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Supreme Court of the United States

Thomas U. Greer, Commander, Fort
Dix Military Reservation, et al.,

Petitioners,

V.

Benjamin Spock, et al.,

Respondents.

No. 74-848

Washington, D. C.
November 5, 1975

Pages 1 thru 55

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IN THE SUPREME COURT OF THE UNITED STATES

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THOMAS U. GREER, COMMANDER, FORT :
DIX MILITARY RESERVATION, et al., :

Petitioners, :

v. :

BENJAMIN SPOCK, et al., :

Respondents. :
----- :

No. 74-848

Washington, D. C.,

Wednesday, November 5, 1975.

The above-entitled matter came on for argument at
11:01 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT H. BORK, ESQ., Solicitor General, Department of
Justice, Washington, D. C. 20530; on behalf of the
Petitioners.

DAVID KAIRYS, ESQ., Kairys and Rudovsky, 1427 Walnut
Street, Philadelphia, Pennsylvania 19102; on behalf
of the Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 74-848, Greer against Spock.

Mr. Solicitor General, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE PETITIONERS

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

We're here on writ of certiorari to the Court of Appeals for the Third Circuit. The Court held that the petitioners, one of whom is the Commander of Fort Dix in New Jersey, is required by the First Amendment to the Constitution to permit political campaign speeches by respondent, and the distribution of literature in areas of Fort Dix that are open to the civilian public.

A preliminary injunction was entered in this case, requiring that, of the Commander, this Court refused a stay by a vote of five to four, I believe, and now a permanent injunction has been entered.

Respondents Spock and Hobson have been denied permission to hold a political rally on the base under Fort Dix Regulation 210-26, which I will describe in a moment.

And the other four respondents were barred from the base for the unauthorized distribution of literature, under

Fort Dix Regulation 210-27.

The content of the particular literature is not before us, it's not in the record, not in issue. Respondents were barred because they refused to seek prior written approval.

I think it will facilitate discussion if I take up the two issues separately. And I would like to begin with the issue of political speech and campaign rallies on a military base.

The regulation at issue is printed on page 6 of our brief, it's Fort Dix Regulation 210-26, paragraph 2a, and it states simply that "Demonstrations, picketing, sit-ins, protest marches, political speeches and similar activities are prohibited and will not be conducted on the Fort Dix Military Reservation."

Now, the only part of that regulation that's really at issue here is the part that applies to and prohibits political speech -- political speeches. Not political speech in the informal sense, but a formal political speech.

Now, respondents, I think, in their brief and in their argument and, indeed, I think the Court of Appeals for the Third Circuit discussed that regulation as if it were subject to the same analysis as the ordinance of a city council, applying to civilians within that city. And I have no trouble in agreeing that if that were the case, if this were not a special context, indeed, the ordinance, such an ordinance would be unconstitutional under the First Amendment.

But we're dealing here with a military base, devoted

to the training of soldiers, and it's never been held, I think, -- or it's never been suggested, I don't believe -- that the First Amendment converts a military base into a Hyde Park for the convenience of those who wish to make campaign speeches.

The fact that Fort Dix has, as it does have, some streets and parking lots, I don't think makes it a wide open forum for partisan political rallies. And I should note here that the difference from the civilian context is marked by the fact -- and I think it's undoubted -- that the Commander of Fort Dix has the lawful power to exclude all civilians from the base.

I take it that that's true from Cafeteria Workers v. McElroy, I take it that that's true from 18 U.S.C. 1382, and, indeed, I take that to be true because I think it's conceded in this case.

QUESTION: Well, it was true in Flower, too, wasn't it?

MR. BORK: It's true in Flower, also. I think Flower is a different case, in a variety of reasons I'm going to come to. One, I think -- one reason, one point of difference, it seems to me, is that that street was indistinguishable from any other civilian street, indeed continued straight through from the city; in a way that is not true at Fort Dix.

But I think that there are other reasons that Flower does not govern this case.

QUESTION: If I recall correctly, Flower put emphasis

on the fact that this was a public street, in fact, going through that base, --

MR. BORK: That's true.

QUESTION: -- as a part of the base.

MR. BORK: That's true. I think that street was indistinguishable from any other public street, with shops and civilians on it, and so forth.

QUESTION: It merely meant that the base there was divided into two parts by a public highway that went through some major portion.

MR. BORK: That is true, and I think the Court said there that the military had abandoned control over that street. I think that definitely in Fort Dix that is not true.

QUESTION: Well, but civilians can certainly come on- to Fort Dix without being stopped at a guard's gate or anything like that.

MR. BORK: They can. The Commander, I think, retains the lawful power to change that at any time.

QUESTION: Well, but didn't he retain that power in Fort Sam Houston in Flower, too?

MR. BORK: Mr. Justice Rehnquist, if I thought that Flower had announced a principle so broad as to say that if the Commander lets civilians on the base, then he must let them on the base for all purposes; that is, that any access means all access, then I would, without hesitation, ask this Court to

modify or overrule Flower.

I don't think it should be read that broadly. One reason, I think, is that this Court thought that street had been abandoned, I don't think there's any abandonment here, for reasons I'll go into; secondly, ten days after Flower, in the Lloyd Corporation v. Tanner case, this Court discussed the fact that a shopping center, which allowed civilians or shoppers or people to enter freely, nevertheless did not extend a full invitation for all purposes.

Now, I would take it that if a shopping center is capable of limiting the scope of the invitation, so as to exclude the exercise of First Amendment leafletting, then, a fortiori, a military base has at least the same powers.

QUESTION: Well, can't you argue just the opposite, though, that since the shopping center is, in many respects, private, it may be able to limit an invitation in a way that the government, which is not private in any respect, can't?

MR. BORK: If, Your Honor, you're referring to the State action difference, I don't think -- I think there may be that difference. On the other hand, in Logan Valley Plaza State action was seen, and in that section of Lloyd Corporation v. Tanner, which discusses the ability of the shopping center to extend an invitation which is limited in scope, they are not dealing with the State action problem. So that I think that aspect of that opinion is fully applicable here.

But, in any event, I take it as a premise that it's undenied that the Commander of the base could exclude all civilians. I take it, also, as a premise that some deference is due to the judgment of the military commander; indeed, that deference is expressed in 18 U.S.C. 1382, as to what activities harm the function of the military.

The fact that there are open spaces here and streets, I think in no way conforms this case to cases involving the civilian context, as Hague v. C.I.O. speaks of the streets from time immemorial being used as places for discussion in the exchange of political ideas. And it's that tradition, that use, that makes them a public forum in some sense.

In Lehman v. Shaker Heights, this Court quoted the words of Lord Dunedin, who said -- and I think it's perfectly applicable here -- "the truth is that open spaces and public places differ very much in their character, and before you could say whether a certain thing could be done in a certain place you would have to know the history of the particular place."

The history of military bases in this country has been uniform. Campaign speeches have not been given on them. That has been something that has never been allowed. So far as I know, Dr. Spock is the first candidate for a national public office, or indeed for any public office, who has attempted to give a political speech on a base.

QUESTION: What about, say, a charter amendment in a

city or some initiative or referendum matter?

MR. BORK: I -- the --

QUESTION: A speech in support or in opposition to --

MR. BORK: You mean as opposed to a candidate? An issue speech.

Mr. Justice White, the regulation at Fort Dix, I take it, would cover that, because it would be a political speech, I take it. I'm not sure that they mean partisan political speech by that. I think they might mean issue political speech as well.

But that, of course, is not what's before us, in this particular case.

QUESTION: But you are positing -- but you are justifying the regulation on the grounds that particular kinds of speech just don't fit in the military?

MR. BORK: Yes.

QUESTION: Unh-hunh.

MR. BORK: Yes, I am.

And I would have thought that that was clear from the tradition of this country, and that the law was clear to that effect. And, indeed, it seems to me there are only really two arguments advanced by the Court of Appeals and by the respondents against it.

QUESTION: But you would, I suppose -- but you're saying the regulations prohibit all political speech, it's just

not some?

MR. BORK: That is true.

QUESTION: And you wouldn't be here, I suppose, if it just prohibited some kinds of political speech?

MR. BORK: If it were discriminatory, you mean, Mr. Justice White?

QUESTION: Yes.

MR. BORK: No, I would not be here. This is a non-discriminatory regulation, designed for very good purposes.

QUESTION: You'd let that case be argued by the general counsel of the Army, then?

MR. BORK: I would authorize -- I might, at the outside, authorize the filing of a brief, Mr. Justice Rehnquist.

But the Court of Appeals' argument rests upon two propositions, both of which I think are demonstrably false.

The first is, and I quote, "if the reservation is open to all the rest of the public, there is no basis for holding that it may be closed selectively to political candidates or to distributors of unapproved literature."

Now, since it's conceded that the base commander could seal the base to all civilians, that argument merely asserts that if the Commander allows any access by civilians, he is constitutionally required to allow all access.

QUESTION: Well, wouldn't you concede that if he does

in certain areas of the base allow access to the public, he has to allow access to every member of the public who isn't misbehaving or showing some --

MR. BORK: Well, I think he has to allow access to every --

QUESTION: I mean, he has to allow access to Dr. Spock.

MR. BORK: Allow access to -- Dr. Spock has complete access to the base, any base, Mr. Justice Stewart. I'm talking about Dr. Spock for the purpose of making a political campaign speech --

QUESTION: But the way you put it was not quite the way you intended it, perhaps.

MR. BORK: Access for all purposes, perhaps, would be better. If he allows access for any purposes, the Court seems to be saying he must allow access for all purposes.

QUESTION: Yes, that's a different --

MR. BORK: Now, that proposition, I think, if it were true, would force every Commander to choose between sealing his base tight or allowing it to become Hyde Park, a forum for political discussion.

And, indeed, if that proposition were true, I take it this Court would face much the same choice, because this Court has limited access, political banners and campaign speeches may not be made in this building or on these premises,

although access is allowed to the public. So I take it that if that proposition were generally true, this Court would be put to the same choice of excluding the public or allowing political speech when it didn't interfere with a particular session of the Court.

Any of those choices would be quite wrong, and they would be quite wrong, I think, for reasons that parallel the reasons of forcing such a choice upon the military would be quite wrong.

And, as I've mentioned, also, the Court of Appeals' proposition, that access for any purpose is access for all purposes, seems to me, also, to be contradicted by the later opinion in Lloyd Corporation v. Tanner.

It is a simple non sequitur, and I think there must be some other policy reasons one would have to search for.

Now, the only other argument worth mentioning, made by the Court of Appeals, is that a wide range of newspapers and magazines are permitted on the base, and the troops are allowed to listen to radio and television without restriction in their off-duty hours. And the Court notes that sometimes minor-party candidates don't get as much media coverage, and they don't have as much money to buy media coverage as more popular or better-known candidates do, and therefore must make do with face-to-face campaigning.

Now, the Court concludes from that that the minor-

party candidate is harmed because he needs to get on the base to have face-to-face campaigning, although there's the rest of the nation to engage in it, whereas major-party candidates are reported in the New York Times or any of the magazines or on television. And the Court concludes this remarkable analysis by referring to the Fort Dix policy, therefore, as, quote, "a feigned neutrality that serves no discernible military purpose".

And I would like to raise several objections to that, although there are more than several that could be made. And, in the first place, I would like to raise the objection, or like to point out that the statement that there is no discernible military policy is simply wrong. In fact, there is a crucial military policy, and that policy is the traditional safeguard in this nation of the separation of the military establishment from our political processes.

It's not a question of will these people passing out leaflets or making speeches interfere with the training exercise, of course that can be prevented. And it's not a question of will political opinion reach the soldiers, they reach it all kinds of ways. Soldiers are citizens and they get opinions through the media, from each other, from civilians outside, in a variety of ways.

QUESTION: Mr. Solicitor, I have a problem, a little problem, with just one point. You could mail these leaflets, and that's okay?

MR. BORK: That is true. Well, if the leaflets --

QUESTION: If they were mailed, there's no restriction against that. If they were mailed to each soldier on the base.

MR. BORK: There's no restriction in the sense that the mail isn't covered.

QUESTION: Right.

MR. BORK: But I think, Mr. Justice Marshall, --

QUESTION: But you can't hand them out. Now, --

MR. BORK: Well, you can hand them out if you get prior approval, and prior approval, the regulation says, will be granted.

QUESTION: But you don't get prior approval of the mailing.

MR. BORK: Well, no, but that's, it seems to me, not a good objection to this policy, to say that the military hasn't expanded the policy to cover censorship of the mails. The military has been quite reasonable about these policies, and it has not attempted to censor or cut things out. It has tried to impose minimal regulations.

QUESTION: Well, if they do, I imagine that would be litigated, too.

MR. BORK: I imagine it might be, Mr. Justice Marshall.

But I think the fact that they have not tried to censor the mails is not a reason to object to their attempts to make sure that leaflets are not distributed, which pose a

clear danger, as they say, to discipline, morale, and --

QUESTION: Well, do you think -- could the base forbid soldiers stationed there from attending political meetings off base?

MR. BORK: No. They do not, Mr. Justice White.

QUESTION: Well, could they?

MR. BORK: Could they? I do not believe so. They do have a regulation that says if they attend political -- partisan political meetings off base, they shouldn't -- they must not attend in uniform.

QUESTION: That's right.

MR. BORK: Which points out the clear symbolic line that the military is trying to draw between military activity and political activity.

QUESTION: So it isn't that --it's the way -- their worry is how the military would look to the public, rather than any danger to the soldier?

MR. BORK: Oh, no, I think not. I think not. I think the American soldier --

QUESTION: Well, they're going to let him go off the base and attend any political meeting he wants to attend.

MR. BORK: That's right. That's quite true, Mr. Justice White, and this is not an attempt to prevent him from hearing any ideas.

QUESTION: And they let him listen to the radio all he

wants to or read all the magazines and --

MR. BORK: I must say, the fact that the military allows all of these things --

QUESTION: Yes.

MR. BORK: -- and is so wide open, it seems to me not an argument against that narrow --

QUESTION: Well, what is the reason, then, for the regulation?

MR. BORK: Well, I think it's simply this: It has always been understood that there is this separation between the military and the political process. It's understood that you are also a citizen. But when you come on the base, at that point you leave organized, partisan political activity behind you, it's not part of your military life. And I think that is largely a symbolic difference, but it's a crucial symbolic difference. It separates it in the minds of the soldier. He knows when he's in his unit he's not a political animal. He may have an opinion, but right now he's being a military man.

That has been a tradition in American politics and in American military life throughout most of the history of this Republic, and I think it's a crucial tradition. It's crucial for two reasons, crucial in two aspects.

QUESTION: Yes, but while they are sitting there on the base, and they listen to -- they're free to listen to political speeches on the radio or on television --

MR. BORK: That, it seems to me, --

QUESTION: -- they are free to sit around in their uniform and read the magazines, read the speeches.

MR. BORK: That is true. That is true. I think we are dealing, as we must in this area, with differences of degree which, at some point, become so large that they become differences in kind. And it seems to me that the soldier listening to the radio, reading a speech, talking in the barracks, going to a rally elsewhere -- well, eliminate the last. The first three examples is reached as an individual, and that is quite a different thing from rallying soldiers on a base, where they perceive themselves as soldiers, and subjecting them to political exhortation, that, I think, encourages a blurring of the distinction between the military and the civilian -- and the regular political process. And that's a distinction I think we would be in very bad shape if we blurred.

And, of course, it requires drawing lines. The military here has drawn the line as far back as they can and allowed as much as they can, which I think ought not to be turned against them. I think it's commendable that they have drawn the line and the regulation as narrowly as they have.

If we once blur this distinction, so that troops are subjected to political speeches on base, gathered in crowds on base, we then begin to teach them that political ideas

properly mix with military enclaves, military functions. That, it seems to me, is a very bad idea. It may affect ultimately their performance of their military duties, it may affect their attitude toward their superiors or towards their juniors.

There will be times in this country again, I'm sure, of enormous unrest and great dissent, of civil disobedience. One thing we ought to preserve is the idea that the military doesn't take part in that as military. So that we don't get military disobedience in the name of political ideas.

The other thing about that that one ought to mention -- we live in quiet times now, but if political speeches and campaign rallies can be held on the base by civilians, I don't see how troops can be kept from holding their own political rallies and campaign speeches on a base. There may be times and conditions in this country in which there will be a military viewpoint, or at least you encourage the formation of a military viewpoint, if you allow that kind of thing. And I think that would be very bad for American politics, if there were a military political viewpoint.

What this regulation is designed to implement, narrowly and carefully, is a tradition that prevents a politicized military and a tradition that prevents militarized politics.

And that's what I think is at stake here.

And I think the fact that so many other sources of information are open to the troops is not a reason to question this policy.

Now, the statement that the neutrality is feigned, I think -- I mean, I hope I have shown that there is a discernible, indeed a crucial, military policy that is served by these regulations.

But I should like to address --

QUESTION: You've been addressing yourself up to now primarily to Regulation 210-26 2a, haven't you?

MR. BORK: I had been, Mr. Justice Stewart, but I got drawn into this --

QUESTION: I know you did.

MR. BORK: -- to the leafletting as well.

QUESTION: I know you did, but it was your purpose to separate the two and discuss them separately.

MR. BORK: At the outset, that was my purpose.

QUESTION: Yes.

MR. BORK: And I have been addressing this, although I think the leafletting regulation is close to it.

But I wanted to say one other thing about this statement that this is a feigned neutrality.

It is a real neutrality, and if there is a disadvantage in getting media, proportional media coverage by these candidates, financially disadvantaged candidates have no greater

First Amendment rights than other candidates.

The Constitution does not require the Commander at Fort Dix to make his troops available, as compensation for a candidate's inability to buy ads or to attract the New York Times or the attention of NBC.

If, indeed, that were the Constitution, which the Third Circuit appears to think it is, I would suppose it would be true that if the Commander could close his base to all civilians except minor-party candidates -- because he'd be required to use his base as a reservoir to compensate disadvantaged candidates.

Now, there are more objections to it, but I trust that I have shown at least that the policy is real, and that the neutrality is not feigned, but real.

Now, the leafletting regulation is really here on its face, in effect, because we have no example of the leaflets, they are not in evidence because they weren't submitted for approval. But I should say that the way this operates is the leaflets are -- or any matter that would be passed out, is presented to the Base Commander. He is directed by the regulations that he is to allow distribution, unless he makes a finding -- unless he makes a finding -- supported by evidence that he can state that there would be a clear danger to morale and discipline on his base.

QUESTION: Have there in fact been instances where

he has done that, Mr. Solicitor General? Where he has made those findings?

MR. BORK: I believe so at Fort Dix. I believe so, but if I'm wrong, I'll correct myself later.

If he makes such a finding, he must forward it, by telephonic communication, to a higher echelon, indeed to Army Headquarters, so that they can decide and impose a uniform national policy on this. So that we don't have base commanders doing aberrational things. And he is specifically instructed that whether he likes the literature or not has nothing to do with it, he is specifically instructed that it doesn't matter if the literature is critical of U. S. policies or officials, and it doesn't matter even if it's unfairly critical.

All he may judge is whether it poses a clear danger to the discipline and good order and morale of the troops.

QUESTION: Mr. Solicitor General, maybe it takes us out of order back to the historical aspect, but isn't there some history that during the Civil War commanders who favored Lincoln gave special treatment to campaigners who came on the bases and out into Army camps, even in the field, at the time they were setting up arrangements for the balloting of soldiers?

MR. BORK: Indeed there have been violations of this tradition throughout history, and I think those were examples of it, Mr. Chief Justice.

However, to say that a tradition has been violated,

I don't think means that it is not important, not crucial, and not worth trying to preserve. Indeed, Congress, in a number of statutes, I think, cited at page 26 of our -- well, it's not 26, but cited in our brief -- has attempted to -- page 36 of our brief. We list some statutes in which Congress has tried to shore-up this tradition. And it may be precisely because of knowledge that in the past some violations and breaches of that tradition have occurred.

I was -- my attention was called just yesterday to a letter by President Lincoln to General Hooker, when he appointed him in his command, in which he said: "I'm appointing you, there are some things about you I like and some things about you I don't like," he said, "but you do keep" -- it was a very straightforward President, and he said, "but you do keep your military duties and politics separate; and that I like."

So I think that this has been a tradition and a safeguard that we have tried to insist upon, that has been violated from time to time, but I think that is only all the more reason to try to insist upon it now and to continue to insist upon it.

I should like to reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Solicitor General.

Mr. Kairys.

ORAL ARGUMENT OF DAVID KAIRYS, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

I'd like to start with a few facts about the base, particularly regarding the questions that were asked by the Court of the Solicitor General.

First of all, I don't note any way in which the Solicitor General actually distinguishes this base or these areas that First Amendment rights were granted in this case from either the areas at Fort Sam Houston involved in Flower, or from the usual kinds of civilian streets.

They say that it's distinguishable, and I still don't see the specific way that they distinguish it.

Regarding the question of Mr. Chief Justice Burger, there are also highways, State roads and county roads that go completely across the base. And the one involving several of the respondents here, on the Wrightstown Road exit, which is pictured in Appendix Volume II, at page E-2, in certainly indistinguishable from a city, you can't even figure out, on that picture, where the base starts and where the city ends.

It seems to me --- I have never seen Fort Sam Houston, but it seems to me that that's a picture of what this Court seemed to describe in that case.

QUESTION: You mean because it looks like a company

town of an older case, it is a company town?

MR. KAIRYS: No, I'm saying the base is -- the road goes right through the city and right through the base, exactly as in Flower. And it seems to me that it is indistinguishable from a city street.

QUESTION: Well, it wouldn't satisfy you, though, if your client were permitted to make a speech out in the street, subject to all the traffic hazards that would be involved?

MR. KAIRYS: Oh, no, I'm referring to the sidewalk on that street.

QUESTION: On this picture, which side is the base and which side is Wrightstown?

MR. KAIRYS: The photographer is on the base.

QUESTION: And so --

MR. KAIRYS: And Wrightstown is in beyond -- do you see the railroad crossing? The crossed white fence at the top of a post?

QUESTION: Oh, yes.

MR. KAIRYS: Where the railroad comes.

QUESTION: Yes.

MR. KAIRYS: Right next to that there is two small mounds, this is in the testimony regarding this picture, there's two small mounds on either side of the street that indicate that you are entering the base.

QUESTION: So the near left side is the base?

MR. KAIRYS: The whole -- the street where that railroad crossing is, beyond that railroad crossing is Wrightstown, New Jersey, in the background of the picture.

QUESTION: Yes.

MR. KAIRYS: Towards the photographer, closer to the picture is the base. From then -- and then --

QUESTION: Where's the "Cleaner & Laundry", on the base or --

MR. KAIRYS: That's in Wrightstown.

QUESTION: And what about the one on the left side, also a cleaner and a laundry?

There are two cleaners and laundry there.

MR. KAIRYS: The two cleaners are in Wrightstown. They are just before the entry to the base. It's really a matter, as the Court of Appeals said, of about five feet from the commercial district of Wrightstown to the beginning of the base.

QUESTION: And that bar just beyond the cleaners and laundry, that's also Wrightstown?

MR. KAIRYS: That's all Wrightstown, yes, sir. The two civilians on the base, on this side, the photographer's side of the railroad crossing, are Respondents Ginaven and Misch actually handing leaflets to two soldiers just prior to their arrest. This was taken actually just prior to their actual arrest.

QUESTION: I suppose, Mr. Kairys, there is one distinction between Flower and this case, that one was not plenary argument, it was a summary disposal, wasn't it?

MR. KAIRYS: Oh, yes, procedurally. Yes.

Are you referring to some distinction between the particular area of the base involved there and the one here?

QUESTION: No. You just said there wasn't any difference between the Flower case and this one, and --

MR. KAIRYS: I'm sorry --

QUESTION: -- I'm merely saying that if there was that distinction here --

MR. KAIRYS: Yes, sir. I was limiting myself. I'm sorry, I should have been clear. I was limiting myself to the description of the actual areas involved, that they are the same.

And I don't think it's fair to say that the base was abandoned in any kind of sense of abandoning control, as the Solicitor General says, in Flower.

It's evident from the fact that Flower was arrested there twice by military authorities, that indeed the military exercised control over that area.

QUESTION: That automobile that's turning right [sic] onto -- is that -- is the highway at that point --

MR. KAIRYS: That is a civilian vehicle --

QUESTION: Is that on the base or is that a State

highway?

MR. KAIRYS: That's on the base, but it's a State road that goes right through the base.

QUESTION: Well, that's my question.

MR. KAIRYS: Yes, sir.

QUESTION: In other words, there are State roads that go through the base which are not under the control of the military, is that right?

MR. KAIRYS: Absolutely. The State retained easements over those roads when the land was ceded to the military.

QUESTION: Well, as I remember it, I've been over this base many times, and there are countless streets like that, aren't there?

MR. KAIRYS: There are. The -- Colonel Olsen, the Provost Marshal, testified that there were ten such entrances similar to this, that are wholly open to the public; merely marked that you're entering the base.

As a matter of fact, on Exhibit E-4, that's taken on New Jersey Route 68, which is another State road that goes entirely across the base, and it marks the base, as it does at the other one, and there's a sign on the gate there that says "Visitors Welcome".

QUESTION: Who has jurisdiction of the roads there for traffic violations?

MR. KAIRYS: They are patrolled by the military.

QUESTION: So the military hasn't released them entirely.

MR. KAIRYS: No.

QUESTION: What if you want to hold a parade on one of those State streets, State roads, whom do you ask for permission?

MR. KAIRYS: Ones within the base, you mean?

QUESTION: Well, it's a State highway, though.

MR. KAIRYS: Yes, --

QUESTION: On Route 68, where it goes through the base.

MR. KAIRYS: You would have to ask the military authorities.

QUESTION: Yes.

QUESTION: Why is that?

MR. KAIRYS: The only thing that the State has is an easement across the base.

QUESTION: Well, what if it wants to use its easement for a parade?

MR. KAIRYS: Well, I don't know if it's ever happened, but the military proclaims its control over those roads entirely.

And it does close them -- for instance, if there's a demonstration or other activity at McGuire Air Force Base, which is down the road, the military will entirely close the

civilian use of Route 68.

QUESTION: So whatever property right the State has, it's subject to military requirements.

MR. KAIRYS: That's correct.

QUESTION: If the military wants -- if the military said, "We're so busy on this base we're going to have to use this State highway from now on, exclusively for our own purposes"?

MR. KAIRYS: Then the State seems to accede to that.

QUESTION: Mr. Kairys, who maintains the roads?

MR. KAIRYS: As I understand it, the military does.

QUESTION: Do the State Police have any jurisdiction on any of these roads or streets?

MR. KAIRYS: I don't believe so. I think their jurisdiction ends right at the beginning of the base on any of the roads.

QUESTION: So they are maintained and policed by the military?

MR. KAIRYS: That's correct. They're definitely patrolled by the military, and any traffic violations are processed by the military.

QUESTION: Are there any State courts within Fort Dix?

MR. KAIRYS: Courts?

QUESTION: Courts, yes.

MR. KAIRYS: No, sir.

QUESTION: No civil judicial bodies sit within Fort Dix's boundaries?

MR. KAIRYS: That's correct.

QUESTION: So the only State thing is you have State signs up, that's all?

MR. KAIRYS: You mean the numbers on the roads?

QUESTION: That's all the State has.

MR. KAIRYS: That's correct. And the State has ceded all other authority over to the military regarding these roads. the military --

QUESTION: Do you know whether the highway right-of-way reaches beyond property lines? Are the sidewalks on part of the right-of-way or not?

MR. KAIRYS: I don't know. But the military exercises effective control over the sidewalks.

QUESTION: Well, I understand that, just likely, but it could be, as in some cities, part of the curb area is highway.

MR. KAIRYS: It's possible; it's possible. I don't know.

QUESTION: You don't know that?

MR. KAIRYS: No.

QUESTION: If you get a traffic ticket, what tribunal do you report to? If you get a traffic ticket --

MR. KAIRYS: If you get it from the military.

QUESTION: A military tribunal?

MR. KAIRYS: Yes. I believe they take you to a magistrate, if it's anything serious.

QUESTION: That's a U. S. magistrate?

MR. KAIRYS: Yes. And any violations of law, they report to the U. S. Attorney in that area.

QUESTION: I'm not sure I got your response clear on the parade matter that Justice White was inquiring about.

If Dr. Spock wanted to run a parade down there, with torch lights and the usual political parade, is it your view that the military commander could not refuse such a parade permit?

MR. KAIRYS: Well, it seems to me that -- first of all, parades were not included, nor demonstrations in this particular case. But they are a protected form of speech.

It seems to me that that would have to undergo the same kind of analysis that we have urged the Court to take in this case, and that is that we'd have to look at the government interest involved, under the test that this Court has prescribed over and over again, and see if that's an important or substantial interest, to see if it's unrelated to suppression of speech, and if the restrictions of speech are no greater than are essential to furtherance of that interest.

And if not, then the First Amendment rights should be allowed, I believe.

I think that's what the Solicitor General fails to do in this case, at all, is to subject this base to that kind of analysis. Rather than go through the analysis and point to some specific military interest, any kind of concrete interest, what the government has done, essentially, is to create a kind of false dichotomy that has sort of an emotional appeal. They say it's a question of a military base, rather than streets, sidewalks and parks.

Well, these are streets, sidewalks and parks. And they are open to the public. People can go on there for any reason they please, or for no reason at all. There's no limit on that. That's --

QUESTION: Do you agree that the Commander of the base could exclude them all for all purposes?

MR. KAIRYS: I do. Certainly.

But I think implicit in the difference, say, between the decision in Haque v. CIO, and the decision in Davis v. Massachusetts, is that that power to exclude all doesn't necessarily include the lesser power to exclude some, or to exclude based on content. I mean, that's essentially, it seems to me, what the Solicitor General is saying, that we go back to Davis v. Massachusetts, where the only question is property rights, and if you have -- since you have the right to totally exclude someone from your property, you also have the lesser right to partially exclude, to selectively exclude, or to

exclude certain purposes.

It seems to me that that was overruled in Hague, and, since then, once something is open to the public, people are allowed to come on and talk for any reason. The Provost Marshal testified that the sight of a civilian talking to a few soldiers in front of the PX or in front of the cafeteria was so common that it wouldn't even be noticed.

There's no question of them going up and checking and asking what that person is saying at all.

QUESTION: What about coming on the base for the purpose of making a speech that attacks military policy and is aimed at urging soldiers not to fight in a particular battle or a particular war?

MR. KAIRYS: Well, you're talking about whether that could be punished afterwards?

QUESTION: No, I'm talking about whether, if that's the kind -- whether that's the kind of a speech that the Commander could exclude from the base.

MR. KAIRYS: I think he -- well, I don't think, under the guise of that danger, he could exclude all speeches. And that's really the question here.

QUESTION: Well, that isn't what I asked you. I asked you whether he could exclude that one.

MR. KAIRYS: Yes.

QUESTION: Well, the United States' position is that

you ought also to be able to exclude political speech generally, because political speech is inconsistent -- that kind of political activity is inconsistent with the military posture.

MR. KAIRYS: But they offered no evidence or argument about these particular speakers, the content of what they're going to say or the form.

QUESTION: No, they don't. They say -- but they just say political speeches generally.

MR. KAIRYS: Well, then that gets to the neutrality point, which I think is a separate point. I think what they're saying is that the only kind of favoritism that makes any difference to the Solicitor General is favoritism as to who speaks person-to-person. That one form of speech. They want to eliminate favoritism as to one form of speech. It seems to me that that's not really the relevant concern.

When you have partisan --

QUESTION: That's neutral as to people.

MR. KAIRYS: Pardon me?

QUESTION: That's neutral as to people --

MR. KAIRYS: As to that one form of speech, they are neutral.

They are wrong when they say Dr. Spock is the first one that gave a political speech. The first one was former Vice President Agnew, who gave a speech at Quonset Naval Base in Rhode Island. Permission to give that speech was granted three

days after they had made an argument, the military had made an argument based on neutrality -- the exact argument that they make here -- in which they opposed, in court, they made this argument opposing also Dr. Spock and the same respondents in this case, who sought access to that same base.

QUESTION: The speaker in the case you gave was the incumbent Vice President, wasn't he?

MR. KAIRYS: That's correct. And he gave a political speech --

QUESTION: And one remembers a great many occasions when an incumbent President spoke only at -- almost only at military bases, for the last year or so of his incumbency.

MR. KAIRYS: Yes.

QUESTION: He is Commander-in-chief, and I suppose he could change any regulations that might be made at Fort Dix or anywhere else, couldn't he?

MR. KAIRYS: That's correct.

I think this sort of neutrality that obviously doesn't really mean much to the Department of Defense if, three days after they argue at court, they could grant permission for a political candidate to make a political speech, it obviously doesn't mean anything to them.

QUESTION: Well, but those are two different arguments. One is to say that the position really hasn't been maintained at all, and it's just kind of a screen, that the Defense Depart-

ment really doesn't follow this position of neutrality. But it's quite another thing to say that the position, even if maintained, is not a legitimate or compelling government interest which would justify what the Army tried to do here.

MR. KAIRYS: We're saying both. I'm saying, even putting aside what they did at Quonset Naval Base, that they are trying to maintain a kind of neutrality around one form of speech. They're saying that as to face-to-face speech we're going to be totally neutral.

Now, of course, it's a pretty expensive brand of neutrality, because it means that the only candidates who can get information to the voters -- and there's 22,000 voters at Fort Dix -- the only candidates who could do that are the ones that can afford to hire the mass media to get their message across.

QUESTION: Could you help me with one point. This isn't a general Army Regulation, this is a Regulation of Fort Dix you're talking about, isn't it?

MR. KAIRYS: That's correct.

QUESTION: So where does Quonset come into this?

MR. KAIRYS: I was just responding to the statement made by the Solicitor General that Dr. Spock was the first candidate ever to do a campaign speech on a base. That's all.

QUESTION: That doesn't -- what does that have to do with this case?

MR. KAIRYS: It's just that factually it wasn't correct. Former Vice President Agnew had been the first one.

QUESTION: It's not important, the fact it wasn't correct.

MR. KAIRYS: Okay.

QUESTION: Mr. Kairys, before you go on, did I understand you to say that the base, as you view it, properly could exclude a speaker who advocated pure pacificism, no fighting, no wars?

MR. KAIRYS: Well, certainly if it gets to the point of urging insubordination, failure to follow orders; yes.

I think that would also -- that could involve protected speech, and the circumstances of any such case, all of the circumstances, would have to be included in the same analysis.

QUESTION: Suppose you had a candidate for President who was running on a platform of peace under any and all circumstances, never fight, never resist, total pacificism, but he was a candidate for President; how would you analyze that?

MR. KAIRYS: Well, I would apply, myself, a clear and present danger standard to statements like that by a civilian, certainly by a civilian candidate for President. And if there were no clear and present danger of unlawful activities or of violence, or something like that, then I would say it's protected.

QUESTION: Suppose -- let me pursue the hypothetical that Justice White was giving you -- suppose we had some city in the country that had problems, such as we had in Little Rock about twenty years ago, and 104th Airborne Division was ordered to stand ready to fly out to that city and see that the federal law was enforced. And so a Senator from that State asks the base commander for permission to come on the base and explain to the soldiers why they shouldn't have any part of it, or to explain anything that he wants to explain; do you think the Commander has got to allow that Senator to come on the base?

MR. KAIRYS: Well, if he gets to the point of urging disobedience to orders, then I think it's no longer protected.

QUESTION: Well, let's say that the Senator simply says he wants to come on the base and discuss the problem. You don't know what he's going to say until after he gets there.

MR. KAIRYS: Well, I think soldiers, like other citizens, should have all First Amendment rights that they can, that are not inconsistent with their status of soldier. This Court has said that as to prisoners. And that if there is a political controversy going on in the country or in a particular area about an issue, that people should be able to talk to them and that they should be able to receive that information.

QUESTION: Then, are you receding from your suggestion that if this sows seeds of disobedience, that it could be pre-

cluded?

MR. KAIRYS: I'm saying if -- if you urge insubordination, I could see situations where if you urge violation of orders, that that could -- that that's no longer protected.

QUESTION: What do you do, stop the Senator in the middle of his speech?

MR. KAIRYS: Yes, that's -- I thought the tradition and the history, if they mean anything, is that that is what you do; that you don't impose a prior restraint on speech.

QUESTION: Well, isn't it a prior restraint if you stop him in the middle? It's prior restraint as to the second half --

MR. KAIRYS: Well, I thought you meant by the middle -- I thought you mean by the middle, he was already doing it.

QUESTION: Yes. Already doing it.

MR. KAIRYS: Well, at the point he already does it, then you stop him.

QUESTION: I see. You don't think that's prior restraint?

MR. KAIRYS: No. If he's already committed a crime, no.

QUESTION: Mr. Kairys, I think you said earlier that the Commander could close the base to all citizens?

MR. KAIRYS: Yes.

QUESTION: Well, suppose he were to say: "Commencing October the 1st, 1976, through November the 7th, 1976, the base shall be closed to all citizens"?

MR. KAIRYS: Well, effectively banning the time when any candidate could come on.

QUESTION: Unh-hunh, it being the Presidential Election time.

MR. KAIRYS: I would subject that to the same analysis, if there's no substantial --

QUESTION: Now, this is a bar to any civilian, for any purpose, coming on the base.

MR. KAIRYS: I understand.

Well, if there's no substantial concrete military interest in this, unrelated to suppression of freedom of expression, which -- and I think this would have a presumption that it's related to -- to me it would -- that it's related to suppression of expression, then, if there is no such interest, then it wouldn't be valid.

I would subject it to the repeated analysis that this Court has handed down.

I think it's important, in considering all the claims of the military in this case, that they have not really pointed to any specific interest, and it's pretty evident from one quote, a very brief quote from their brief, that I would just like to read. This is at page 39.

"We do not in any way deprecate the value of freedom of speech by observing that certain candidates might express views that could undermine the morale, obedience and discipline of members of the military."

There's an awful lot of "mights" and "coulds", and the whole thing is framed as an observation.

QUESTION: What about the argument that I understood the Solicitor General to make -- you can agree with it or disagree with it; but I thought that was the government's position -- that on-base military personnel in uniform are to be divorced from active political participation?

MR. KAIRYS: Well, the question of whether they could come to one of these rallies which, first of all, are held on off-duty times -- the rally in this case was held on a Saturday, in an off-duty time. The question of whether they can come in uniform or not, which I would probably agree with them on, is a separate question.

QUESTION: Well, then, you agree that there is -- that that is a legitimate principle, I take it; you're just arguing about whether it's applicable here.

MR. KAIRYS: I wholly agree with neutrality of the military as a principle. I think that's extremely important, but I don't think they are neutral when they allow one branch, one group of candidates, the major-party candidates, to have this total barrage of access with one form of speech, the mass

media, and then deny something which I believe also they are entitled to on the base, since it's open and there's no counter-veigning military interest, they deny them the right to face-to-face speech.

QUESTION: But their answer to that is that it's one thing for an individual, perhaps in fatigues, perhaps in uniform, to go into the PX, buy a copy of Newsweek or Time, and go back to his bunk, go back to the day room, and read what it has to say; and quite another thing to get an assemblage of two or three thousand people in a parking lot and have a political address.

MR. KAIRYS: Well, first of all, --

QUESTION: Now, that has some --

MR. KAIRYS: -- Colonel Olsen indicated that he saw no problem with people talking about the campaign, it happened all the time. And they stand around and they do talk about the campaign, groups of soldiers. They also allow events that have 5,000 civilians. They allow a rock concert out on a ball field, with 5,000 people --

QUESTION: But that would have nothing to do with the divorce between military in uniform and political.

MR. KAIRYS: That's correct, but it certainly indicates that you can't say -- as the Court of Appeals says, you can't really find, per se, the possibility of disruption. And I think that's a separate issue. But the neutrality issue, it seems to

me, is a feigned neutrality, as the Court of Appeals said. They're maintaining a neutrality as to one form of speech. When the real question, in terms of neutrality, is over-all neutrality.

I mean, how can they seriously say that the military is being neutral at Fort Dix, when this ad, at page E-3 of Appendix II, this ad urging the re-election of President Nixon at the time of the hearing in this case was in Army Times. The most predominant newspaper on the base.

QUESTION: Their argument, I take it, is that their neutrality requires that the type of active political rally not be held on the military base, and that nobody of any party can hold that kind. Now, you say it's --

MR. KAIRYS: That's not neutrality.

QUESTION: Well, it's a form of neutrality. You're saying that because your man doesn't have access to the other materials that come out in quite a different way, it's not neutrality; but it's really just not neutrality that is completely fair to your man.

[sic]

MR. KAIRYS: No. No, irregardless of whether they could afford it or not, it simply isn't neutrality. Neutrality, to me, should refer to all forms of speech. If you're going to let one group of candidates get exposure -- to me exposure is the issue -- if one group can get exposure on the base by one form, then you're no longer neutral. Neutrality is out of the

question. And the question becomes: Is it appropriate, or is there any reason why you shouldn't allow other candidates to use this other form?

QUESTION: Well, but the Court has always treated differently rallies and parades, which are subject to fairly rigorous time/place restrictions.

MR. KAIRYS: That's right.

QUESTION: Certainly the State couldn't impose the same kind of restriction on selling magazines at a newsstand.

MR. KAIRYS: No, I'm not asking that. I'm saying that if civilians generally have the right to exercise First Amendment rights on the base, which I believe they do because the base is open and because there's no specific concrete military interest that competes with it, these are open areas, streets, sidewalks and parks, there is no nearby courthouse, there is no nearby jail or anything like that, that once civilians generally have the right to exercise that right, and once you allow other parties, the majority parties, to come on in some form, to get exposure, there's no reason not to allow these candidates to exercise that face-to-face right.

There's no reason based in neutrality or disruption or anything else.

I think, if I can get back briefly just to the --

QUESTION: Well, all you really want to do is reach the soldiers, I take it, and --

MR. KAIRYS: That's correct.

QUESTION: -- by coming on the base, at least you can't -- you really are saying we want to come in and appeal to soldiers as soldiers.

MR. KAIRYS: They do.

QUESTION: Yes. And that's one thing that the other candidates that have access through the media are not doing.

MR. KAIRYS: Well, if you read --

QUESTION: And they're making the general appeal.

MR. KAIRYS: Well, if you read President Nixon's ad, I think it's pretty well pitched towards soldiers. If you read this ad, page E-3 of Appendix II.

QUESTION: Well, you're talking about the press, then.

MR. KAIRYS: That's correct -- well, I'm saying that they use --

QUESTION: You're talking about the press. And I suppose that your candidate can buy an ad in the papers that are distributed on the post. You can't say that -- you can't say you can't afford that.

QUESTION: You could mail him a leaflet in this case; you can mail it.

MR. KAIRYS: Well, --

QUESTION: You're talking about poor candidates not being able to use the media.

MR. KAIRYS: They can't buy an ad in Army Times.

That's -- that's censored.

QUESTION: Well, they can buy in other newspapers, though.

MR. KAIRYS: Yes, they can buy an ad in the newspapers.

QUESTION: And you can mail this leaflet.

QUESTION: Yes. You can mail all the leaflets.

QUESTION: You can mail those leaflets.

MR. KAIRYS: Well, that's an extraordinary -- there's 22,000 soldiers.

QUESTION: Well, are you arguing equal protection now?

MR. KAIRYS: Yes, we do. And the question is, even if you have some alternative, that I believe is not sufficiently affected, but even if you have some alternative, what is the government interest? It seems to me the burden should be there. What is the government interest in not allowing them to do the face-to-face speech?

QUESTION: Well, you haven't met the government on its own ground yet. You've talked just discrimination and non-neutrality; but you haven't really faced up to whether or not there's anything of substance to the government's position that there's some inconsistency between overt political activity in uniform, on a base, and being a soldier.

MR. KAIRYS: Well, I think the uniform issue is a separate issue. If they want to prohibit any military personnel

from viewing any political event in uniform, as they've done, then there's a question -- there could be a question; I don't think there is -- as to whether that's valid or not.

But that's a separate issue, as to whether they could come on or not. They stand there and they read that ad in uniform. I mean, anyone can, in the local newspaper, say, the Army Times, which is sanctioned by the post and is censored by the post authorities, approves an ad in that --

QUESTION: But suppose -- I suppose you would -- would you say that you had a case with respect to this fort if, adjacent to the military property, there was a stadium that was free of charge, you could hold meetings there? Just on private property.

MR. KAIRYS: Well, that --

QUESTION: And any military man was completely free to come to that if he wanted to, as long as -- and he --

MR. KAIRYS: But they're not. Most of them are restricted to the base.

QUESTION: Well, --

MR. KAIRYS: That's in the testimony of the Provost Marshal.

QUESTION: You mean you want a captive audience, is that it?

MR. KAIRYS: Well, they're hardly captive. It's 55 square miles. I mean, they can choose to come to the rally

or not.

QUESTION: But they aren't spread equally over the 55 square miles, are they?

MR. KAIRYS: Well, this area that this rally was held was on a parking lot adjacent to a movie theater. There are six different movie theaters on the base. It was one of six movie theaters. It was called Theater V.

Now, there's certainly no aspect of a captive audience. This is an outside area. It's literally 55 square miles, and no one had to attend this.

QUESTION: Well, but don't you have some of the same problems you had with the Hatch Act? If you know your Colonel is going, and your Major is going, and they're supporting this candidate, there's a certain compulsion on you to show up, too, isn't there? Particularly if they mention it to you.

MR. KAIRYS: I don't see that that -- no. I don't. Any more than there's a compulsion, say, to back President Nixon. Why --

QUESTION: Well, but don't you think if the government can ban that sort of compulsion under the Hatch Act for civil servants, it can follow this procedure here?

MR. KAIRYS: Well, I don't consider going to a rally and hearing someone speak, participation. And even the military's own regulation, itself, says that common sense shall apply to that regulation. I don't consider that participation.

Well, I would just like to come back to that quote briefly, if I can -- is my time up?

MR. CHIEF JUSTICE BURGER: No, that's your five minutes.

MR. KAIRYS: That's my five minutes; okay.

MR. CHIEF JUSTICE BURGER: About four minutes left.

MR. KAIRYS: I think the case hinges, in addition to this neutrality question, on whether civilians generally have the right to exercise First Amendment rights on these portions of the base. And that, again, I would subject to the Court's usual analysis. And an observation that views might be expressed that could undermine is hardly sufficient, as a military -- as a government interest, to override interest in freedom of speech.

And I think that if the Court allows that kind of observation to be held sufficient to impose a prior restraint, that that's a serious problem, and that they've done exactly what, in the quote, they said they didn't want to do; they have deprecated the value of freedom of speech.

I'd just like to briefly address, then, the second issue, concerning the prior restraint on leaflets.

It seems to me that if the Court agrees that civilians do have the right to exercise First Amendment rights on these areas, because they are essentially public streets, sidewalks, and parks, and because there's no military interest to do other-

wise, then the corollary right of being free of a prior restraint as to content, it seems to me, would follow. And the petitioners, in their brief, actually concede that.

So if the Court accepts that analysis, it seems that there is no problem as to the second point.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, --

QUESTION: May I ask you a question, Mr. Kairys?
is
The order before us/a permanent injunction against interfering with the distribution of campaign literature in unrestricted areas. Does the record define precisely what those areas are?

MR. KAIRYS: Well, it defines them as -- in a negative way. It defines them as any area not marked "Restricted". And they are prominently marked. And there's testimony that does define them. The barracks are restricted, and so no one went near them. And we accepted their definition of restricted, we never challenged anything they said in that regard.

And we never sought to go inside of any building.

QUESTION: Right. The residential areas, as I recall, were not marked "restricted".

MR. KAIRYS: That's correct. The barracks were, though.

QUESTION: What's the difference between the barracks and the residential areas?

MR. KAIRYS: The residential areas, at least the way

I consider them, are where there's a whole row of houses, almost like a settlement, where families live. The barracks are where the troops are billeted.

QUESTION: The married soldiers perhaps live in the residential areas, --

MR. KAIRYS: Yes, --

QUESTION: -- and the unmarried ones in the barracks.

MR. KAIRYS: -- and probably the officers.

QUESTION: You think the record is clear as to the areas, because the injunction imposes severe risk on --

MR. KAIRYS: Well, that was limited as a result of the order as to the specific rally, it limited the areas in a more defined way. And it said where leafletters could go and where they couldn't, and it said exactly where the rally would be. And that was arrived at by negotiation between counsel.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Solicitor General. We'll let you complete your argument before we recess for lunch.

REBUTTAL ARGUMENT OF ROBERT H. BORK, ESQ.,

ON BEHALF OF THE PETITIONERS

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

There are just a few matters I would like to clear up. There has been repeated reference to the Army Times,

which appears in the second part of the Exhibit, Plaintiff's Exhibit 7, on E-3, and a censorship by the base, or something of that sort.

I think it should be made perfectly clear that the Army Times is a civilian publication, it is not published by the Army, the Army has no control over it. That ad could appear in the New York Times and come on the base, as well.

As to the other points I wish to touch upon, there's reference to the fact that the candidates can't get at these soldiers because they are confined to the base. The truth is only the trainees are confined to the base for the first four weeks of their training, which means that there are three weekends, total, denied to respondents in their efforts to reach these gentlemen off the base.

Mr. Justice White mentioned the fact that coming onto the base was an attempt to appeal to soldiers as soldiers, and I think that's crucial.

I would refer the Court to the first volume of the Appendix, in several places, but particularly at page 178, where Mr. Hardy testifies to the reason he wants to get back onto leaflet. He says:

"There are troops in both Thailand and the Gulf of Tonkin which could be easily re-introduced into some active role there, so anti-war activity among G.I.'s is still, in my opinion, and in the opinion of Resistance, an important aspect

of our work in something we need to continue."

There is no doubt that this leafletting and this speech was aimed at these people, not because they were an enclave of citizens they could not reach, but because they were soldiers whom they wished to influence in their attitudes toward the war.

Now, I suppose I should say something about Flower, since it's been discussed repeatedly. The picture, E-2, which we have been asked to look at, is entirely different from the picture I recall seeing of New Braunfels Avenue. You can see an obvious line where the town stops. There is an ordinary civilian community, with cleaners and laundries and pizza houses and so forth there, and suddenly all of that community activity stops and you're clearly on a military base.

So it's not indistinguishable from the community, there's a clear line.

Here, Mr. Kairys says, quite correctly, that there was no abandonment in this case. Military jurisdiction over even traffic violations is complete, and any case goes to a U. S. magistrate or, if necessary, to a U. S. court.

QUESTION: Mr. Solicitor General, what difference would it make if the topography and color of the highway pavement and the quality of the sidewalks and the kinds of houses were exactly the same before you got on the base and after you got there? What's the difference --

MR. BORK: I don't think it would make --

QUESTION: Just the difference that soldiers exclusively occupy the base.

MR. BORK: I don't think it would make any difference, Mr. Chief Justice, because all of the policy reasons would apply, and that's why I don't believe in this expanded reading that we're getting of the Flower case.

Because if that's what Flower really meant, then it really is a trivial point, and I can't believe that it is. It becomes a trivial point in that all the military need do is spend the additional money to put a sentry at the post and say, "Show me your pass" or "Get a pass." What that has to do with political campaign rallies on the base, I don't know. I don't see the nexus between spending the money to close the base in that sense and the First Amendment question and the separation of military and --

QUESTION: Indeed, some bases do have a sentry box there, and they have a fence around them. But I take it from the arguments made that the same arguments would be advanced if there was a ten-foot wall and two sentries at the gate.

MR. BORK: I take it so, because if the point is that the base commander must use his troops to compensate Dr. Spock or other minor-party candidates for an inability to get a good Nielsen rating, then I think it wouldn't matter whether there's a wall or whether the base is open.

And I would point once more to Lloyd Corporation v. Tanner and, indeed, to Grayned v. City of Rockford, which said that even a public sidewalk could be denied its use for some purposes, because of the interest in running schools. I think the interest here, in the separation of the military and the political, is clearly of that caliber; and, furthermore, it is not a public sidewalk, it is a military base, which, by tradition in this country, has been closed to this kind of activity.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 12:04 o'clock, p.m., the case in the above-entitled matter was submitted.]

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