

Supreme Court of the United States

October Term, 1968

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FILED

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JOHN F. DAVIS, CLERK

In the Matter of:

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LESTER GUNN, et al.,

Appellants.

VS

UNIVERSITY COMMITTEE TO END THE
WAR IN VIET NAM, et al.,Appellees.
-----X

Docket No. 269

Pt. 2

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Place Washington, D. C.

Date January 14, 1969

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1968

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4 LESTER GUNN, et al., :

5 Appellants, :

6 v. :

No. 269

7 UNIVERSITY COMMITTEE TO END THE WAR :
8 IN VIET NAM, et al., :

9 Appellees. :
10 - - - - -x

Washington, D. C.

11 Tuesday, January 14, 1969

12 The above-entitled matter came on for further
13 argument at 10:25 a.m.

14 BEFORE:

15 EARL WARREN, Chief Justice
16 HUGO L. BLACK, Associate Justice
17 WILLIAM O. DOUGLAS, Associate Justice
18 JOHN. M. HARLAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

20 APPEARANCES:

21 DAVID W. LOUISELL, ESQ.
22 Box R, Capitol Station
23 Austin, Texas
24 Counsel for Appellants.
25

1 APPEARANCES (continued):

2 SAM HOUSTON CLINTON, JR., ESQ.
3 205 Texas AFL-CIO Building
4 308 West 11th Street
5 Austin, Texas
6 Counsel for Appellees

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(The argument in the above-entitled matter
resumed at 10:25 a.m.)

MR. CHIEF JUSTICE WARREN: Lester Gunn, et al.,
Appellants, versus University Committee to End the War in
Vietnam, et al., Appellees

Mr. Clinton, you may continue your argument.

ORAL ARGUMENT OF SAM HOUSTON CLINTON, JR.

ON BEHALF OF APPELLEES

MR. CLINTON: Mr. Chief Justice, may it please the
Court.

For just a moment, I would like to put back into
perspective what we were speaking of yesterday afternoon.
These events occurred December 12. Within nine days the
plaintiffs filed a complaint in the court below.

Thereafter, the three-judge court was convened. About
60 days after the events occurred, the defendants below, the
law enforcement officers in Bell County and the county
attorney, moved to dismiss the complaint.

Now, certainly, I think, that based upon the allega-
tions, the facts that were later shown to support those allega-
tions, at the time that the complaint was filed there was a
clear case or controversy, and to the extent that it was argued
that the court did not have jurisdiction, certainly at that
point the court clearly had jurisdiction, because the test is
whether there is a substantial controversy of sufficient
immediacy and reality to warrant the issuance of declaratory

1 judgment.

2 Q I don't see that the opinion was considered
3 whether on the question of declaratory judgment this record
4 did show a substantial controversy of sufficient immediacy and
5 reality.

6 On what do you rely that it did exist?

7 A I don't know that the court put it in those
8 terms.

9 Q I don't believe the opinion ---

10 A We rely for immediacy and reality on the fact
11 that charges that the disturbing of the peace complaints were
12 filed when it is obvious to anyone who knows anything about
13 the facts that there was no chance to prove any guilt.
14 They were sent ---

15 Q As I understand at, at the time that this opinion
16 was filed for hearing, those complaints had already been
17 withdrawn.

18 A Yes, but that is only a part of what we rely on.

19 Q Yes.

20 A We rely on the whole course of conduct in Bell
21 County from that time right on down including all the harrass-
22 ment: the handcuffing, the jailing, the frisking, the strip-
23 ping, the threatenings, the calling of traitors, all of those
24 things plus the comments of the chief of police: "Get out of
25 my town and don't come back."

1 Q And did all of these antedate the dismissal
2 of those charges?

3 A Oh, yes, they did.

4 Q Anything following the dismissal of the charges?

5 A There is no evidence of that, no evidence,
6 whatsoever, one way or the other. We further pled the law
7 that the statute was unconstitutional, we pled these acts of
8 intimidation and harrassment and so on, ask for injunctive
9 release against them. We pled against the showing of what
10 the purpose of the university committee is, and the chilling
11 effect that it had that these actions ---

12 Q May I ask, does the record show whether the com-
13 mittee had demonstrated at any other place in that county,
14 except at Fort Hood, at any time?

15 A I am not sure that the record does show. The
16 record shows that the committee has, as its purpose, the
17 appearing for purposes of demonstrations anyplace within the
18 vicinity of 100 miles of the university, where any representa-
19 tives of the administration that were promoting the foreign
20 policy of which the committee opposed would appear ---

21 Q But as far as the record is concerned, the
22 actual demonstration in Bell County was this demonstration
23 on the 12th of December when the President was at Fort Hood?

24 A That is correct. What we think the defendents
25 really argued below and their motion says -- was the motion

1 to dismiss but it was based solely -- it was directed solely
2 to the dismissal of that part of the prayer which sought
3 injunctive release against the pending charges. The motion to
4 dismiss was not specifically directed to that part of the
5 prayer that sought the injunctive release of restraining
6 enforcement of the declaratory judgment.

7 The court was aware of that and pointed out that
8 it was perfectly clear to the court below that they no longer
9 had to consider it our prayer for temporary release as to the
10 pending charges since those had been dismissed.

11 The court went on to say, we think quite correctly,
12 that the motion to dismiss was not specifically directed to
13 the ultimate prayer for declaratory judgment or for permanent
14 injunction against enforcement of this statute and then the
15 court went ahead to find that it was unconstitutional and to
16 say that we were entitled to injunctive release, but as I
17 pointed out yesterday did not actually issue any order in the
18 form of an injunction.

19 Now, in connection with those pending charges ---

20 Q Did the judgment or the declaratory judgment
21 and the injunction stand on the same footing, I take it, I mean
22 if there is a judgment for one there is a judgment for the
23 other, isn't there?

24 A I suppose we are dealing in semantics. The
25 court handed down an opinion in which it said at the tail end :

1 "The plaintiffs are entitled to their declaratory judgment
2 and injunctive release."

3 Now, following that there has never been any kind of
4 paper entitled "Judgment" that really sets out ---

5 Q But even to be here there has to be a judgment.

6 A Oh, yes.

7 Q So there is a judgment.

8 A To the extent that it is in that opinion, there
9 is a judgment.

10 Q And it is reviewable here. But to the extent
11 that it is there it is both for declaratory judgment and
12 injunction.

13 A Yes, sir, without any specificity as to what
14 their ---

15 Q Now that the criminal charges are dismissed
16 isn't at least the injunctive judgment in error?

17 A The court only said we were entitled to an
18 injunction, they have not actually issued one. I think, frankly,
19 that the place to take care of that part of the case is back
20 below if the court, hopefully, affirms a three-man back for the
21 actual preparation of the term.

22 Q I just asked you if there is a judgment for
23 one there is a judgment for the other, there is a judgment
24 that there isn't and that he is entitled to an injunction.

25 A Yes.

1 Q Now, isn't that judgment wrong?

2 A Well, no, sir, I don't think it is wrong. I
3 think we have shown that not only did the acts have a chilling
4 effect but they completely froze all speech and activity and
5 expression, and that we have shown our irreparable injury as
6 stated in the ---

7 Q I thought that this was a matter of comedy.
8 You could expect a State court to recognize that if this
9 statute is bad as the declaratory judgment says it was that the
10 State court would recognize that this is bad and would recognize
11 some constitutional defense to a prosecution.

12 A A State court, it is conceivable, might do that
13 and that is one reason I say that we need to take that up with
14 the court below. But there is no assurance that the defendant,
15 Sheriff Gunn, will do that or that the justice of the peace
16 will not again require them to post a \$500 bond and go through
17 all of those things before we ever get to a court of record
18 who would be aware of the decisions of this court and follow
19 them.

20 In that connection, I made this statement yesterday
21 that I want to correct. I indicated, in answer to a question --
22 actually I kind of volunteered -- that the trial in the JP court
23 was on an information following the complaint.

24 That is not correct. The trial in the county court
25 is on the information and the JP court is tried upon a complaint

1 and then we are entitled to appeal ---

2 Q And it is tried on the complaint that is appended
3 to your complaint in this action.

4 A Yes, sir, it is actually appended, yes, sir,
5 that is correct.

6 Q Yes.

7 A In the JP court from which, if convicted, we have
8 an appeal in the county court. In county court ---

9 Q But information had to issue then after the
10 trial and before the JP; is that it?

11 A The information would not come into play until
12 we appealed to the county court and where we have our trial.

13 Q I see.

14 A Now, I think the question really is after the
15 charges had been dismissed, whether or not they became moot.
16 It seems to me that it is this Court's very recent decision
17 in Carroll versus Princess Anne it answered
18 that question in our favor. We view it as authority for us
19 rather than counsel does as authority for them for there
20 clearly you have a similar situation in that the underlying
21 controversy between our committee and its members and the
22 law enforcement officers in Bell County continues to exist.

23 There is nothing in this record that the sheriff of
24 Bell County would not once again enforce, or attempt to enforce
25 against the plaintiffs Article 474 if they went back up there

1 and anywhere in Bell County.

2 To the contrary, the sheriff has said: "Don't come
3 back to my county. I don't want to see your faces here again."
4 Much the same situation existed in Princess Anne.

5 There, there was a temporary injunction that had been
6 issued. That was the cause of the chilling effect on the
7 amendment rights.

8 Moreover, in another case referred to in that
9 opinion was the situation of ICC orders where they were only
10 issued for a short time and then to be re-issued and in that
11 fashion that view was precluded.

12 I say to the Court there is not a thing in the world
13 to prevent the sheriff and the county attorneys from doing the
14 same thing here -- charge us as they did and then when we get
15 to the proposition where we are trying to defend our case, turn
16 around and dismiss the complaint again and try to deny us any
17 kind of final determination that this statute is unconstitutional
18 and should not be enforced.

19 Q Mr. Clinton, would you tell us whether this
20 committee still exists, and is it active, and ---

21 A I would say to the Court that it does exist
22 and that it is active, although I must admit the record does
23 not show that anything is active.

24 Q What is the meaning of that statement that it
25 still exists?

1 A It exists as an approved, on-campus group at
2 the University of Texas. It continues to hold meetings in the
3 university area. It continues to distribute through the mail
4 and through advertisements it continues to state its positions
5 on things in the university area.

6 For whatever it is worth, I again emphasize that it
7 is a group that is approved, an on-campus group, at the Univer-
8 sity of Texas. I am not sure how much time I have remaining
9 but I would like to spend that talking just a little bit about
10 Article 474 ----

11 Q Before you get to that, may I just ask one
12 question. Are there findings of fact that the sheriff and JP
13 said the things that you have been telling us about?

14 A No, sir, there are not.

15 Q Those are just in the affidavits, though.

16 A They are in the affidavits, yes, sir.

17 Q And there are no findings, other than those, that
18 you can glean from the opinion.

19 A The court below rendered the main opinion and
20 something called the addendum on a motion for new trial and
21 those are the only two papers handed down by the three-judge
22 court, and whatever the actual findings of fact there are, are
23 in one or another of those opinions.

24 In that connection, it is perfectly clear that the
25 court below is satisfied from the evidence through affidavits,

1 that university committee members remain plaintiffs, some of
2 whom were not really members of the university committee but
3 rather sympathizers, supporters and associates -- that all of
4 had ceased, certainly in Bell County, any type of activity,
5 peaceful activity, designed to carry out the purposes of the
6 committee.

7 One or two of the plaintiffs indicated that he had
8 ceased all activities everywhere because he said this was a
9 State statute and he was afraid that the same thing would
10 happen in to him in any county if he engaged in similar
11 protest activities as it happened in Bell County.

12 He did not again want to be subjected to the
13 charges, to making bonds, and to court appearances and things
14 of that nature. Accordingly, he had ceased all activities by
15 way of freedom of expresstion.

16 Article 474, I think, is clearly, on its face, and
17 in view of decisions of this Court from Cantwell vs. Connecticut
18 to Ashton vs. Kentucky -- Article 474 must fall because of
19 that phrase in there vociferous language or indecent, or what-
20 ever it is, the operative phrase then going down to calculated
21 to disturb the inhabitants of the place where the event takes
22 place.

23 Certainly, in 1966 in Ashton vs. Kentucky in almost
24 identical terms calculated to create a disturbance or breach
25 of peace. In here we have calculated to disturb. This Court

1 said that sort of a standard leaves wide open the standard
2 of responsibility and involves calculations as to the boiling
3 point and does not in any way involve an appraisal of the
4 comments, per se.

5 That is the same fault that Article 474 had. It is
6 vague because of that language. It will lead to the police
7 officer to the deputy sheriff a determination at that moment
8 as to whether the language is such as to create the boiling
9 point on one or more of the listeners involved.

10 It is over-broad because it obviously includes
11 expression, therefore, it must fall under Terminiello v. Ed Cox.
12 It is a combination of both over-broad and vagueness and is,
13 we think, essentially presents the same type of problem that
14 this Court resolved in Cox vs. Louisiana in which the breach
15 of the peace statute there was condemned where the Louisiana
16 court had held that it meant breach of the peace to agitate,
17 to disquiet, to arouse from a state of repose, that those
18 terms were both vague and overly broad in that they would
19 sweep within their scope permissible activities under the
20 1st Amendment.

21 The State here tried to defend Article 474 by saying
22 that it only prohibits or proscribes conduct in which there
23 is involved so great an amount of noise that is calculated to
24 disturb.

25 We submit that that is not a saving interpretation

1 at all. It would outlaw practically all modern demonstrations,
2 some of which have been approved by this Court. In Edwards vs.
3 South Carolina there was singing, handclapping, marching,
4 and things of that nature.

5 Clearly, a loud amount of noise and no doubt, as I
6 believe the record showed in that case, there were some people
7 disturbed.

8 Q Do you know any of the cases in which the
9 Court said the 1st Amendment respects loud or boisterous conduct
10 or noises near a private dwelling?

11 A No, but we don't have that here. These events,
12 in our case, clearly took place in a public place.

13 Q Where did they take place?

14 A College campus.

15 Q Where on the college campus?

16 A Well, it was right adjacent to the parking lot.

17 Q You don't think there is anything to distinguish
18 between a college campus and a street?

19 A Not in this particular incidence ---

20 Q Or a park?

21 A --- where there was a public program and some
22 30,000 other people who were there as attendants?

23 Q What campus was it?

24 A The campus of the Central Texas College near
25 Calallen.

1 Q Is that a public college?

2 A I don't believe the record shows, but I assume
3 that it is. It is certainly not a private sectarian college.

4 Q It is or not?

5 A No, it is not a private, sectarian college. I
6 am satisfied that it is a public college. The record shows
7 any of that but the record does show that on this occasion
8 there were some 30,000 people there.

9 Q Well, do you think just because a crowd of people
10 are invited on a certain piece of property that another crowd
11 of people can come on and make all the noise they want?

12 A I think in this instance, under these circum-
13 stances that these plaintiffs could come on as they intended
14 to do and merely display signs.

15 Q Well, I know you say -- you mean just under
16 these circumstances?

17 A In these circumstances, certainly.

18 MR. CHIEF JUSTICE WARREN: Mr. Louisell.

19 REBUTTAL ORAL ARGUMENT OF DAVID W. LOUISELL, ESQ.

20 ON BEHALF OF APPELLANTS

21 MR. LOUISELL: May it please the Court.

22 Of course the situation in the Princess Anne County
23 just referred to by counsel was that there was an extant
24 injunction that was a precedent and that the officials were
25 relying upon it to prevent another meeting before this Court

1 struck down that injunction.

2 In submitting this case, Your Honors, I have only
3 two points to make at this time: Far from sustaining the heavy
4 burden of showing a Texas policy to use Article 474 to stifle
5 speech, I don't think I exaggerate when I say there is hardly
6 any showing of such a policy, except the conclusory statements
7 in the affidavits that their rights are chilled, because of
8 what took place.

9 Q Can you say to what extent their rights were
10 chilled?

11 A If it was chilled to any extent, Your Honor,
12 they must be very chillable.

13 Q Would you suppose there is more of a real
14 controversy here than there was in the Epperson case?

15 A In the Epperson case, however, as the Court
16 very carefully pointed out, it was from a State court where the
17 trial court had granted the relief where the appellate court
18 of the State wrote that two sentence opinion and, whereas, the
19 writer of the court's opinion said the case is here from a
20 State court which we think is an entirely distinguishable
21 situation.

22 Now, in this case, there is no suspicion, there is
23 even no possibility, of suspecting racial prejudice in the
24 case of ours, because local counsel informed me all the per-
25 sons involved were white people.

1 If you go to all the Texas cases in both of our
2 briefs, you won't find, I don't believe, Your Honors, one that
3 even concerns the contest except one involving cursing, and
4 there the Court said: "It isn't enough to show cursing to
5 justify a conviction. The cursing must be shown to have been
6 done in a manner of reasonably calculated to disturb the peace."

7 I think we can almost take judicial notice that
8 protests including protesting about Vietnam is as open,
9 uninhibited at the University of Texas in Austin as it is in
10 Berkeley, California.

11 Q Professor, I am just wondering in view of your
12 statements that this was a not a lawful procedure -- this arrest
13 that was made -- and that, therefore, it hasn't been dismissed,
14 there is nothing to report, what is there to prevent these
15 same people from doing what they said they would do.

16 The Justice of the Peace saying: "You stay out of our
17 county. We don't want people like you." And the Chief of
18 Police calling them traitors and telling them what he would do.
19 What is there to prevent those people from doing the same thing
20 they did here and then when the ordinance is attacked with a
21 manner in which it is being used to dismiss it again and put
22 them to that trouble again, and give them a \$500 bail when the
23 maximum punishment was \$200.

24 A It was a \$400 bail, Your Honor.

25 Q Well, still twice as much.

1 A In the courts nobody would justify that, Your
2 Honor. No sensible would stand before this tribunal and
3 justify that when you take into account the circumstances,
4 though, if there was overreaction here, Your Honor, the
5 tremendous nerve-racking circumstances of that event.

6 Will that be likely to reoccur again? The local
7 people, a lady Justice of the Peace, and if there is that kind
8 of abuse it is with pride that I can say that this Court has
9 made clear the right to a remedy under the Civil Rights Act
10 in Monroe against Hayden.

11 Q Is there one word in the record by affidavit
12 or anything else from the Chief of Police, the sheriff or
13 anybody that said they won't do this again?

14 A There is nothing to that effect but there is,
15 in the affidavits of the sheriff and the deputy sheriff, there
16 are denials of any mistreatment.

17 Q Is there a denial using those words?

18 A I don't believe that those words -- I forget
19 exactly to whom was attributed the word "traitors" but I don't
20 think ---

21 Q I think it was the Chief of Police, if I remember
22 correctly. And I think the Justice of the Peace is accused
23 of saying that he put the bail at \$400 because he wanted to
24 see that they came back and he could try them for the offense
25 and that they didn't want people of that kind in the county.

1 A For that reprehensible conduct there is an
2 adequate remedy under this Court's decision in Monroe against
3 Hayden. But the remedy isn't, Your Honor, to reach out
4 and declare unconstitutional a statute in the abstract. If
5 the court below is right about Article 474 in declaring in the
6 abstract for facial unconstitutionality, so-called, I submit
7 to this Court as far as I can find every disturbing of the
8 peace, every breach of the peace and probably every disorderly
9 conduct statute in this country would fall.

10 Can society afford that?

11 Q Is it necessary to declare this ordinance uncon-
12 stitutional on its face ---

13 A Quite.

14 Q --- in order to get a declaratory judgment
15 and injunction against this kind of conduct on the part of the
16 Chief of Police, and the Justice of the Peace?

17 A Why no, if the judge had been willing to go into
18 the question, the lower court judge -- if they had been willing
19 to go into it, but they deliberately said: "We won't examine
20 into the application of the statute to the facts here. We
21 insist upon doing this in the abstract."

22 Now, Your Honor, I see my time is up and in ---

23 Q May I ask you one question?

24 A Yes, sir.

25 Q You said yesterday, but I didn't exactly get it,

1 whom do you represent?

2 A I represent the three appellates, the sheriff,
3 the Justice of the Peace and the county attorneys of the
4 county involved.

5 Q Is that, in effect, the State of Texas?

6 A The State of Texas is in no way part. The
7 Attorney-General is the senior law officer of the State. In
8 view of the nature of this attack I assisted the State, took
9 part and assisted in the defense of these three appellates.

10 Q Is he on the record in this Court, the Attorney-
11 General?

12 A Yes, Your Honor, that is the Assistant Attorney-
13 General, the active trial counsel in this case, is a party
14 to the brief in this Court.

15 When a group, for example, comes to a classroom door
16 or window and by shrieking and raising a great din disrupts
17 that class, the purpose of doing this, is that free speech?

18 Your Honors, that is the day that prevents free
19 speech. And it is exactly at that type meeting that Article
20 474 is necessary in order to continue a civilization that will
21 make free speech.

22 Q Do we have to justify that kind of conduct in
23 order to consider this justiciable today and grant some relief
24 to this man?

25 A There is no question. If their allegations,

1 however denied they are by the affidavits of the sheriff and
2 the deputies, and so forth -- if those allegations are good
3 faith allegations, if, in fact, they are true, they have every
4 right to relief.

5 In fact, the complaint presumably also seeks a relief
6 in dollars. They have every right under the Monroe case, if
7 there is any truth at all to those allegations, and I wouldn't
8 for a moment deny it. But to reach out and declare in the
9 abstract a statute is unconstitutional that would strike down
10 every other statute in the Union of a comparable nature, I sub-
11 mit is not in the interests of free speech, in any possible
12 way.

13 (Whereupon, at 10:55, the hearing in the
14 above-entitled matter was concluded.)
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