ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1863

TITLE UNITED STATES, ET AL., Appellants
v.
MARY T. GRACE, ET AL.

PLACE Washington, D. C.

DATE January 18, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, ET AL., :

Appellants :

v. : No. 81-1863

MARY T. GRACE, ET AL. :

- -x

Washington, D.C.

Tuesday, January 18, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

REX E. LEE, ESQ., Solicitor General of the United States, Department of Justice, Washington, D.C.; on behalf of the Appellants.

SEBASTIAN K.D. GRABER, ESQ., Alexandria, Virginia; on behalf of the Appellees.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in United States against Grace. And before we hear the arguments, let me announce that Justice Brennan is unavoidably absent, attending the funeral of a member of his family, his brother. But he will participate in this case.

Mr. Solicitor General, you may proceed whenever you are ready.

ORAL ARGUMENT OF REX E. LEE, ESQ.,

ON BEHALF OF UNITED STATES, ET AL., APPELLANTS

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

At issue in this case is the constitutionality of 40 U.S.C. Section 13k which prohibits picketing, leafletting, and demonstrating in the Supreme Court building and on its grounds. A related statutory section, 13p defines the Supreme Court grounds as extending to the curb of each of the four streets enclosing the block on which the building is located.

The Appellees, Zywicki and Grace, after making several attempts between May of 1978 and March of 1980 to distribute leaflets or demonstrate with a sign on the Supreme Court grounds, and on each occasion being informed by Supreme Court police officers that the

conduct was prohibited, brought this action seeking a declaratory judgment that Section 13k's ban is unconstitutional. The District Court dismissed their action, and the Court of Appeals by a two-to-one decision held the statute unconstitutional on its face.

Section 13k is a content-neutral congressional restriction on a place within which one manner of First Amendment activity, demonstrating and leafletting, may occur.

This Court made it clear in Heffron versus Krishna Consciousness that time, place, or manner restrictions have been upheld providing three criteria are satisfied. They are: first, that it must be content-neutral; second, that it must serve a significant governmental interest; and third, that it leaves open ample alternative channels for communication.

This statute clearly applies to all demonstrating and leafletting activity without regard to content. The remaining issues therefore concern the significance of the governmental interests and the adequacy of alternative channels for communication.

QUESTION: Generally, do you think that a regulation which in effect says no time, no place, no manner can really be called a time, place, and manner regulation?

MR. LEE: Clearly, where it leaves open, if that is the reason for the alternative -- adequacy of the alternative channels inquiry. Just as in Greer versus Spock, there was no opportunity for political advertising or political activity within the military, for instance.

QUESTION: Well, I for one wouldn't think of Greer versus Spock as a time, place, and manner restriction. I think of it as a no-public-forum case.

MR. LEE: Well, it -- it may be -- it may be that in addition. But the no-public-forum concept is the notion that there are certain kinds of places where certain kinds of activity are not to be permitted. And this is not a restriction on all types of First Amendment expression. It is a restriction on one type of expression; namely, picketing, leafletting and demonstrating within an identified place, the same as you had in Heffron and in Greer versus Spock and in Grayned versus City of Rockford.

So that what is brought into place so long as it is content-neutral is the consideration of the comparative interest of the government on the one hand in identifying a certain limited place in which one manner of restriction is to be upheld, and also the alternative means of communication.

With regard to the congressional objective, the Court of Appeals acknowledged that the government does have a substantial interest in restricting picketing and other forms of expression in or near courthouses, but concluded that these legitimate concerns are fully addressed by another statute, 18 U.S.C. Section 1507, which prohibits picketing or parading in or near any federal courthouse with the intent of influencing a judge, juror, witness, or court officer.

The Court of Appeals reasoning that Section 13k is outside Congress' constitutional authority because its purposes are adequately accomplished by another statute is flawed in several respects.

The first is that it is a non sequitur. I know of no authority, and the Court of Appeals certainly suggested none, to support the proposition that the Constitution prohibits Congress from enacting two separate statutes that address the same problem in overlapping ways.

Indeed, that proposition is squarely rejected by this Court's holding in O'Brien, United States versus O'Brien, that the existence of a statute prohibiting non-possession of a draft card did not interdict an overlapping statute prohibiting mutilation.

Second, the Court of Appeals premise is in fact incorrect. It is true that Section 1507 overlaps one of Section 13k's purposes; namely, attempts to influence the courts' decisions. But Section 13k also reaches another congressional objective that is not covered by Section 1507 but is equally legitimate; that is, protection against the appearance of impropriety, against the inference that the processes of the Nation's highest Court are or may be influenced by demonstrators or leafletters.

Section 13k stands as a congressional assurance to the people of this Nation --

QUESTION: Well, does the statute do that, or the person who pickets do that?

MR. LEE: It is just --

QUESTION: What -- what infers that this Court would be influenced by one person holding a sign?

MR. LEE: The inference against which Congress may legitimately protect is the inference that would be drawn by the people that because of the mere existence of picketers on the Supreme Court grounds, that the Court's decisions are in fact influenced by that kind of process. It --

QUESTION: Well, is that what Congress has said?

MR. LEE: What Congress has said is that picketing and demonstrating activity within the narrow space of the Supreme Court block is incompatible with the traditional purposes for which this Court is to be used. Among the considerations that Congress could properly have taken into -- into account were the same consideration that this Court relied upon in Cox versus Louisiana, and I am quoting, that "A state may protect against the possibility of a conclusion by the public that the Judge's action was, in part, a product of intimidation and did not flow only from the fair and orderly working of the judicial process."

Significant in that respect, Justice Marshall, in our view, is the distinction between the holding in Cox and that in Edwards versus South Carolina. Those two cases were handed down within just a couple of years of each other. They involved remarkably similar demonstration-type activities, one of which was held constitutionally protected and the other not.

There are only two significant differences so far as I am aware. One is the difference between the places where the two demonstrations occurred. The state capitol grounds in Edwards and the courthouse grounds in Cox.

Demonstrations on the grounds of an elected

legislative body are not only compatible with the legislative function, they reflect the fact that in our representative system of government the pressure of popular opinion is properly brought to bear on legislative policy makers.

By contrast, as this Court observed in Cox, government may protect not only against such pressure in fact being brought against the courts, it may also protect -- and this is a quote from this Court's opinion in that case -- "the judicial process from being misjudged in the minds of the public." And as this Court said just last term in Clements versus Fashing, that whereas a legislator will vote with due regard for constituent views, it is a serious accusation that a judge made a politically motivated decision.

QUESTION: Mr. Solicitor General, how can that interest justify prohibiting the leafletting in this case involving some Central American political situation?

MR. LEE: That is precisely my point, Justice Stevens. It is the distinction between activity which is directed toward the Court and its activities, which wouldn't --

QUESTION: But that leafletting couldn't even affect the appearance, which is your present justification, I understand.

MR. LEE: No, but it could affect the appearance, because permitting the leafletter and the demonstrator, the sign carrier and the leaflet distributor on the grounds of the court --

QUESTION: Just confine it to the leafletter about South American politics, where you have no cases --

MR. LEE: Whether it is about South American politics or whatever, the mere presence on the grounds of that person engaging in that kind of activity leads to a possible inference that that kind of activity may influence the Court's decisions, because passersby, observers of that activity, may very well not read what is in fact on the leaflet and only draw the inference that leafletting is in fact occurring and may have an influence on the Court's decision, regardless of the content. It's the speech-plus kind of notion that -- that this Court has recognized in a number of contexts.

QUESTION: Well, if that's a sufficient justification, I suppose the statute could extend across the street, too.

MR. LEE: The matter of linedrawing is a difficult one. And it could extend across the street. And your point, of course, illustrates just how narrow really is the disagreement between the government and our opponents, because everyone agrees, I take it -- the

Court of Appeals, the Appellees, and the Amicus -- that Congress could properly prohibit any kind of leafletting or other activity within the building itself.

So that the only spatial issue that we're talking about in the protection of this kind of interest is whether you can extend it, whether Congress can extend it, from the edge of the building to the edge of the curb.

Now, it could, of course, be extended across the street, which would make it -- and in my opinion, that would also be constitutional -- but those kinds of lines are the kinds of lines that are traditionally drawn by legislatures and they reflect the kind of policy kind of judgment that we have traditionally entrusted to the legislatures.

QUESTION: Mr. Solicitor General, they haven't had to raise it in this case. You're talking about within the building, but is it in your mind perfectly clear that the statute could prohibit the wearing of a campaign button within the building, for example?

MR. LEE: I have some question of whether --

QUESTION: And that statute may do that.

MR. LEE: Yes. I have some question whether the wearing of a campaign button would actually come within the strictures of the statute itself. If it

simply happens to be something that is a matter of the individual's apparel and is not done in a demonstrating kind of fashion, then it might not come within the -- within the -- within the scope of the statute.

QUESTION: That touches, does it not, on another argument raised by the Appellees, which is the argument that the statute is unconstitutionally vague, in any case?

MR. LEE: Yes. And I think that that one, Justice O'Connor, for reasons that -- I think that that one has been laid to rest by this Court's decisions over a period of time from Broderick against Oklahoma and culminating with last term's decision in New York versus Ferber.

Certainly, the disparity between the clearly prohibitable activity on the one hand and the arguably protected activity on the other in this case is much lesser than it was in New York versus Ferber. And as I read that case, this Court said in very clear terms that what you take into account is the comparison between the legitimate scope, the legitimate sweep of the statute, and the possible impermissible applications. And that so long as the impermissible is not substantial, then you do not reach the constitutionality of a hypothetical case in the process of deciding the constitutionality of

the statute on its face.

QUESTION: Mr. Solicitor General, is there any other building in this city that has this special protection?

MR. LEE: To my knowledge, there is not, Justice Marshall.

QUESTION: Well, how do you single this one out?

MR. LEE: Because that is in its very nature the kind of judgment that we entrust to legislatures for several reasons as a matter of linedrawing. At the end of the day it is a judicial judgment. But as this Court said initially in Grayned versus City of Rockford, the question is whether the particular type of expression is compatible with the purpose of the particular place in which it occurs at a particular time.

The inquiry then is whether the expression activity is or is not compatible with the purpose of the particular place. Now, how and by whom is this issue of compatibility to be resolved? At the end of the day it is a judicial decision because it is an issue on which the constitutional holding turns.

But it is, I think, significant in this respect, that the restriction in the Cox case, in Grayned, and in Greer, all represented specific

particularized determinations by the authorized policy makers concerning that issue of compatibility, concerning the compatibility of demonstrations with the particular purposes for which a particular place was intended.

The statute in Cox, for example, dealt specifically with picketing near a courthouse. That was the legislative determination that was involved in that case. The anti-noise ordinance in Grayned prohibited disruptive noise on the school ground. And the regulation in Greer pertained to one particular military reservation.

Now, compare that with Edwards versus South Carolina. The law allegedly violated in Edwards versus South Carolina was a breach of the peace statute which contained no legislative judgment concerning whether demonstrations were compatible with the grounds surrounding a legislature.

Now, that is not to say that the legislative determination is conclusive, because it is not. But neither is it irrelevant. As this Court observed in Grayned, a precise statute gives this Court the assurance that the legislature has focused on the First Amendment interests and has determined that other governmental policies compel regulation.

The reason was best explained, perhaps, by Professor Kalven, that in the difficult balancing processes that these cases force upon the Court, it has the benefit of a council of a deliberate, specific, and relevant legislative judgment. The legislative judgment underlying Section 13k is likewise deliberate, specific, and relevant, and it is that picketing, demonstrating, and leafletting on the Supreme Court grounds are incompatible with the use to which that particular area should be put; specifically, the prevention of the public perception of impropriety in the judicial process.

Let me say just a word about the adequacy of alternative channels for communication. The impact of this statute on the Appellees' legitimate First Amendment interests is really quite minimal. In Greer versus Spock the Court upheld a ban on partisan political speeches and demonstrations within a military reservation, observing that the people at Fort Dix could attend political rallies out of uniform and off base. There were other means for the expression of that particular kind of political communication.

And similarly, the Heffron opinion stressed alternative means and places for the practice of Sancratan, which was the religious objective in that case. These alternatives did not represent the

demonstrators' first choices, but in each of those cases the place restriction was upheld and in each the disparity between the demonstrators' first choice and the alternative was, if anything, greater than in this case.

All that Section 13k requires is that the demonstrators move not off the -- off base and out of uniform, many miles away, but 20 feet farther away, clearly a lesser spatial sacrifice than was involved either in Greer or Heffron. And this illustrates --

QUESTION: Well, those people couldn't have come in here and talked to us.

MR. LEE: Well, even the Court of Appeals and --

QUESTION: I am not talking about the Court of Appeals, I am talking about my own opinion.

MR. LEE: Well, of course. It -- this statute has nothing to do with voluntary conversations that members of the Court might choose to have with any person.

QUESTION: I also would not go to one of their meetings, either, I give you my word.

MR. LEE: I understand.

The narrowness of the disagreement between our position and that of the Appellees demonstrates that the

final matter is really one of linedrawing, that it is the kind of linedrawing that lies within the congressional objective, and that if in the interest of preserving the appearance of military propriety, which was one of the objectives that was upheld in Greer versus Spock, is proper, then certainly a congressional objective should be similarly upheld.

QUESTION: Mr. Solicitor General --

MR. LEE: Yes.

QUESTION: -- may I ask one other question --

MR. LEE: Yes.

QUESTION: -- on this appearance point? In your jurisdictional statement you pointed out that the disqualification statute provides that we should not sit in a case in which our impartiality might reasonably be questioned. And I wonder -- and the other side has suggested that that statute might apply to at least some members of the Court -- I wonder if you have anything further to say on that subject other than what you have said on it.

MR. LEE: Only this, Justice Stevens -- I guess two things. One is, we know of no reason why any member of the Court should be recused. In our view, there is no closer interest of any member of the Court that is involved in this case than would be involved in

a case concerning the Court's jurisdiction, the kind of issue that the Court is called upon to pass on with some frequency; and secondly, that the strong congressional policy reflected in 28 U.S.C. Section 1252, that the constitutionality of congressional statutes be decided by this Court should counsel against disqualification. And for that reason, we know of no reason that any member of the Court should be disqualified.

I would like to reserve the rest of my time for rebuttal.

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

Mr. Graber.

ORAL ARGUMENT OF SEBASTIAN K.D. GRABER, ESQ.,
ON BEHALF OF MARY T., GRACE, ET AL., APPELLEES

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

The issue in this case is whether pristine First Amendment activity may be absolutely forbidden anywhere on the grounds of this Court despite the fact that such expression is not basically incompatible with the normal uses of the sidewalk that surrounds the Court, and despite the fact that the manner of expression in which my clients were engaged -- that is, dissemination of printed matter -- is allowed on the

sidewalks surrounding the Court, which is to say that the Washington Post is allowed to disseminate its particular views through its newspaper.

And we submit that the statute at issue is totally unnecessary to preserve the integrity of this Court and that Congress has specifically addressed the concerns of the appearance of justice when it promulgated 1507 and made a specific and considered legislative judgment which is reflected in the legislative history of 1507, that upon a balancing of interests certain speech could be prohibited; namely, speech which is directed toward influencing the Court. And we submit, as the Court of Appeals found, that 1507 amply protects the appearance of justice interests.

Moreover, we would point out that Section 13k was not passed by Congress, at least as reflected in the legislative history, based on the assumption that some protection was needed beyond that provided by 1507. In fact, 13k was enacted prior to promulgation and enactment of 1507.

Both statutes were considered by the same Congress, the 81st Congress, in 1949. However, examination of the legislative histories, which we detail in our briefs, reveals that 13k was really a housekeeping measure that in 1949 for some reason the

legal counsel to the District of Columbia determined it no longer possessed authority to commission special officers to police this Court. At that time, the marshal of this Court went into conference with the Court and consulted apparently with legislative counsel to the House of Representatives, and the legislative scheme which was modeled after the scheme applying to the Capitol was enacted.

And 13k virtually identically tracks the language of the Capitol statute, 193g, which was invalidated as being spatially unconstitutional in the Jeannette Rankin case.

Now, Mr. Lee has pointed out that the test articulated by this Court in Grayned should be applied to this case. And we agree with that. And that test is whether the manner of expression is basically incompatible with the basic and normal use of the area in which the expression takes place.

And we respectfully submit that a lone leafletter or a lone sign holder who is expressing their views on this Court in a peacable, silent, and orderly manner is not doing something that is basically incompatible with the normal use of the sidewalk.

Now, the government would have the Court hold that the grounds of the Court are more akin to a

military base as in Greer, or a prison as in Adderly, than the public sidewalk that it actually is. As the Court I am sure is aware, there is a bus stop outside and tourists come to the Court. The sidewalk is basically like any other sidewalk save for the fact that it borders this Court.

Now, the government also states that this is a time, place, and manner restriction. However, as Mr. Justice Rehnquist I believe pointed out, it is difficult to categorize this statute as a time, place, and manner restriction, since it totally forbids any expressive activity on the grounds of this Court.

Now, in Heffron the Court held that the statute at issue was the time, place, and manner restriction, pointed out that the members of the Krishna sect were not totally forbidden from reaching their intended audience but rather, like all other commercial and other enterprises at the state fair, were confined to a particular area on the state fair grounds and in an area where the public was expected to pass.

Moreover, the Court noted that members of the Krishna sect were free to walk around the court -- excuse me, the state fair grounds and orally proselytize their view without restriction.

QUESTION: Mr. Graber, would you be here if

the statute just forbad what it forbids now on the -- inside the building or on the steps? What if it permitted -- treated the sidewalks like any other public sidewalk?

MR. GRABER: We would have no quarrel with that. Obviously, any party --

QUESTION: Well, why should the statute be held unconstitutional on its face then?

MR. GRABER: Because the statute is not, we submit, subject to a limiting construction, both because of its vagueness -- namely, the time to define --

QUESTION: Well, I know, but what -- this is a federal statute, and it's a federal court. We're not dealing with a state statute, and in other cases where a -- it is claimed that a statute is unconstitutional on its face because it's overbroad, we have simply said, well, the statute is unconstitutional and insofar as, but otherwise constitutional, which is -- the statute is then no longer overbroad.

MR. GRABER: Well, we would submit, Mr. Justice White, that Section 131 --

QUESTION: Your client would win his case.

MR. GRABER: Yes.

QUESTION: But the statute wouldn't be -- wouldn't be unconstitutional on its face.

MR. GRABER: We would certainly accept a limiting construction that would make 13k inapplicable to the sidewalk surrounding the Court, but I submit that the better disposition would be to hold that rather than this Court rewriting the statute, that the marshal is provided under 131 with ample authority to promulgate regulations to preserve the decorum and dignity of this Court. And the better mechanism for dealing with the issues in this case would be to --

QUESTION: Why do you think that's a better -- bettter mechanism than to -- if Congress could just repass the statute and it's the very same statute but limit it to the steps and the inside of the building, why should we send it back to Congress and make them do that?

MR. GRABER: The basic reason --

QUESTION: Because all -- all they'd do is say -- say the statute is unconstitutional as it might be applied to the sidewalks.

MR. GRABER: The basic reason, Your Honor, is that I don't believe this Court's function is to rewrite statutes. And moreover, the first portion --

QUESTION: Well, this Court, after all, the overbreadth doctrine is an invention of this Court. Normally, you take -- you declare statutes

unconstitutional as applied. And that's normally what you do. And it's -- it's just a judicial invention to strike a statute down on its face for overbreadth, isn't it?

MR. GRABER: Yes. Well, as I say, we would have little problem if the Court held that 13k cannot be applied to the sidewalk. That achieves the result which --

QUESTION: But you want more than that.

MR. GRABER: Well, I think the first part of this statute presents a prohibition against assemblages and processions, no matter the purpose. And Judge McKinnon, dissenting in the court below, when he analyzed the statute, also pointed out that the first part of the statute -- and the statute as the Court knows, is written in the disjunctive -- prohibits processions and assemblages without mentioning the purpose.

And then the second aspect of the statute goes into prohibiting expressive activity. And the first part of the statute is so absurdly vague and overbroad that we would submit that that -- if the Court was to place the limiting construction, it should also make clear that the first part of the statute is unconstitutionally overbroad.

QUESTION: May I ask, Mr. Graber, what standing do you have to quarrel with the first part of the statute? Your client didn't violate that, did he?

MR. GRABER: Well, my client has in the past in fact been charged under the first part of that statute.

QUESTION: But none of the incidents in the record would violate the first part of the statute.

MR. GRABER: That's correct.

QUESTION: In fact, I wonder if they violate the second part of the statute.

MR. GRABER: I do, too.

QUESTION: Did you -- did you take the position in the lower court that you didn't even violate the statute?

MR. GRABER: Well, in fact, Judge Oberdorfer, the District Court Judge, pointed out in his opinion that he did not feel that our client's conduct was --

QUESTION: Well, then how do we even get to a constitutional question?

MR. GRABER: Because the marshal's interpretation of the statute is that it does --

QUESTION: Are we bound by the marshal?

MR. GRABER: No, but the -

QUESTION: Because if it's perfectly clear on

the face of the statute that your clients didn't violate it, why do we have to have a major constitutional case out of a very petty dispute?

MR. GRABER: Because the fact of the matter is that when my clients are outside on the Court sidewalk, the marshal has told them they have to leave and --

QUESTION: You then went into a District Court and said he shouldn't do this, and the Judge could have said, you're absolutely right, but he didn't have to decide any constitutional question, did he?

MR. GRABER: No, but if the marshal and the Supreme Court police are free to apply the statute --

QUESTION: Well, they're not if they obey the District Court order that tells them not to.

MR. GRABER: Well, the Superior Court placed a limiting construction on the statute, limiting it to the intent to influence. And when Mr. Zywicki --

QUESTION: No, but I am leaving out the intent to influence. I don't see under the plain language of the statute how your client violated either of the two clauses. You weren't engaged in a parade; and you didn't use a flag, banner, or device designed to bring into public notice any party, organization, or movement.

MR. GRABER: Well, I agree. In my opinion --

QUESTION: So how do we get to any

constitutional question?

MR. GRABER: Well, the statute is overbroad, we believe, and on its face can be attacked --

QUESTION: Well, but can some stranger come in and just say, I want to have a statute held unconstitutional even though I didn't violate it and there's no basis for prosecuting me under it?

MR. GRABER: Well, Your Honor, after being threatened with arrest repeatedly, we believe that our client had -- has standing under the overbreadth doctrine to attack the statute on its face as applied to persons whose situations are not before the Court as well as to their own situation.

QUESTION: Well, you really just want to win your case, don't you?

MR. GRABER: No, Your Honor. The --

QUESTION: You mean you don't want to?

(Laughter.)

MR. GRABER: -- the Superior -- obviously, I want to win the case. But we are pointing out that when it comes to the way the First Amendment is honored on the streets, it is one thing for us to say that obviously the marshal or the police should not apply the statute --

QUESTION: What if you had made two arguments,

as Justice Stevens suggested, and the Court, you say, this statute doesn't -- didn't apply to this conduct whatsoever. And secondly, if it does, it's unconstitutional. And what if the Court of Appeals had said, well, or the lower courts had held, well, we know that we can construe the statute to -- it should be construed to exclude this conduct, but we just would rather reach the overbreadth argument?

MR. GRABER: Well, as I say --

QUESTION: Now, what -- normally, you don't reach constitutional questions if you don't have to, as Justice Stevens indicates.

MR. GRABER: Well, we submit in this case that the Court has to address the spatial constitutionality because of the fact that it is being administered against all expressive activity. And despite a court's limiting construction of the statute, the Superior Court is vested with jurisdiction over criminal prosecutions under this statute. When our firm represented individuals in that Court and attacked the statute's constitutionality, the Court did place a limiting construction on the statute, limiting it to influence picketing.

When Mr. Zywicki wanted to come to the Court again to distribute leaflets concerning Central America,

we told him we did not view that as being within the limiting construction and he could safely do that. And when he came to the Court and informed the Supreme Court police that the statute in his understanding had been narrowed, the police said, well, it has not been narrowed.

And what I am saying is that the way that the First Amendment is applied by the police does not provide the deference to the First Amendment that is necessary. And in fact, the police are often telling people that they may not exercise their First Amendment rights even though technically they may be incorrect in their interpretation of this statute.

QUESTION: Mr. Graber, let me go back to one of Justice White's original questions. If this statute eliminated the sidewalk and also the plaza in front of the building, would you be here?

MR. GRABER: No. We believe that the plaza area, beyond the plaza area a statute could prohibit all expressive activity.

The government makes several arguments which we feel are without merit. I have already addressed the time, place, and manner argument.

The government also argues that this is a minimal intrusion on individual's rights. However, it

is not a minimal intrusion on the rights of persons who wish to reach the audience of persons who frequent this Court. Persons who frequent this Court tend to have more of an interest in justice issues than persons who may frequent other areas. And an individual may wish to reach those persons because they have a more sensitive concern over justice issues, whether those issues arise in Central America or whether they may concern pending legislation in Congress; for example, to limit --

QUESTION: Do you assume that the people who come into this Court come in and talk to us?

MR. GRABER: Only those of us who are at the lectern, Your Honor.

QUESTION: Well, I don't understand your point. You want to influence the people who pass by this building because they will influence us?

MR. GRABER: Not necessarily because they will --

QUESTION: Is that what you think?

MR. GRABER: No.

QUESTION: Because you can save your time.

MR. GRABER: No. The -- their desire to reach persons who frequent the grounds of this Court. We are not attempting, or they are not attempting, to influence the Court, but they are trying to reach people who do

frequent the Court. For example, constitutional lawyers who come to this Court may, if they receive a leaflet about a certain issue, become concerned with that issue and decide to donate their time to that particular issue.

A person across the street would have no ability to reach the constitutional lawyers who come to this Court --

QUESTION: What is a constitutional lawyer?

MR. GRABER: A constitutional lawyer, Your Honor, is one who devotes his or her practice to the study of the Constitution and the prosecution and defense of constitutional issues; for example, myself.

(Laughter.)

MR. GRABER: Most of the cases that I have handled deal with constitutional issues rather than business law issues or tax issues or matters of that sort.

QUESTION: Or statutory construction issues?

(Laughter.)

MR. GRABER: The government has also made an argument that this statute is really narrower than Section 1507. But we would submit that this statute is, quite to the contrary, much broader than Section 1507. The government also points out that to invalidate 13k would force the police to make content-based

discrimination in determining whether or not particular demonstrators or leafletters are attempting to influence the Court.

However, 1507 reflects the Congress' concern in striking the balance between the rights of individuals to express their views and the rights of the government to protect the integrity of its processes.

And really, that is the basic interest at issue in this case: the integrity of the judicial process. And in other cases which have analyzed that interest in other contexts -- for example, Brown against Hartledge and other cases -- the Court has still applied the traditional First Amendment analysis. And we would submit that this statute cannot withstand application of traditional First Amendment analyses.

It is not content-neutral. The overbreadth of the statute requires the marshal to selectively determine who to enforce it against and who not to enforce it against.

Secondly, the -- there are not other areas where a leafletter may reach persons who frequent this Court. Therefore, the statute --

QUESTION: Well, how about the jail case, Mr. Graber? I suppose people who are interested in prison conditions would much prefer to present their message

right at the prison or right at the jail. And yet Adderly and Jones certainly suggest that even though that's your message, you have simply got to find somewhere else to do it.

MR. GRABER: Well, there are -- the concerns that are applicable to jails and military bases are concerns that are quite different to a public sidewalk surrounding a branch of the national government.

QUESTION: Well, but this isn't just a branch of the national government. It's the judicial branch which not only, in Hamilton's words, was the least dangerous branch but is also thought to be the one that should be least influenced by public opinion.

MR. GRABER: Except that, Your Honor, when James Madison introduced the First Amendment to the first assembled Congress, the original language limited petition for redress of grievances to the legislature. And Congress rejected that view and broadened it to include the government, which does include all three branches.

Now, 1507 protects the interest in protecting this Court against influence picketing. And we have no quarrel with 1507.

QUESTION: Well, if you think -- if you read the petition for grievance provision the way we do, why

-- why would you concede that influence picketing, is it all wrong or can it be limited at all by Congress? If people are petitioning for redress of grievances when they go before a courthouse where someone is being tried and say, we want this guy convicted whatever the evidence is, why don't you call that a petition for redress of grievances?

MR. GRABER: Because the due process clause, which is also a constitutional guarantee, affords parties the right to an impartial tribunal which is not influenced by speech specifically directed toward issues that are before the tribunal. And therefore, due process considerations support the sort of choice Congress made.

QUESTION: Well, then it's your position that you can picket or leaflet or demonstrate on the sidewalk, at least around the court, about an injustice in Central America but that you couldn't complain about anything about justice in this country?

MR. GRABER: No. As long as the -- the case is not pending before this Court or it's not directed toward an issue which is pending in this Court.

QUESTION: How about the sidewalk around the Court and an issue that is pending in this Court?

MR. GRABER: Then I believe 1507 applies.

QUESTION: Well, how about this statute, someone picked up under this statute and charged under this statute?

MR. GRABER: Well, I -- then the statute could be attacked on the grounds on which we are submitting, and the prosecution in that case would have chosen the wrong statute in which to prosecute the individual.

Unless there are any further questions by the Court, in conclusion we would simply submit that this statute was not based on considered judgments of Congress that the First Amendment may be absolutely rendered inapplicable to this Court; rather, the statute was passed along with the other scheme of which 13k is a part to generally protect this Court.

The other interests which are advanced by the government -- decorum and dignity -- are protected by the other aspects of the statute which are not being attacked: the statutes which forbid the makings of orations, engaging in disruptive or disorderly conduct, and the authority that the marshal has under 131 to promulgate whatever regulations may be reasonable to assure the decorum and dignity of this Court.

QUESTION: May I ask one other question? You gave an example earlier in your presentation about the sale of the Washington Post within the area covered by

the statute. You don't contend that violates the statute, do you?

MR. GRABER: Yes, because --

QUESTION: What part of the statute does that violate?

MR. GRABER: It is a device, the vending machine is a device designed or adapted to bring into public notice an organization; namely, the Washington Post. And every day when the person from the Post comes and puts in their newspaper, as the government conceded in the District Court, that statute is being violated.

QUESTION: How about the Pepsi Cola delivery truck at the back?

(Laughter.)

MR. GRABER: That is another problem.

(Laughter.)

QUESTION: You can't be serious.

(Laughter.)

MR. GRABER: Your Honor, I did not write this statute. But the literal terms of the statute prohibit any device designed or adapted to bring into notice any organization, movement, or party.

QUESTION: Oh, but a court construing any statute under -- in any jurisdiction tries to construe it with some notion as to what the evils the legislature

intended and what a common-sense construction of the statute would result in. There may be close cases under the language, but I can't believe that the Pepsi Cola truck or the Washington Post circulation man really are violating the statute.

MR. GRABER: Well, the fact of the matter is the Washington Post daily is allowed to distribute through the printed word its views --

QUESTION: If you pay for it.

MR. GRABER: If -- exactly.

QUESTION: Well, that's a little different than your case.

MR. GRABER: Well --

QUESTION: Well, who paid your clients?

MR. GRABER: Nobody.

QUESTION: Well, that's the difference.

MR. GRABER: Also --

QUESTION: This is in a very different theory of why the Post would violate the statute now. You're saying -- you're abandoning your suggestion just because the sign that says "Washington Post" on the vending machine, that doesn't -- that's really pretty far out. And that would make the sign, I suppose, on the men's room violate the statute.

MR. GRABER: No.

(Laughter.)

MR. GRABER: It is a different theory, the theory being that once the forum is open to a particular medium of expression, then the government is hard-pressed to justify closing it to the same medium of expression.

QUESTION: Well, but I am asking you why, why it violates the statute. I am not asking about the constitutional theory now. And you have another theory on the Post other than the fact they have their sign on the vending machine?

MR. GRABER: Yes. That is that the -- whoever has allowed dissemination through printed matter to the Post and also met forum but is depriving my clients of their rights.

QUESTION: Well, but forget your client for a moment. How does the Post violate the language of this statute by being sold within the building or wherever it is sold?

MR. GRABER: Well, the Post itself, because of the ambiguity of the term "device," the Post itself may be a device which with its banner contains a reference to the organization of the Washington Post.

QUESTION: Okay. I understand.

QUESTION: Mr. Graber, is it agreed by both

sides that your clients were on the public sidewalk and not any closer to the grounds or building --

MR. GRABER: Yes.

QUESTION: -- than that?

MR. GRABER: Yes. The facts are that my clients were very near the vending machines and the curb line of the street.

CHIEF JUSTICE BURGER: Thank you, Mr. Graber.

Do you have anything further, Mr. Solicitor General?

MR. LEE: Just very briefly, Mr. Chief Justice.

ORAL ARGUMENT BY REX E. LEE, ESQ.,
ON BEHALF OF UNITED STATES, ET AL.,
APPELLANTS -- REBUTTAL

MR. LEE: First, with regard to the most recent exchange between Mr. Graber and the Court, I think that what that illustrates is the wisdom of two messages that I see emanating from this Court's opinion in New York versus Ferber that came down last term. And those two messages are that where you have a statute that is attacked as being either overbroad or vague, that the first thing you look for is to see if there isn't some way that a common-sense narrowing interpretation of the statute can't save its constitutionality.

That is particularly appropriate in this instance, because unlike the statute in Broderick and in New York, this is a congressional statute, and therefore the interpretative stewardship lies within this Court itself.

QUESTION: Mr. Solicitor General, do you think these people violated the statute?

MR. LEE: I think, Justice Stevens, that insofar as Ms. Grace and her sign are concerned, I think she did. And I think that one is fairly clear.

QUESTION: And what is the party, organization, or movement?

MR. LEE: The device. The device.

QUESTION: There is a device, but what did it -- was it apt -- did it bring into public notice any party, organization, or movement? And with what party, organization, or movement did that sign bring into notice?

MR. LEE: The movement, I would say, the party or the movement is the movement that her papers --

QUESTION: Her sign just quoted the First Amendment.

MR. LEE: First Amendment. The movement is the movement that --

QUESTION: The First Amendment Movement.

MR. LEE: The First Amendment Movement.

QUESTION: That's subversive.

(Laughter.)

QUESTION: And that's a narrow construction of the statute?

MR. LEE: Her individual view, her individual view, which may have been shared by other people, that this Court is not -- is not interpreting in the proper way the provisions of the First Amendment.

QUESTION: Maybe she was applauding our interpretations.

MR. LEE: That is very possible.

(Laughter.)

MR. LEE: Nevertheless, it does come within the --

QUESTION: It's certainly difficult for me to identify the party, organization, or movement that that sign -- that that sign brings into public notice.

MR. LEE: Let me say two things. One is that I think we should give at least something that approaches the deference to administrative agencies who are charged with the responsibility of interpreting the statutes, the judgment, the interpretation that is given to it by the marshal. Certainly, it's not binding, but neither is it -- is it totally irrelevant. And the

marshal has interpreted this statute as prohibiting generally picketing-type activity. And the picketing-type activity certainly does include the carrying of a sign.

The second message that comes out of this Court's holding in New York versus Ferber is that because you can find one isolated element of unconstitutionality, that you don't throw out the -- the entire statute. Therefore, both the construction alternative and also the on-its-face approach as opposed to the -- or excuse me, the as-applied approach as opposed to the on-its-face approach are two messages that come clearly from this Court's decision of last year in New York versus Ferber.

Now, finally, as to whether this really is just a place restriction, Mr. Graber expresses the view that it totally forbids expressive activity. And that clearly is his view. That is the way that he would interpret the statute, because of his example including everything from the Washington Post to the Pepsi Cola truck.

The point of the matter is that is not the purpose of the statute, it is not the way the marshal has interpreted it, and this Court's opinions clearly teach that you don't interpret the statute in such a way

that is to be unconstitutional. The purpose of interpretation is to save rather than to condemn.

As a statute that prohibits picketing-type activities, demonstration kinds of activities, it is a statute that falls squarely within the ambit of what this Court has held in Greer versus Spock, Heffron, and the other cases. It forbids only one kind of expressive activity; namely, the picket sign, the leafletting, the parading. Just as the Court said, one of the basics for the Court's holding in Greer versus Spock was that the kind of political activity that was involved in that case might create, and I am quoting, "the appearance that the military was acting as a handmaiden for partisan political causes or candidates."

If the preservation of military appearances justifies a place limitation on demonstrations, then we submit that a fortiori a congressional judgment affecting a much smaller place in the interest of preserving public confidence in the judiciary should also be upheld.

And now, finally, aside from all other considerations, it should lie within the legitimate authority of Congress to identify a limited number of places which serve as symbols of certain congressionally determined national values. And where necessary to the

achievement of those symbolic purposes, Congress may further determine that those few places are to enjoy a special environment free of the picketer and free of his signs.

And if Congress wants to take special steps to prevent the grounds of this Court from becoming another Hyde Park or even a Lafayette Park, in symbolism of the dignity and decorum and total judicial values that are represented by this Court, not only as representative of its own work but also the work of the entire federal judiciary, then that, we submit, lies within the legitimate prerogative of Congress so long as it is content-neutral, and this one clearly is, and so long as there are adequate alternative channels for communication, and clearly there are.

For this reason, the judgment of the Court of Appeals should be reversed.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:54 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:
United States, et al., Appellants
v. Mary T. Grace, et al. #81-1863

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BY _____
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