



AMERICAN CIVIL LIBERTIES UNION OF UTAH FOUNDATION, INC
355 NORTH 300 WEST, SALT LAKE CITY, UT 84103
(801) 521-9862 PHONE • (801) 532-2850 FAX
ACLU@ACLUUTAH.ORG • WWW.ACLUUTAH.ORG

September 20, 2006

Mr. Jim Beadles
Utah Department of Transportation
4501 South 2700 West, First Floor
Salt Lake City, Utah 84114

By USPS and Facsimile (801.965.4338)

Re: UDOT Special Event Permits

Dear Mr. Beadles,

We write on behalf of Marshall Thompson, who proposes to walk from the Idaho border to the Arizona border, primarily along the U.S. 89-91 corridor (with a few breaks where U.S. 89 merges with an interstate). It is our understanding that Mr. Thompson has received conflicting advice from Utah Department of Transportation (UDOT) representatives about whether he needs to obtain a permit for his walk. We write to clarify relevant law and to explain that Mr. Thompson must not be required to seek a permit. Such a requirement would be repugnant to the free speech protections in the First Amendment to the United States Constitution and in Article I, section 15 of the Utah Constitution.

Mr. Thompson hopes to bring attention to his desire to bring American troops home from Iraq at a rational and reasoned pace. His plan is to spend 26 days walking—one day for every 100 Americans killed thus far. Mr. Thompson will carry no signs or placards; he may carry a small American flag. He will invite no one to walk with him on the highway right-of-way. When he enters the city limits of sizeable communities along the route, community leaders will be asked to join him where sidewalks are available. He will avoid impeding vehicular or pedestrian traffic, whether on the highway right-of-way or in the cities. It will be an orderly and dignified effort. As a veteran who recently returned from a one year tour of duty in Iraq, Mr. Thompson is deeply patriotic and has served his country for several years, including tours in Kosovo and South Korea, and most recently, Iraq.

When Mr. Thompson contacted UDOT he was assured that pedestrian traffic by a single individual is permissible on Utah's roads (except interstates). He has been told by three UDOT employees that no permit is required. However, other UDOT employees have told him that a permit is required because this is a "special event." The UDOT Administrative Rules appear to define a special event as "any use of state routes other than normal traffic movement." *See* Utah Admin. Rule 920-4-1. Mr. Thompson will be walking alone the majority of the distance, and will not present a threat to normal traffic movement. He will only be accompanied by others within municipalities where sidewalks exist and pedestrian traffic is appropriate.

In a recent conversation with a UDOT representative, Mr. Thompson was told he needed a permit because of the purpose of his march. To require a permit based on the intent of a person lawfully

walking upon a UDOT right-of-way would be to impose a content-based restriction on speech, in violation of federal and state constitutional protections. Further, on any given day, numerous people walk, jog, and ride their bikes on state roads without seeking or being required to obtain a permit.

As you are aware, parks, streets, and sidewalks have consistently and clearly been acknowledged to be the quintessential public forum. "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Saia v. New York*, 334 U.S. 558, 561 n.2 (1948) (quoting *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939)). While requiring permits for public forums is permissible under certain conditions, courts have struck down permit schemes that work to restrict the public speaking of lone protesters. Indeed, permitting schemes that apply to small numbers of people or sole protestors have been successfully challenged, at least in part, on that basis. See, e.g., *Douglas v. Brownell*, 88 F. 3d 1511, 1524 (8th Cir. 1996) (finding permitting scheme insufficiently tailored where it could apply to only 10 people); *Grossman v. City of Portland*, 33 F. 3d 1200, 1206 (9th Cir. 1994) (same, applying to six to eight people); *Community for Creative Non-Violence v. Turner*, 893 F. 2d 1387, 1392 (D.C. Cir. 1990) (same, applying to two or more people); *Nemo v. City of Portland*, 910 F. Supp. 491, 496 (D. Ore. 1995) (same, applying to four or more persons). Applying UDOT's permit scheme to Mr. Thompson's solitary march would be unconstitutional.

Moreover, if the permitting scheme were applied to Mr. Thompson, the insurance requirement, hold harmless provision, and property restoration agreement required in order to engage in free speech activities would amount to a prior restraint on speech. Prior restraints, such as these monetary requirements, "bear[] a heavy presumption against [their] constitutional validity," *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), and the government "carries a heavy burden of showing justification for the imposition of such a restraint." *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971); see also *Alexander v. United States*, 509 U.S. 544, 554 n.2 (1993) (discussing origin of prior restraint doctrine). Imposing these restraints in this case would effectively silence Mr. Thompson's speech. The basis for the presumption against prior restraints is a "distinction deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

Given the clarity of the law, we trust that UDOT will not unconstitutionally require Mr. Thompson to seek a permit. Please advise within 48 hours whether UDOT intends to enforce its permit scheme against Mr. Thompson. If UDOT so intends, Mr. Thompson will seek a temporary restraining order in federal court to prohibit such enforcement. However, we hope that this matter can be amicably resolved.

Yours,

Margaret Plane
Legal Director
ACLU of Utah

Herm Olsen
Attorney at Law
Hillyard, Anderson & Olsen, P.C.