

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1998

TITLE WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners v. COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.

PLACE Washington, D. C.

DATE March 21, 1984

PAGES 1 thru 50



1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - - x
3 WILLIAM P. CLARK, SECRETARY OF THE :
4 INTERIOR, ET AL., :
5 Petitioners :
6 v. : No. 82-1998
7 COMMUNITY FOR CREATIVE NON- :
8 VIOLENCE, ET AL. :
9 - - - - - x
10 Washington, D.C.
11 Wednesday, March 21, 1984
12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:15 a.m.
15 APPEARANCES:
16 PAUL M. BATOR, ESQ., Chicago, Illinois;
17 on behalf of Petitioners
18 BURT NEUBORNE, ESQ., New York, N.Y.; on behalf
19 of Respondents.
20 - - -
21
22
23
24
25

1	<u>C O N T E N T S</u>	
2	<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
3	PAUL M. BATOR, ESQ.,	3
4	on behalf of Petitioners	
5	BURT NEUBORNE ESQ.,	25
6	- - -	
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5

2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8
9
0
1
2
3
4
5

5

6

7
8

9
0
1
2
3
4

5
6
7
8
9

0
1
2
3
4
5

1 there will be an average of three or so demonstrations
2 going on.

3 The case is fundamentally about what sorts of
4 parks these are to be. The specific question in the
5 case is whether the National Park Service has the
6 authority to enforce a flat general rule that provides
7 that nobody may spend the night camping in Lafayette
8 Park and the Mall. You may not use these places as
9 overnight sleeping accommodations.

10 Respondents are here arguing that the
11 Constitution gives them the constitutional right to use
12 these places as overnight sleeping accommodations. They
13 say that the use of these parks overnight for sleep is
14 speech within the meaning of the First Amendment.

15 The regulation involved in the case is not in
16 terms directed at speech. It does not on its face even
17 have the effect of limiting expression. The regulation
18 simply prohibits camping, and camping is defined in the
19 common sense way of use of the parks for living
20 accommodation purposes, including the constituent
21 activity of sleeping overnight in tents.

22 Now, Respondents asked for a permit to conduct
23 a demonstration in Lafayette Park and the Mall. It's
24 common ground that the purpose of the demonstration was
25 sincere, important and serious, to demonstrate the

1 tragic plight of homeless people.

2 To do this, the Respondents sought a permit to
3 erect 60 tents in Lafayette Park and the Mall, and there
4 would be 150 people demonstrating there for a period of
5 three months, during which the 150 people would be
6 spending the nights asleep in tents in Lafayette Park
7 and the Mall.

8 The Park Service granted the Respondents a
9 wide-ranging permit to demonstrate. Nobody tried to
10 prevent the Respondents from exercising their right to
11 speak, to assemble, to petition the Government for a
12 redress of grievances. Respondents were told they could
13 come to Lafayette Park, they could speak in every normal
14 sense of that term as freely as they wished, they could
15 maintain a continuous round-the-clock presence, maintain
16 an all-night vigil.

17 They could assemble and parade and leaflet.
18 They could use symbols and signs. They could even erect
19 symbolic structures and tents in order to convey the
20 message of homelessness.

21 But they were also told that they may not use
22 the park overnight to sleep, and this lawsuit tests the
23 validity of that application of the regulations. The
24 Government is here because the Court of Appeals of the
25 District of Columbia held in a six to five ruling that

1 the First Amendment guarantee of freedom of speech
2 applies to the sleeping activity proposed by the
3 demonstrators.

4 QUESTION: May I ask a couple of preliminary
5 questions, Mr. Bator. The Respondents indicate that
6 other demonstrators have been given permits by the Park
7 Service to sleep overnight in the park. Is there any
8 question about the validity of that statement?

9 MR. BATOR: Your Honor, the district court
10 found explicitly, on the basis of a record that I think
11 substantially supports that finding, that there has been
12 no discrimination in the application of this
13 demonstration; that in fact the Park Service has across
14 the board tried conscientiously to enforce the
15 regulation against sleeping.

16 It is the case that for a period of three
17 months, under a previous judgment of the Court of
18 Appeals of the District of Columbia, that court held
19 that the regulations in fact permit certain kinds of
20 sleeping. The Government then proceeded forthwith to
21 amend the regulations.

22 QUESTION: And the amendment of the
23 regulations was designed to prevent sleeping overnight
24 in the parks?

25 MR. BATOR: It was designed to prevent camping

1 and sleeping as a constituent of that camping.

2 QUESTION: Mr. Bator, has there ever been a
3 complete ban on demonstrating in Lafayette Park?

4 MR. BATOR: There had been a ban, I believe,
5 back -- I don't know when the date --

6 QUESTION: Many, many years ago?

7 MR. BATOR: Many years ago, there was a
8 complete rule against any demonstration in Lafayette
9 Park.

10 QUESTION: Would it be the Government's
11 position that that would be perfectly valid?

12 MR. BATOR: Your Honor, it's not this case,
13 and in the case of Lafayette Park I think our position
14 would be that it would be valid, but we luckily do not
15 need to argue that position.

16 QUESTION: Why do you draw a distinction
17 between sleeping all night and demonstrating all night?

18 MR. BATOR: The composition of the Park
19 Service regulations on that is to maintain a bright line
20 between the round-the-clock vigil and the camping,
21 sleeping activity, and I think that that is responsive
22 to the notion that the round-the-clock vigil is --

23 QUESTION: You mean that there's a bright line
24 between sleeping and not sleeping?

25 MR. BATOR: The bright line is between the

1 round-the-clock --

2 QUESTION: How do you tell when somebody's
3 sleeping and when they're not sleeping? I know people
4 that sleep with their eyes wide open.

5 MR. BATOR: Your Honor, the --

6 QUESTION: I mean, I was worried about that
7 bright line.

8 MR. BATOR: The bright line is between two
9 sorts of activities. I think, Your Honor, if you were
10 told -- if I were told that I'm allowed to go into that
11 park and maintain a round-the-clock vigil, but I'm not
12 allowed to use the park as sleeping quarters overnight,
13 I think I would understand that rule. It is really
14 directed at two different sorts of activities.

15 QUESTION: But precisely how do they carry on
16 the round-the-clock vigil between midnight and so on?

17 MR. BATOR: How?

18 QUESTION: How do they do it?

19 MR. BATOR: People do maintain round-the-clock
20 vigils in these parks.

21 QUESTION: How? What do they do?

22 MR. BATOR: They stand, they sing, they carry
23 candles. There are many -- the round-the-clock vigil,
24 as the Court of Appeals of the District of Columbia has
25 indicated, is a fairly well recognized and

1 understandable and important sort of symbolic activity.

2 QUESTION: Well, you could also sit in a chair
3 or lie down, as long as you're not sleeping, is that
4 it?

5 MR. BATOR: Yes, sir.

6 QUESTION: So you can enter a tent and lie
7 down and lie there all night --

8 MR. BATOR: Yes, sir.

9 QUESTION: -- as long as you don't sleep?

10 MR. BATOR: Yes, sir.

11 QUESTION: And you're all right.

12 MR. BATOR: Yes, sir. Now, I'd like to say
13 why that line is in fact a very important line. The
14 problem of the Park Service is not -- that is, once a
15 given demonstrator is already there and he's allowed to
16 go into the tent and lie down, you say, what difference
17 does it make if he's actually allowed to go to sleep?

18 But that does not mean, Your Honor, that it
19 makes no difference to the parks whether the rule is
20 that you can sleep there overnight as part of camping
21 activity on the one hand or whether you're allowed to
22 stand a round-the-clock vigil and if you want in
23 connection with that to pretend that you are asleep.

24 QUESTION: Well, may he sleep during the day?
25 Does the rule bar him from sleeping during the day?

1 MR. BATOR: The rule bars sleeping only if it
2 is a constituent of the use of the park for living
3 accommodation purposes. That is, the purpose of the
4 regulation is basically to prevent the kind of
5 continuous and intense use that is associated with
6 actually coming in and occupying a place as a place to
7 live in.

8 And we think that's an intelligible line, and
9 we think it makes a difference, Justice Brennan, because
10 the fact is that the problem of feined sleep and
11 pretending to sleep simply has not surfaced as a problem
12 in the management of these parks.

13 The problem of the parks is to try to save
14 them from the kind of intense occupation that is
15 associated with a general rule that you can come in and
16 camp overnight.

17 QUESTION: Is that partly related to the
18 proposition that the park is there for the use of
19 everyone, including hundreds of thousands of tourists
20 that come to Washington --

21 MR. BATOR: Yes, sir.

22 QUESTION: -- want to take pictures, walk
23 around the flowers?

24 MR. BATOR: It has historically been the
25 position of the Park Service that these places simply

1 are not suited for camping because they are so intensely
2 used by so many people for so many different purposes.
3 So that that problem of continuous occupation on the
4 part of demonstrators would create a severe strain on
5 the park and on the resources of the services.

6 QUESTION: Mr. Bator, I have trouble. When
7 they are camping there and not sleeping, aren't they
8 interrupting all this, other people? Two people can't
9 be in the same spot at the same time.

10 MR. BATOR: Right.

11 QUESTION: You did give them a permit to set
12 up tents and to crawl in those tents. Well, that
13 deprives these people from walking around and looking at
14 the flowers, doesn't it?

15 MR. BATOR: Yes, sir. It is not --

16 QUESTION: You agreed to that. You also
17 agreed that if anybody goes to sleep on a bench, you
18 don't lock him up, do you, for sleeping?

19 MR. BATOR: No, sir.

20 QUESTION: If he just happened to fall off?

21 MR. BATOR: The finding of the Park Service
22 here, Your Honor, Justice Marshall, is that the threat
23 to the parks comes from a regime in which people
24 generally are told that they can stay for a long time
25 and sleep there. The practice of people catnapping or

1 feigning --

2 QUESTION: But they didn't bar that. They
3 said you can stay there for that "long time", providing
4 you don't sleep. Isn't that what the rule is?

5 MR. BATOR: The judgment of the Park Service
6 is that if you have a rule that you have to maintain an
7 all-night vigil, that is not likely to threaten the park
8 in a serious way. That is, the question here is how
9 many people are going to come, how long are they going
10 to stay.

11 QUESTION: Mr. Bator, does any part of the
12 Park Service's liberality in the regulations
13 accommodating demonstrators stem from previous decisions
14 of the Court of Appeals for the District of Columbia?

15 MR. BATOR: To some extent, yes. The Court of
16 Appeals did hold here that an all-night wakeful vigil is
17 an important First Amendment activity. Similarly, the
18 Court of Appeals did have decisions about the erection
19 of these symbolic tents.

20 To some extent, the Government has been living
21 under a regime of cases which do govern us quite closely
22 and quite severely.

23 QUESTION: Not cases from this Court?

24 MR. BATOR: Not cases from this Court. In
25 fact, the only case from this Court, Your Honor, is the

1 case from 1972, which seemed to hold, although it was
2 not a case decided on the basis of argument and
3 briefing, but in connection with a stay application, but
4 that did install an injunction, reinstall an injunction
5 which prohibited camping overnight in Lafayette Park and
6 the Mall. That was the Morton case, decided by this
7 Court in 1972.

8 I want to come back to this issue, which I
9 think is important because it has concerned so many
10 judges, which is this issue: You've allowed them so
11 much; why not this little bit extra? We think, Your
12 Honors, that that asks the question from the wrong
13 perspective.

14 That is, retrospectively, once someone is
15 there, of course it may not make such a difference. But
16 the question is, what system of rules will threaten the
17 parks? How many of these demonstrations will there be
18 and how continuously will they last?

19 That is why we think it's really the general
20 perspective and the general rule which says it does not
21 endanger the parks and it serves important First
22 Amendment purposes to allow people to maintain an
23 all-night vigil, an around-the-clock vigil, because that
24 can serve as a powerful communicative activity; but
25 actually going in those tents and going to sleep does

1 not involve, we think, powerful communicative activity
2 and, if allowed, creates a general regime that is
3 threatening to the parks.

4 We feel that one of the most fundamental
5 issues in this case is sort of the institutional issue
6 of whether you have a general flat rule to be applied
7 across the board to all comers or whether you have to
8 really do a case by case review in each case whether the
9 particular proposal to sleep in the park has an
10 important communicative or First Amendment aspect and
11 therefore --

12 QUESTION: Are there some -- are there any
13 cases out of this Court -- perhaps you've answered in
14 answering Justice Rehnquist, but are there any cases out
15 of this Court that would prevent the Park Service from
16 saying that no tents or sleeping materials will be
17 allowed in the park?

18 MR. BATOR: We believe, Your Honor, that there
19 are no cases that would squarely prevent that. I think
20 that the Court would have to examine the particular
21 circumstances. But our position --

22 QUESTION: I take it that if the regulation
23 were amended to provide that, that you would be in
24 conflict with the Court of Appeals --

25 MR. BATOR: Right.

1 QUESTION: -- judgments?

2 MR. BATOR: Yes, sir, right. But as far as we
3 know, we would not be in conflict in any direct way with
4 any of the rules of this Court.

5 QUESTION: Well, I take it that, since you say
6 that the question is being asked from the wrong
7 direction, I take it that part of your submission is
8 that you could prevent any sleeping materials in the
9 park?

10 MR. BATOR: We believe so, Your Honor.

11 QUESTION: Including tents?

12 MR. BATOR: The Government, we believe, has
13 tried to be, to take a position that does treat
14 generously of the business of demonstration.

15 QUESTION: It goes farther than you think the
16 Constitution requires?

17 MR. BATOR: I believe we have gone farther
18 than the Constitution requires. I believe we have gone
19 beyond the minimum. And we do think that it is terribly
20 important to be able to do this on the basis of flat
21 rules.

22 QUESTION: Under the present regulations,
23 could a person put up a tent, let's say a pup tent
24 that's probably 25 square feet more or less, and leave
25 it there for an indefinite period, under the existing

1 regulations?

2 MR. BATOR: No, Your Honor, you would have to
3 have a permit for that.

4 QUESTION: No, I mean with a permit, with a
5 permit.

6 MR. BATOR: The permits would not allow you to
7 do that indefinitely.

8 QUESTION: How long? Is there a time?

9 MR. BATOR: I don't believe the regulation
10 itself contains a time limit. But usually -- I think
11 for instance, what happened in this case is that a
12 seven-day renewable permit was given. It would depend
13 very much on whether competing applications were
14 received.

15 QUESTION: If you have 50 pup tents, small pup
16 tents in Lafayette Park for seven days, especially at
17 this time of year, would you say that would interfere
18 with use of the park by other people, visitors,
19 tourists?

20 MR. BATOR: Yes, sir, and I doubt very much
21 whether all 60 -- the 60 here were divided between
22 Lafayette Park and the Mall, and this was proposed for
23 December to March, so that the specific judgment that
24 this was a reasonable demonstration involved that set of
25 circumstances.

1 QUESTION: Mr. Bator, may I ask this question
2 about the general rule, assuming -- you say you want to
3 look at the general rule. Supposing the general rule
4 would prevent demonstrations such as the veterans march
5 of many years ago or Resurrection City or some massive
6 demonstration in the city of Washington for a very, very
7 important cause. And it couldn't -- that kind of
8 aggregation of people couldn't be assembled unless they
9 allowed some kind of camping or sleeping activity.

10 Would the regulation withstand a First
11 Amendment challenge in that kind of situation?

12 MR. BATOR: Yes, Your Honor, the Government
13 does feel that it is important and not fundamentally
14 restrictive of the First Amendment to say that one thing
15 cannot go on here at all ever, and that's to move in and
16 sleep overnight. The fact is that --

17 QUESTION: So that demonstrations of the kind
18 I've described could really be prohibited?

19 MR. BATOR: Your Honor, I don't think there is
20 any indication that very large demonstrations cannot go
21 on in Lafayette Park and particularly the Mall without
22 people being allowed to camp there. There are camp
23 grounds around Washington. It is the case, for
24 instance, that for the Vietnam veterans demonstration
25 last year provisions were made for camping out in

1 Greenbelt Park.

2 I do not believe it is the history of the city
3 that you absolutely have to allow people to camp
4 overnight on the Mall. I think that the traditional
5 position of the Government has been that that place is
6 wholly unsuited for camping.

7 I'd like to turn to another problem with the
8 contrary view here, which is the question, if you ever
9 permit it when do you permit it? One of the very
10 important concerns of the Government here is that if
11 this regulation can't be applied on an across the board
12 basis we get into a very difficult, case by case review
13 of the question whether the particular demonstration
14 does or does not include as an important expressive
15 feature the business of sleeping at night in Lafayette
16 Park and the Mall.

17 And we believe that that inevitably turns
18 basically into content-oriented licensing. That is, if
19 you adopt the rule that in certain cases an exception
20 has to be made, that really is the regime that the
21 Respondents ask for here. They agree that the
22 regulation is valid on its face. They agree that
23 usually people can be prevented from camping on the
24 park. But they say that exceptions must be made.

25 Exceptions for whom? Well, there's the rub.

1 They say exceptions for us, for other people similarly
2 situated. But in all the history of this case nobody
3 has been able to come up with an understandable rule
4 that says when sleeping in the park is or is not an
5 important speech activity.

6 And it seems quite plain to the Government
7 that therefore what this comes to is case by case
8 licensing by the agency, and eventually by the court.
9 And it's licensing that will be uncomfortably
10 content-oriented.

11 I mean, this case is really an ironic
12 illustration, Your Honor, of the fact. In this case,
13 the Respondents and the Government are engaged in a
14 detailed disputation before this Court on whether
15 sleeping is or is not important for conveying the
16 message of homelessness.

17 QUESTION: Would you think it would violate
18 the First Amendment if there was a regulation
19 particularly applying to Lafayette Park that no one, no
20 one, could be in that park after midnight until 8:00
21 o'clock in the morning?

22 MR. BATON: No, Your Honor. I think that the
23 Government would take the position that that would be a
24 perfectly valid regulation. There are many city parks
25 of that size and that uniqueness that are in fact closed

1 at night, that are closed at dusk.

2 We have not, the Government has not adopted
3 that, but I think the Constitution would permit it. I
4 think the Constitution ought to give the Government some
5 latitude in regulating these parks, as long as the rule
6 does not substantially infringe on freedom of
7 expression.

8 And really, Your Honor, I guess it's important
9 that I come back and remind myself and remind the Court:
10 This regulation does not substantially narrow the range
11 of expressive activities that can go on. It does not
12 seriously prevent the demonstrators here from conveying
13 their message, from speaking.

14 QUESTION: If I understand it, the
15 demonstrators want to get over the proposition that
16 there are many people who have no place to sleep. Now,
17 how can you do that without sleeping?

18 MR. BATOR: Your Honor, we don't think the
19 physical activity of sleeping is important itself in --

20 QUESTION: Have you ever tried to live without
21 it?

22 MR. BATOR: I beg your pardon, Justice
23 Marshall?

24 QUESTION: Have you ever tried to live without
25 sleeping?

1 MR. BATOR: No, sir.

2 QUESTION: Have you ever had to sleep on a
3 grating?

4 MR. BATOR: No, sir.

5 QUESTION: Well, these people want you and
6 others to understand that.

7 MR. BATOR: I understand that, Justice
8 Marshall, and we respect --

9 QUESTION: All you have to do is to look out
10 the window of your office and you'll see it every
11 night.

12 MR. BATOR: I understand that, Justice
13 Marshall. And the Government respects and I respect in
14 every way the sincerity and the importance of the
15 message that is attempting to be conveyed.

16 But there is a problem, which is that if you
17 have a rule not to curb expression, but to prevent
18 certain kinds of conduct, there is a problem about
19 saying that whenever somebody says that the best way to
20 convey a message is to act it out by engaging in that
21 conduct that that automatically constitutes speech.

22 I think that defacing the portrait of a
23 President is a very powerful and expressive way of
24 conveying the message of contempt for the President. Is
25 it speech within the meaning of the First Amendment?

1 Respondents will say it's a silly question because
2 countervailing governmental interests will prevent, will
3 justify a prohibition of destroying presidential
4 portraits. But the Government feels it has the right to
5 persist in the question: When you prevent destruction
6 of the presidential portrait, is it speech that is being
7 suppressed?

8 There is a problem here about dissolving the
9 distinction between conduct on the one hand and speech
10 on the other, that I think that this Court was sensitive
11 to in the O'Brien case. Your Honor, Justice Marshall,
12 we feel that saying to these demonstrators, you can come
13 to Lafayette Park, you can stay a week, you can take
14 turns in shifts, you can speak, you can petition, you
15 can leaflet, you can parade, you can hold up symbols and
16 signs as much as you want, you can do every expressive
17 activity short of actually moving in and living here,
18 that that really does give generous scope for expressive
19 activity.

20 And we vigorously say that the Government's
21 position that camping is not allowed in these parks does
22 not entail a callous disregard of the message that is
23 being conveyed.

24 QUESTION: Well, indeed, under the regulation
25 you can pretend to sleep.

1 MR. BATOR: Yes, Your Honor. I just keep
2 hoping that will not make the case seem trivial, because
3 we feel that the fact that pretend sleep is allowed,
4 which is not a problem for the management of the park,
5 is really somewhat irrelevant to the case.

6 QUESTION: Well, if it tends to seem trivial,
7 I think the Government has nobody but itself to blame
8 for having gone to such lengths in allowing these
9 things.

10 MR. BATOR: Your Honor, the regulations don't
11 say people may pretend to sleep. The Government simply
12 has not dealt with this problem because it's a
13 non-problem. What the regulations say is that you may
14 demonstrate and in connection with demonstrations you
15 may erect symbolic tents, and that's what we were told
16 we had to do in one of the Court of Appeals cases.

17 And really, the problem of people then coming
18 in and pretending to be asleep has not -- the Government
19 has created a program for that activity. It just is a
20 non-problem.

21 QUESTION: You didn't come up here from those
22 previous judgments, did you?

23 MR. BATOR: No, sir.

24 QUESTION: So you are stewing in your own
25 juice in some way.

1 (Laughter.)

2 MR. BATOR: No.

3 QUESTION: May I ask one other question --

4 MR. BATOR: Could I just say one thing to
5 that? We are perhaps stewing in our own juice, but
6 we're stewing in it perhaps because I think it has been
7 the position here of the Government to try to be as
8 receptive as possible in a reasonable way to what are
9 important First Amendment activities. Somehow, I guess
10 we feel we're being cudgeled on account of that and that
11 we shouldn't be.

12 QUESTION: I just wanted to clarify one thing
13 I'm not sure of. Is there a regulation that prohibits
14 sleeping unrelated to permits and so forth? So that if
15 some of these people, not as part of a permitted
16 activity, just went out and slept on a bench or
17 something, could they do that?

18 MR. BATOR: Your Honor, the demonstration
19 regulations and the camping regulations do not speak
20 about the problem, if you will, of people sleeping on
21 the bench. Now, there are probably provisions in the
22 District of Columbia Code about --

23 QUESTION: But no park district regulations,
24 and we're talking about an area subject to the
25 jurisdiction of the park district?

1 MR. BATOR: As far as I know. I'm a little
2 uncertain, but none of the regulations that we're aware
3 of speak to speech as such.

4 QUESTION: I wasn't aware of any either.
5 Thank you.

6 QUESTION: Nothing speaks to a noontime nap, I
7 take it?

8 MR. BATOR: No, sir. No, sir.
9 I'd like to reserve the rest of my time.

10 CHIEF JUSTICE BURGER: Mr. Neuborne.

11 ORAL ARGUMENT OF BURT NEUBORNE, ESQ.,

12 ON BEHALF OF RESPONDENTS

13 MR. NEUBORNE: Mr. Chief Justice and may it
14 please the Court:

15 The briefs and oral argument of the Deputy
16 Solicitor General illustrate with his characteristic
17 clarity the narrowness of the dispute that separates the
18 demonstrators and the Park Service in this case, both on
19 the facts and the law.

20 Factually, the Park Service agrees that the
21 demonstrators seeking to dramatize the plight of the
22 homeless may erect symbolic tents, that up to 50 persons
23 in a quadrant of Lafayette Park and up to 100 persons in
24 a small section of the Mall may maintain a 24-hour
25 presence in and about the tents, and may assume feigned

1 postures of sleep in connection with the tents.

2 The demonstrators for their part agree and
3 recognize that they may be there for seven days, not
4 three months, seven days, subject to a renewable permit
5 if there are conflicting uses or some other reason why
6 they should not stay.

7 QUESTION: If they did not, if the Park
8 Service did not renew after seven days, must they have
9 the burden to show that it's because other people want
10 to use it or can they just cut them off in seven days?

11 MR. NEUBORNE: Well, one reason why they could
12 cut them off would be that other people wanted to use
13 it. But if there were also, for example, a danger to
14 the park, if there were a problem with the grass or a
15 problem with maintenance or a problem with the usage,
16 for example, by tourists.

17 If indeed the general use of the park were
18 jeopardized by remaining beyond the seven day permit,
19 the park department or the Park Service --

20 QUESTION: What if they just decided, seven
21 days is enough for any one demonstration?

22 MR. NEUBORNE: That's an issue that would be a
23 troublesome one. It's not this case. In all candor --

24 QUESTION: Why would it be troublesome?

25 MR. NEUBORNE: In all candor, Your Honor,

1 Justice Rehnquist, the position of the demonstrators at
2 that point would be that the Government would be obliged
3 to demonstrate a reason, some justification for why it
4 was necessary to cut the demonstration short. If in
5 fact that reason were present --

6 QUESTION: Well, what case would you rely on
7 for that proposition?

8 MR. NEUBORNE: I would rely on the general
9 notions of the First Amendment, that where expressive
10 activity is at stake the Government ought to demonstrate
11 some need before it cuts it off.

12 QUESTION: I don't think that's necessarily
13 true when the Government's dealing with its own
14 property, is it?

15 MR. NEUBORNE: The property of the Government
16 -- the suggestion that the parks are the property of the
17 Government is an extraordinary statement. The parks are
18 the property of the people, Justice Rehnquist.

19 QUESTION: Well, who do you think title to the
20 parks is in, Mr. Neuborne?

21 MR. NEUBORNE: Title to the parks from time
22 immemorial, as this Court said in Haig versus CIO, rests
23 in the people.

24 QUESTION: I don't think it said --

25 MR. NEUBORNE: Who engage in First Amendment

1 activity.

2 QUESTION: I don't think the Court said that
3 title rested in the people.

4 QUESTION: What if the Park Service, in
5 conjunction with let's say the Secret Service and
6 various other people, said that for security reasons all
7 areas within 1,000 feet or however many feet it takes to
8 get up to the Hay-Adams and the width of Lafayette Park,
9 that that would be closed from midnight until 8:00
10 o'clock in the morning?

11 MR. NEUBORNE: If that were factually
12 justified, if indeed a factual basis could be justified
13 --

14 QUESTION: Well, it could be justified. The
15 justification is just what I postulated, that for
16 security reasons the park must be cleared by midnight
17 and no person is allowed in until 8:00 o'clock in the
18 morning.

19 MR. NEUBORNE: Well, Your Honor, I think that
20 would be facially valid, Chief Justice Burger. The only
21 limitation would be that if the regulation were
22 promulgated for the purpose of suppressing First
23 Amendment activity or if the regulation were promulgated
24 in the absence of a genuine need and if on review the
25 Government were not able to demonstrate a need, then the

1 regulation would be subject to attack.

2 But assuming that the regulation is
3 promulgated in good faith and assuming that there is a
4 factual basis for it, yes, a security-based regulation
5 would be valid. No one suggest that there is an
6 obligation to take risks with the security of people in
7 the park or with the security of the President of the
8 United States or with the security of any other
9 Government official.

10 If indeed a factual basis is laid for the need
11 for regulations, the regulations are valid. Indeed,
12 that's what this case is all about: the degree to which
13 the Government is obliged to justify its regulation of
14 First Amendment activity by coming forward and
15 demonstrating a factual need for the regulation.

16 There is no question but that these
17 demonstrators, and indeed the vast bulk of people
18 engaged in First Amendment activity, would not wish to
19 engage in activity and would not wish to urge a rule
20 that would create a genuine risk to a significant social
21 interest.

22 QUESTION: What did you say is the number of
23 tents that could be put up in Lafayette Park?

24 MR. NEUBORNE: The precise numbers for this
25 demonstration were, as I understand it, 20 tents in a

1 quadrant of Lafayette Park and 40 tents on the Mall.
2 The numbers of the tents, of course, are not writ in
3 stone. If the Park Service felt that there were too
4 many tents and that were the problem, of course one
5 could discuss the degree to which the park is to be
6 used.

7 QUESTION: What about a regulation that no
8 tents, no tents at all, would be allowed?

9 MR. NEUBORNE: That raises the troublesome
10 question of the Court of Appeals decisions. I think it
11 is accurate to describe those decisions as not having
12 reached the substantive question of whether there is a
13 First Amendment right to erect structures in a park.
14 All the District of Columbia held, and I take it the
15 reason why the Government did not appeal those cases, is
16 that the Park Service was obliged to apply a
17 nondiscriminatory rule with respect to structures, and
18 if it allowed some groups to erect structures then it
19 had to allow all groups to erect structures; that it
20 couldn't pick and choose on the basis of content.

21 And since the parks department and the
22 Government wishes to allow certain groups to continue to
23 engage in that type of activity, they were obliged to
24 apply a nondiscriminatory rule. There is no case that I
25 know in the District of Columbia that requires a

1 substantive regulation. It is an equal access rule that
2 is applicable in the courts of the District of
3 Columbia. Now, if that issue --

4 QUESTION: Mr. Neuborne --

5 MR. NEUBORNE: Yes, sir.

6 QUESTION: -- may I just put a hypothetical.
7 Let's assume a small group wanted to hold a convention
8 in Washington and they decided that the hotel rates here
9 were too high and so they applied for a permit to bring
10 their tents and sleeping bags and stay in Lafayette Park
11 for the duration of the convention.

12 That I take it would be, if you win this case,
13 would be a permit the Government would have to grant?

14 MR. NEUBORNE: I hope not, sir, no.

15 QUESTION: Sir?

16 MR. NEUBORNE: I hope not, sir. I do not
17 believe that to be so. In fact, the most plausible
18 interest the Government has put forward is precisely
19 that. They have suggested that if the homeless
20 demonstrators are permitted to sleep as part of
21 expressing their message, it would be impossible to set
22 up a series of rules that will distinguish between them
23 and the conventioners who are coming to town. I think
24 there are three reasons why that ad horrendum argument
25 doesn't work.

1 The first one is just the general notion that
2 undifferentiated fear of future abuse is not a basis for
3 suppressing First Amendment activity. Put passing --

4 QUESTION: What?

5 MR. NEUBORNE: Undifferentiated fear of future
6 abusive attempts to use the parks. There is no
7 empirical basis for the fear that large numbers of
8 people wish to sleep in the District of Columbia parks
9 in the dead of winter to express a point.

10 QUESTION: But if this particular convention
11 was composed of people of very limited or negligible
12 means, wouldn't they have similar objectives to your
13 clients, that they just couldn't afford any of the
14 hotels in Washington?

15 MR. NEUBORNE: Well, for one thing, there are
16 camp grounds around the Washington area.

17 QUESTION: Your people could have gone there
18 also, couldn't they?

19 MR. NEUBORNE: Yes. But if it was their
20 purpose to camp, then the camp grounds would be the
21 place for them. If it was their purpose to express a
22 message really at the center of the nation's
23 consciousness -- and I commend the Solicitor General --

24 QUESTION: A message that hotel rates are too
25 high is not a First Amendment expression?

1 MR. NEUBORNE: It is, Your Honor. But the
2 nexus between the demonstrators' activities, the need of
3 a particular group to have a form of expression -- the
4 only form of expression open to the Respondents in this
5 case, the homeless men, is to attempt to re-enact in a
6 highly public place, in the dead of winter, in a
7 dramatic and poignant way the plight of what it means to
8 be homeless, of what it means to be without shelter
9 every night.

10 The close, extremely close nexus between that
11 degree of message and the concept of sleep renders that
12 group very different than other people who would come
13 into the park and say, I wish to sleep, first because
14 it's convenient for me to do so, and secondly because I
15 have some sham reason why I wish to express an idea by
16 the use of sleep.

17 No one suggests that the Park Service would be
18 obliged to ignore the good faith or the bona fides of
19 someone who came and argued about setting up a tent.

20 QUESTION: You underestimate the
21 resourcefulness of lawyers. I should think a good many
22 suits would be brought in light of what you just said.

23 MR. NEUBORNE: Well, I hope that wouldn't be
24 so. If it were so, the Government might then have a
25 different case, if in fact the Government demonstrated

1 that it was unable to administer this system.

2 After all the Federal Communications
3 Commission administers a very troublesome and difficult
4 statute, makes sophisticated choices about access to
5 limited resources, does so in a non-content-based way by
6 making judgments about the good faith and need of
7 particular demonstrators.

8 The Selective Service System makes very
9 difficult judgments about the good faith of persons
10 claiming conscientious objector status. Unemployment
11 compensation boards across the United States determine
12 the good faith of religious objections in cases flowing
13 from Sherbert versus Verner.

14 People asserting an exemption from public
15 school attendance, from a whole host of otherwise
16 applicable and valid rules, assert religious or First
17 Amendment objections, and those objections are passed
18 upon for sincerity.

19 QUESTION: Are the campers here allowed to
20 have a fire?

21 MR. NEUBORNE: No, sir.

22 QUESTION: What if a group came, to extend
23 Justice Powell's illustration, and said that they
24 noticed that the Washington Post had within the last
25 week announced or indicated that prices of restaurants

1 were prohibitive in Washington, too high, and that they
2 then want to assert their view in opposition to and to
3 demonstrate the plight of ordinary people who can't
4 afford to pay \$25 or \$30 for dinner or \$7 for a
5 breakfast, and so they want to have a fire to cook their
6 own breakfast and lunch?

7 MR. NEUBORNE: Well, Your Honor --

8 QUESTION: That's demonstrating a point, isn't
9 it?

10 MR. NEUBORNE: Yes, it is, and it is an
11 attempt to reenact a particular plight, and so the
12 hypothetical is well taken.

13 If a single person wished to do that a single
14 time, in a way that did not substantially interfere with
15 the use of the park -- I would assume that the building
16 of fires and the breaking of earth might well
17 intrinsically interfere with the use of the park and
18 could be prohibited. But if that were not so and if the
19 purpose of the particular enterprise were to express a
20 point, well then I think they probably could do it.

21 The problem, the problem with this particular
22 case and the point that the Government so aptly makes is
23 that the reason that this is important to the
24 demonstrators -- I think it's a perfectly valid question
25 for both the Court to ask and for the Government to ask

1 is that, if we're willing to be so liberal, if the
2 Government is willing to be so liberal and allow the
3 24-hour presence, and allow the tents, and allow the
4 feigned sleep, why is it that the demonstrators feel so
5 strongly about the need to sleep? Why isn't feigned
6 sleep enough?

7 And I think that goes to two particular
8 questions, two particular issues. First, the question
9 of what it is the demonstrators are attempting to
10 express? They're attempting to express the central fact
11 of homelessness, a fact which is, quite frankly, beyond
12 the collective consciousness of most of us -- the notion
13 that there is no shelter, no shelter at all, and that
14 every night individuals, human beings in this country,
15 go without decent shelter; and that the central fact of
16 that is the fact that they must find a place to sleep.

17 QUESTION: For First Amendment analysis, is
18 that any different from camping in the park, in Justice
19 Powell's illustration, as a protest against the high
20 rates of hotels, and having fires to cook meals to
21 protest against the high cost of restaurants in
22 Washington?

23 MR. NEUBORNE: Yes, sir, I think there is a
24 distinction.

25 QUESTION: How is it distinguishable?

1 MR. NEUBORNE: I think the distinction is --
2 the distinction lies at two points. First it lies in
3 the nature of the people making the demonstration, in
4 the nature of the people involved in the demonstration.
5 In both Justice Powell's hypothetical --

6 QUESTION: My hypothesis, you must accept it
7 assuming that the people who are doing what I suggest
8 are just as sincere and just as hard-pressed as your
9 people are. What is the difference for First Amendment
10 analysis?

11 MR. NEUBORNE: Well, in that case the question
12 might well be, are there alternative mechanisms to make
13 the point, and how closely is the activity connected
14 with the expression that the demonstrators are
15 attempting to carry out?

16 Here you have a group of people, the homeless
17 men, who lack any other mechanism for getting their
18 point across. In fact -- and forgive me for stating it
19 in these terms -- what this case is not about, and what
20 unfortunately neither you nor I nor anyone else appears
21 to be able to do anything about, is whether or not
22 homeless people will sleep in the parks.

23 Homeless people will be in Lafayette Park,
24 they'll be on the Mall, they'll be in the parks of
25 virtually every city in the nation. The truth is we are

1 prepared to tolerate their presence sleeping in those
2 parks.

3 QUESTION: Approximately how many people pass
4 by the mall between the hours of 12:00 midnight and 6:00
5 in the morning?

6 MR. NEUBORNE: I would assume, Justice
7 Marshall, very few. I myself have not been there.

8 But that goes back to the reason why sleep is
9 so important for this particular demonstration. The
10 purpose of the demonstration is to attempt to jolt
11 complacent people into recognizing what it means to be
12 homeless, and the most effective way, indeed probably
13 the only effective way, since all of us have excellent
14 defense mechanisms that turn homelessness into a verbal
15 abstraction and that keep homeless people invisible, the
16 only effective way to make that point is to reenact in a
17 highly public place at the center of the nation's
18 consciousness -- and that's what these parks are -- the
19 light of what it means to be a homeless person.

20 And the notion of people sleeping in the midst
21 of winter without adequate shelter, without amenities,
22 without food, without the storage of belongings, without
23 any of the accoutrements of camping, solely to make that
24 point is the significance of this particular
25 demonstration.

1 And the reason why these rules are so
2 important and the reason why they are so different is
3 that no society has attempted to reach out to the
4 disadvantaged the way this society has, to provide them
5 with a mechanism for entering into the public debate.
6 The First Amendment, were it confined solely to verbal
7 activity, were it confined solely to the classic means
8 of expression, would be a means of communication that
9 was open to the comfortable and the highly educated.
10 And what is extraordinary about our law and what allows
11 us to defend it against criticisms that the First
12 Amendment is really a repressive technique is that this
13 Court in two lines of opinions has recognized first that
14 non-verbal expressive activity is worthy of First
15 Amendment protection, and secondly -- and this is a very
16 important point, Justice Rehnquist, in answer to your
17 first question -- that the free public spaces of the
18 nation, the parks and the sidewalks, are legitimate
19 places for the exercise of First Amendment activity.

20 And when you put together those two lines of
21 cases, the notion that you can engage in non-verbal
22 expression and the notion that you can do so in the free
23 public spaces of the nation, you have put together a
24 mechanism that allows every segment of American society
25 to speak.

1 QUESTION: Will you stop a minute so I can ask
2 you a question?

3 MR. NEUBORNE: Of course.

4 QUESTION: Good.

5 If the parks are scheduled for other
6 activities -- softball games, soccer games, that sort of
7 thing -- do you think that the First Amendment claims
8 can simply override those activities?

9 MR. NEUBORNE: Absolutely not. I think that
10 there is an imperative of shared use, and I think if the
11 Government comes forward with legitimate reasons why a
12 particular area or a particular use of the park is to be
13 used by someone else, they have an absolute right to
14 regulate how the park is used in particular settings.

15 This particular demonstration is scheduled for
16 seven days in the midst of winter, in one quadrant of
17 Lafayette Park and a small part of the Mall. If the
18 National Park Service were to say to us that someone
19 else wants to use it and they asked for it first, or if
20 they were to say to us that your use of the park
21 genuinely interferes with other people's enjoyment, I
22 think we would not persist for a moment.

23 QUESTION: What if the Government were to say
24 that Lafayette Park is a very small place and as a
25 result we're not going to allow any demonstrations. It

1 interferes with too many tourists. They like to see the
2 park just as kind of like a green pleasant place. They
3 don't like the hassle of demonstrations. If you want to
4 demonstrate, you can go to the Mall, where you're
5 equally visible, and we're just not going to have
6 Lafayette Park used for demonstrations.

7 Is there anything wrong with that?

8 MR. NEUBORNE: I think there are areas of the
9 park, for example the areas near the Washington
10 Monument, the area surrounding the Lincoln Memorial,
11 which have traditionally been recognized as places of
12 serenity and contemplation. And were the Park Service
13 to designate Lafayette Park as such an area of serenity
14 and contemplation, I think it would be a serious
15 mistake, because that has come to be a traditional place
16 of the exchange of ideas. It is the closest thing we
17 have to Hyde Park in London.

18 But were the Park Service to do that and were
19 there to be sufficient alternative places to express
20 oneself, I would have no objection to that.

21 I hope that you don't believe that the
22 argument here is an argument for absolute use of parks
23 whenever a First Amendment person wishes to do so. It
24 is simply this: that when communicative activity is to
25 take place in a park, if the Government is to suppress

1 it the obligation is on them to come forward with a
2 reason, with a genuine need to do so.

3 And we believe on the facts of this case they
4 have simply failed to come forward with their reason.
5 There might be other cases, but not --

6 QUESTION: Well, is it really so unreasonable,
7 though, to say that in a tiny fragile park like
8 Lafayette Park that you can't camp out? You can do all
9 these other things, but you can't camp out. Is that
10 really unreasonable?

11 MR. NEUBORNE: Were there a showing that the
12 camping out, Justice O'Connor, that the sleeping in some
13 way incrementally interfered with the park -- you see,
14 the problem is of course, on the facts of this case the
15 act of sleep, the act of actually remaining there, which
16 is quite important to the demonstrators as a
17 communicative mechanism, the act of remaining there to
18 sleep through the night in no way increases the
19 intensity of the park use.

20 So that the problem is, on the facts of this
21 case the Government simply hasn't made its showing.
22 There may be other cases. There may be other situations
23 where a particular --

24 QUESTION: Mr. Neuborne, I wonder if that's
25 consistent with the record. It seems to me there are

1 two ways to look at this case. One is that the only
2 thing that's at stake is whether they lie there and
3 pretend they're asleep or actually sleep, and you have
4 roughly the same number of people as otherwise.

5 Or alternatively -- and this is what I
6 understand the facts to be -- it may be that unless
7 they're allowed to sleep they really won't come, a
8 significant number of people will not be there. And
9 that's what your application said. So the difference as
10 I understand it is not just this hairline between
11 feigned sleeping and real sleeping. It's the difference
12 between what the Government would call camping and you
13 would call demonstrating and just not having it, having
14 no such activity.

15 MR. NEUBORNE: Well, first, Justice Stevens,
16 we have agreed and I think the Government recognizes
17 that there is complete agreement on the maximum number.
18 We're talking about a maximum number of 50 people.

19 QUESTION: I understand, but your own
20 application says that the maximum number will never be
21 there unless they can sleep. So that you can really
22 look at the case as the sleeping is a function that must
23 be performed in order to let the demonstration be
24 successful, sort of like saying you've got to be able to
25 camp somewhere if you're going to have a Resurrection

1 City -- a functional need in order to have an overall
2 demonstration, which is quite different from the thing
3 you've both been arguing about, namely that you're
4 assuming everybody's out there pretending their asleep
5 when we know that's not true; they are not going to be
6 there unless they can sleep.

7 MR. NEUBORNE: I agree, Your Honor, Justice
8 Stevens, that were the sleep here solely facilitative,
9 were it simply a mechanism to make it easier to conduct
10 the demonstration, while that is a non-constitutional
11 factor that the Park Service might take into account, it
12 is certainly not constitutionally obliged to do so. And
13 that is not the basis on which we argue here.

14 QUESTION: I realize it's not the basis on
15 which you argue, but it's what you said in your
16 application.

17 MR. NEUBORNE: But there is a linkage between
18 that statement and the communicative elements as well,
19 and that is a recognition -- and this is a biological
20 recognition -- of what it means to be a homeless person
21 and on the street all day.

22 It would be dishonest for us to represent to
23 the Park Service that we could go along with a
24 requirement to feign sleep and have homeless people at
25 the demonstration, because as a biological fact, once

1 the homeless lie down they're going to fall asleep. By
2 definition, they have nowhere else to go to take a
3 catnap.

4 That is, that is one of the principal
5 stumbling blocks in accepting what is a generous attempt
6 to allow First Amendment activity in the park, and that
7 is, if one suggests that one can only feign sleep, one
8 cannot actually sleep, one then defines homeless people
9 out of the demonstration, because it is simply
10 physically impossible for a homeless person. Having
11 scuffled on the streets all day trying to get food,
12 trying to get a place to satisfy bodily needs, when
13 finally that homeless person comes to the demonstration
14 site and lies down, that homeless person is going to
15 fall asleep.

16 And it would be dishonest for us to represent
17 to the Park Service that anything short of that will
18 happen. And that is why if homeless people are to be
19 permitted to speak in this demonstration, that the sleep
20 must be permitted or else the demonstration simply
21 cannot take place.

22 There is, and this is of course quite
23 anticlimactic, a non-constitutional way to review this
24 case as well, which I hope the Court will consider. It
25 is I think consistent with appropriate judicial

1 approaches in this area, and that is to look closely at
2 the regulation and ascertain whether it in fact bans the
3 activity that the demonstrators hope to engage in.

4 The regulation, which is set forth in the
5 Petitioners' breach at Appendix 1A, the regulation
6 forbids using the park as a living accommodation, and it
7 sets up a totality of the circumstances test to
8 determine whether or not a living accommodation is in
9 fact being carried out. And among the various indicia
10 is cooking, breaking the earth, storage of personal
11 belongings, and sleeping.

12 QUESTION: Did you present this argument to
13 the Court of Appeals?

14 MR. NEUBORNE: Yes, sir. Yes, we did.

15 QUESTION: Did any of the eleven judges agree
16 with you?

17 MR. NEUBORNE: No, sir. They did not address
18 the issue. But I hope that the Court will consider
19 whether or not a non-constitutional means of resolving
20 this issue is the appropriate one.

21 QUESTION: Well, there's no question that what
22 the people who drafted it interpret the regulation that
23 way.

24 MR. NEUBORNE: Yes, but I think the
25 traditional --

1 QUESTION: And there's no mystery about what
2 their interpretation is.

3 MR. NEUBORNE: No, they made it very clear.
4 And indeed, in all fairness, the regulation was drafted
5 to deal with the Court of Appeals decision.

6 QUESTION: And isn't the regulation subject to
7 that construction? It might be subject to some other
8 construction, but isn't it --

9 MR. NEUBORNE: Well, I think where there are
10 two plausible constructions, Justice White, of a
11 regulation -- and I think it is a plausible construction
12 to suggest that it does not bar the activity at issue
13 here.

14 Where there are two plausible constructions,
15 one of which would avoid a difficult constitutional
16 issue and one of which would force the Court to confront
17 it, if there is a plausible construction that the Court
18 can embrace which would avoid the constitutional issue
19 --

20 QUESTION: You mean override the view of the
21 agency of its own regulation?

22 MR. NEUBORNE: It wouldn't be the first time
23 that this Court has done so to avoid the necessity of a
24 constitutional adjudication.

25 To summarize --

1 QUESTION: Before you do, let me ask you one
2 other factual question.

3 MR. NEUBORNE: Yes, sir.

4 QUESTION: As I understand it, there's no
5 fires permitted. How do these people keep warm?

6 MR. NEUBORNE: They don't keep warm, Mr.
7 Justice Stevens. That's the problem.

8 QUESTION: Even if they come --

9 MR. NEUBORNE: They wrap themselves, they wrap
10 themselves in whatever, overcoats and bedding and --

11 QUESTION: But you don't have anything like
12 electric heaters --

13 MR. NEUBORNE: Oh, no. No, sir.

14 QUESTION: -- or anything like that, or
15 blankets?

16 MR. NEUBORNE: There is no amenity whatever
17 contemplated in connection with this demonstration.
18 What will take place, if the Court permits it, in the
19 dead of winter is homeless people sleeping in tents,
20 wrapped in a blanket, wrapped in whatever overcoats they
21 have, there voluntarily in an attempt to reach out and
22 touch the compassion of the nation, to express in a way
23 that no verbal communication can, and that indeed these
24 homeless people are incapable of expressing any other
25 way a plea for help and a plea for human compassion.

1 That the case raises difficult issues is
2 unquestionable. That it requires the drawing of
3 difficult lines is --

4 QUESTION: Why don't you take a picture of
5 them sleeping on the gratings, which they do all over
6 Washington?

7 MR. NEUBORNE: Yes, sir, I know.

8 QUESTION: Well, why don't you take those and
9 use those? Wouldn't they be a demonstration?

10 MR. NEUBORNE: They would be and indeed are.

11 QUESTION: Well, why don't you?

12 MR. NEUBORNE: Well, there are pictures
13 taken.

14 QUESTION: Well, where are they used? Where
15 do you ever see them?

16 MR. NEUBORNE: That's one of the problems. The
17 problem is getting --

18 QUESTION: Well, I mean, how are you going to
19 -- I'll bet you more people pass by the Department of
20 Justice building than pass by the Mall.

21 MR. NEUBORNE: Yes, sir, but I --

22 QUESTION: And they can see them sitting on
23 the grating in front of the Department of Justice.

24 MR. NEUBORNE: I think that's correct.

25 QUESTION: Well, why do they have to go over

1 to the Mall to see them?

2 MR. NEUBORNE: The problem, Justice Marshall,
3 is that they don't appear to see them. The problem is
4 that when the homeless people are isolated and alone
5 they are invisible, and the real issue in this case is
6 whether there is a mechanism for them to attain some
7 expressive conduct, a political dimension to their
8 desperation.

9 And short of assembling them in a public
10 place, in a highly public area, and short of them
11 reenacting the central plight of their life, there
12 appears to be no other way to catch the heart of the
13 American people, and that's what this demonstration is
14 all about.

15 Thank you.

16 CHIEF JUSTICE BURGER: You have nothing
17 further, Mr. Bator?

18 (No response.)

19 CHIEF JUSTICE BURGER: Thank you, gentlemen.
20 The case is submitted.

21 (Whereupon, at 11:10 a.m., argument in the
22 above-entitled case was submitted.)

23 * * *

24

25

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: #82-1998-WILLIAM P. CLARK, SECRETARY OF THE INTERIOR, ET AL., Petitioners v. COMMUNITY FOR CREATIVE NON-VIOLENCE, ET AL.

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

Pine Hunsaid

(REPORTER)

84 MAR 28 P4:28

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE