, held that unpopular and even defamatory speech must receive strong First Amendment protection to ensure that all speech—including calls for civil rights for African-Americans—could be free.

“regardless of frontiers.” The right to free expression and opinion has been reaffirmed in numerous subsequent treaties and international agreements. These include the International Covenant on Civil and Political Rights (“ICCPR”), which is legally binding on all United Nations member states, and recent general comments by the United Nations Human Rights Committee interpreting the ICCPR. In General Comment 22, adopted in 1993, the committee clarified the broad scope of freedom of thought, conscience and religion.⁴ And, in General Comment 34, adopted in 2011, the committee wrote:

*Freedom of opinion and freedom of expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society. The two freedoms are closely related, with freedom of expression providing the vehicle for the exchange and development of opinions.*⁵

III. Why Can’t President Obama Delete the Video from the Internet?

Because the right to freedom of speech is the law, and the president has to follow the law. This means, even though he finds the video “crude and disgusting,” he has no authority to order a private person to remove it from the internet. We often say in America that we are a land of laws, and not people. Even our most powerful national leaders are not above the law.

IV. But Aren’t There Laws against Religious Blasphemy?

No, there aren’t. Various American states used to have laws against blasphemy, but they were often abused to, for instance, oppress religious or political minorities.⁶ In many cases, simply expressing the creed of a minority religion could be considered “blasphemous” with respect to the majority religion. Consequently, blasphemy cases became less frequent. In 1951, New York State rescinded a license for the short film “The Miracle,” directed by Roberto Rossellini, because it was, the State claimed, “sacrilegious” with respect to Christianity. The Supreme Court found

⁴ Office of the High Commissioner for Human Rights, General Comment No. 22: The Right to Freedom of Thought, Conscience and Religion, U.N. Doc. C/21/Rev.1/Add. 4 (Jul. 30, 1993).

⁵ U.N. Human Rights Committee, General Comment No. 34, Article 19: Freedoms of Opinion and Expression, U.N. Doc. C/GC/34 (Sept. 12, 2011).

⁶ Many of the early blasphemy cases involved crude insults against Christian figures, which were not dissimilar to the Innocence video in terms of tone. *See, e.g., State v. Chandler*, 2 Del. (2 Harr.) 553 (Del. 1837) (conviction for public insult against Jesus Christ and Mary); *People v. Ruggles*, 8 Johns. 290 (N.Y. Sup. Ct. 1811) (same). However, the same blasphemy laws were used aggressively against legitimate and respectful critics of Christianity. These abusive prosecutions prompted a growing backlash in the 19th century against application of the blasphemy laws. *See, e.g., Updegraph v. Commonwealth*, 11 Serg. & Rawle 394 (Pa. 1824) (prosecution for statement by member of debating club that Bible “contained a number of good things, yet . . . contained a great many lies”); *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206 (Mass. 1838) (conviction of “pantheist” for publication in newspaper of language critical of Universalist church); *see generally* Note, *Blasphemy*, 70 Colum. L. Rev. 694 (1970).

the denial of a license unconstitutional in part because it feared that the broad blasphemy statute would be used by established “orthodoxies” to censor speech by religious minorities.⁷

The United States is not an outlier in its rejection of blasphemy laws. For instance, the United Nations Human Rights Council’s 2011 resolution on religious intolerance and discrimination, which condemned the incitement of religious violence, noted in the paragraph following the condemnation the positive role that the “open public debate of ideas” can have in “strengthening democracy and combating hatred, [and] overcoming existing misperceptions.”⁸ This resolution replaced language that would have barred “defamation” of religion, which would have caused grievous injury to principles of free expression and opinion.

Crucially, the protection of blasphemy is *not* an endorsement of blasphemy. Most Americans of conscience agree that, for instance, the burning of a Bible, a Koran or a Torah as a method of protest is inappropriate. The act adds little to a reasoned and informed debate, and is often motivated by little more than simple bigotry, which is repellent to our ideals. Nevertheless, as with the defacement of the American flag or Constitution,⁹ or the burning of a presidential effigy, the dramatic nature of the act can make it an effective method of protest and it must be protected under the Constitution.

V. Doesn’t This Qualify as Violent Incitement?

No, it absolutely does not. In the United States, speech that causes (“incites”) violence can be illegal and either punished after it happens, or stopped by the authorities. Such speech, however, is extremely rare. In order to meet the legal test for “incitement,” speech must be intended to cause violence, the violence must occur as a direct result of the speech, and the violence must be likely to occur very soon after the speech (it must be “imminent”).

With respect to the Innocence video, a lot of commentators have been suggesting that release of the video is analogous to “shouting fire in a crowded theater” to argue that the video itself may qualify as illegal incitement. There are a couple of problems with that argument. First, when used as a metaphor for something other than needlessly causing a panic where people are physically hurt, it can be *misused* to make all kinds of protected speech illegal. For instance, the original case citing the “crowded theater” example upheld the conviction of a political activist who peacefully opposed the draft in World War I.¹⁰

⁷ See *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 505 (1952) (“Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority.”).

⁸ H.R.C. Res. 16/18, U.N. Doc. A/HRC/RES/16/18 ¶¶ 3-4 (Apr. 12, 2011).

⁹ Laws banning flag burning have been affirmatively struck down by our highest court. See *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

¹⁰ That case, *Schenck v. United States*, 249 U.S. 47 (1919), is no longer followed. A later case, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), explicitly overruled *Whitney v. California*, 274 U.S. 357 (1927), which has been read as expanding the *Schenck* “clear and present danger” test to all speech that

Second, the example, when taken literally, does effectively demonstrate the imminence requirement for incitement, and how it *doesn't* apply to the Innocence video. Someone who falsely shouts fire in a crowded theater is, by definition, trying to create a panic that will pose a serious and immediate physical danger to the theatergoers, who are likely to jump out of their seats and trample one another in an attempt to escape. There is no “cooling off” period between the speech and the harm. Here, although the video may be the *excuse* for violence overseas, it's certainly not the immediate *cause*. Rather, the organizers who are whipping up mob violence are to blame (as are foreign governments who fail to denounce the violence or, worse, allow the violence to continue).

VI. So, America Supports the Message of the Innocence Video?

Absolutely not. While all major religions should be open to respectful criticism, and there is no excuse for violence (even in the face of blasphemy), the Innocence video is openly bigoted and disrespectful. Again, while we may have to permit deeply offensive speech in order to protect everyone's right to speak, that doesn't mean we have any sympathy for the message. In fact, much of the rationale for tolerating offensive and even hateful speech stems from the historical experience that outlawing “bad” speech makes it more powerful. The Innocence video is crude, poorly made and not worthy of serious attention. But, if we make it illegal, we risk lending it more credence than it deserves, which is exactly what has already happened.

To be clear, American law will not tolerate actual discrimination against any religious group, and Muslims are no exception. In fact, while the Obama administration has received some criticism for its record on civil rights enforcement for Arab- and Muslim-Americans and South Asians, it also deserves credit for its efforts to protect the religious rights of Muslims. For instance, the administration sued in July 2012 to force a Tennessee town to grant a mosque a building permit in time for it to open for Ramadan. In November 2011, government lawyers launched an investigation into a similar denial of a building permit in California. And other parts of the government have worked to prevent employment discrimination and bullying against Muslims.

The ACLU—while defending unpopular speech like the Innocence video—has also been active in protecting Muslims' right to religious freedom. We have filed numerous lawsuits against federal, state and local law enforcement seeking information on, and challenging the practice of, government surveillance in Muslim communities based simply on their religious faith. In Oklahoma, we successfully challenged a state constitutional amendment that would have completely barred courts in the state from even considering Islamic law in their decision-making, a restriction that would apply to no other religion. We have been at the forefront of challenges to racial and ethnic profiling of Arabs, Muslims and South Asians. We frequently oppose efforts to deny mosques and Islamic community centers permission to construct or expand their facilities (including the Park51 community center), and we have repeatedly appeared in court to defend Muslims' right to wear religious garb. Notably, we also aggressively protect Muslims' free

supposedly has a “bad tendency.” *Brandenburg* also limited later cases based on *Schenck*, including *Abrams v. United States*, 250 U.S. 616 (1919) and *Dennis v. United States*, 341 U.S. 494 (1951). There is no question that the extremely high standard for incitement articulated in *Brandenburg* governs today.

speech rights. In 2009, we successfully sued an airline and the government for excluding a Muslim from a flight simply because he was wearing a t-shirt with Arabic script.¹¹

VII. Doesn't the Video Violate the Religious Freedom of Muslims?

No, it doesn't. The First Amendment protects Muslims in two ways. First, it allows Muslims absolute freedom of religious belief and expression. This means that Muslims of any denomination or sect may worship and preach without fear of government interference. Muslim religious practices will also be protected by the law so long as they do not harm the personal or civil rights of others, or interfere with an important government function that applies to all Americans equally. Second, the government may not treat Muslims any better or worse than followers of any other religion. The government cannot, however, prevent other Americans from holding opinions critical of Muslims or Islam, or prevent them from expressing these opinions publicly. Were the government able to do so, Muslims themselves could be subject to severe restrictions on their freedom of speech with respect to other religions.

VIII. But Doesn't America Restrict Anti-Semitic or Anti-Christian Speech?

No, absolutely not. We understand there has been a significant amount of misinformation circulated about American "hate speech" laws. There are no such laws. So long as your speech is peaceful and the accompanying conduct lawful, you can say whatever you want. That isn't to say that the United States or any free speech advocate supports bigotry or discrimination. Quite the contrary. By protecting the right of anti-Semites to speak, free speech ensures that critics of anti-Semites are equally able to be heard. Hate speech laws can also be misused to target legitimate public debate. For instance, conversations about the Israeli-Palestinian conflict could be seen by many as skirting the line with hate speech (against both Palestinians and Israelis).

The United States does have "hate crimes" laws. These, however, involve an underlying criminal act—like burning a house of worship—that is already illegal but where the victim is targeted based on race, religion or some other group characteristic. Hate crimes may be punished more severely, just as we punish premeditated murder more severely.

IX. Didn't the United States Arrest the Producer of the Video?

Yes, it did, and the arrest could raise some First Amendment questions. It is important to realize, however, that he wasn't arrested because the government *disagrees with the message* of the movie. Technically, the producer was not arrested for the video itself (as that would be a blatant violation of the First Amendment). Rather, prosecutors claim he violated the terms of his probation for a past fraud conviction because he used aliases while making the movie, and then lied to probation officers about his role in the production.

The First Amendment question is whether he would have been arrested if the movie had been less inflammatory. If he would not have been, prosecutors are likely using the probation

¹¹ Press Release, Am. Civil Liberties Union, ACLU Sues TSA Official, JetBlue for Discriminating Against Passenger Wearing Arabic T-Shirt (Aug. 9, 2007), <http://www.aclu.org/free-speech-racial-justice/aclu-sues-tsa-official-jetblue-discriminating-against-passenger-wearing>.

violations as a pretext to put him in jail, and that would be a serious First Amendment problem. Based on the media reports to date, however, there is no indication the arrest was pretextual.

* * *

The founder of the ACLU, Roger Baldwin, put the basic idea behind the American principle of free expression well when he said:

It's very simple. If the person you hate has no rights, then the person you like may have no rights either. And in order to defend the people you like, you have to defend the people you hate.

This is especially true for religious speech, for censorship in the name of religion can easily turn into censorship *against* that religion. The protection of free expression for everyone, so long as the expression itself does not cause any physical harm to persons or property, is the only way to ensure that everyone is able to follow their conscience and speak their mind.

Although we expressed initial concern at the White House's requests that Google reassess whether the Innocence video violated its terms of use, we strongly applaud the administration—and especially the State Department—for your subsequent defense of our basic constitutional rights, and of the universal human right to free expression.

Please do not hesitate to contact Legislative Counsel Gabe Rottman at 202-675-2325 or grottman@dcaclu.org if you have any questions or comments.

Sincerely,



Michael W. Macleod-Ball
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