

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

DKT/CASE NO. 83-1624

TITLE UNITED STATES, Petitioner V. JAMES VINCENT ALBERTINI

PLACE Washington, D. C.

DATE April 15, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :
Petitioner :
v. : No. 83-1624
JAMES VINCENT ALBERTINI :

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Washington, D.C.
Monday, April 15, 1985

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:04 o'clock a.m.

APPEARANCES:

DAVID AARON STRAUSS, Assistant to the Solicitor
General, Department of Justice, Washington, D.C.;
on behalf of the Petitioner.
CHARLES STEPHEN SIMS, Esq., New York, New York; on
behalf of the Respondent.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in United States v. Albertini.

4 Mr. Strauss, you may proceed whenever you're
5 ready.

6 ORAL ARGUMENT OF DAVID AARON STRAUSS, ESQ.

7 ON BEHALF OF THE PETITIONER

8 MR. STRAUSS: Thank you, Mr. Chief Justice and
9 may it please the Court, this case concerns events that
10 took place at Hickam Air Force Base in Honolulu,
11 Hawaii. Hickham is the Headquarters of the Pacific
12 Command of the United States Air Force. And, for
13 security reasons, Hickham, unlike other -- many other
14 military installations, is ordinarily closed to the
15 public. That is to say, members must obtain permission
16 and a pass -- members of the public must obtain
17 permission and a pass in order to enter the base.

18 In 1972, the Respondent in this case, James
19 Albertini, obtained permission to enter the base,
20 ostensibly to present a letter to the commanding
21 officer. But once Albertini was on the base, he and a
22 companion gained access to classified Air Force files
23 and, as an act of protest, poured animal blood on the
24 documents in the files.

25 Albertini was convicted of conspiracy to

1 destroy government property and, in addition, the
2 commanding officer at Hickham issued what is known as a
3 "bar letter" to Albertini. This letter ordered him not
4 to reenter the base until he had the written permission
5 of the commander, and advised him of Section 1382 of
6 Title 18 of the United States Code, which makes it a
7 crime to reenter or to be found within a military
8 installation after having been ordered not to reenter by
9 the commanding officer.

10 In 1981 Albertini, without seeking permission,
11 reentered Hickham. He reentered during the base's
12 annual open house. Now, during the open house, portions
13 of the base are open to the public and members of the
14 public do not need passes to enter those portions of the
15 base.

16 And the Air Force puts on various displays and
17 exhibitions designed to show the civilian members of the
18 surrounding communities what goes on behind the normally
19 closed gates of the base.

20 Albertini was seen during the open house in
21 the company of some persons who were staging an antiwar
22 demonstration. He was identified by the commanding
23 officer of the base as the holder of a bar letter. And
24 he was apprehended and subsequently convicted of
25 violating Section 1382 because he had reentered the base

1 after having been ordered not to do so.

2 The Court of Appeals for the Ninth Circuit
3 reversed Albertini's conviction, holding that it was
4 unconstitutional under the First Amendment to apply
5 Section 1382 in these circumstances.

6 Notably, there is scant mention in the Ninth
7 Circuit's opinion of the fact that Albertini had
8 received the bar letter. Instead, the Ninth Circuit
9 undertook a relatively lengthy analysis of the question
10 whether Hickham, on the day of the open house, was a
11 public forum such that members of the public had a right
12 to demonstrate there.

13 After answering that question in the
14 affirmative, the Ninth Circuit concluded in a relatively
15 cursory discussion that it was immaterial that Albertini
16 was the holder of a bar letter.

17 Now, we sought certiorari because we believe
18 that the Court of Appeals' decision had unjustifiably
19 undermined what this Court has referred to as the
20 historically unquestioned power of a commanding officer
21 to exclude civilians from the area of his command, and
22 because we thought the Court of Appeals' sweeping
23 constitutional holding jeopardized the military's open
24 house program, a widespread and worthwhile -- in our
25 view -- effort by the Air Force and the Navy to improve

1 communications between the military and civilian
2 communities.

3 In its order granting our petition, the court
4 requested the parties to address the question whether
5 Respondent's attendance at the open house was the kind
6 of reentry that Congress intended to prohibit in Section
7 1382.

8 Our submission is that the plain language of
9 Section 1382 is sufficient to answer that question in
10 our favor. Section 1382 has essentially three
11 elements. It provides that whoever reenters or is found
12 within a military installation after having been ordered
13 not to reenter is guilty of an offense.

14 Now, in any ordinary sense of the words,
15 Respondent reentered Hickham in 1981. And if there is
16 any doubt about that, then there is certainly no doubt
17 that in the ordinary sense of the words he was found
18 within Hickham in 1981.

19 Respondent has never contended that Hickham is
20 anything other than a military installation. And
21 Respondent admitted at trial in his testimony and
22 continues to admit that he received a bar letter.

23 QUESTION: Mr. Strauss, I guess the Respondent
24 takes the position in his brief that the bar letter is
25 stale and no longer valid. I suppose even if the Court

1 were to agree with your position and reverse, that issue
2 would be open on remand?

3 MR. STRAUSS: That's right, Justice O'Connor.

4 QUESTION: You do agree, do you, that a bar
5 letter can be become stale. You did at one point in
6 your papers; do you still --

7 MR. STRAUSS: Yes, we do.

8 QUESTION: We don't always follow the plain
9 language.

10 MR. STRAUSS: I think the limitation on the
11 duration of a bar letter is found not in Section 1382,
12 but in the requirement that administrative actions be
13 reasonable.

14 And therefore, a bar letter cannot extend
15 beyond a reasonable time, and that is the limitation.

16 QUESTION: Do you have any idea what the
17 Government's position is on a reasonable time?

18 MR. STRAUSS: I think it would necessarily
19 depend on circumstances of each case. In this case, I
20 think it is quite clear just from what we know in his
21 record, which was not even developed with an eye toward
22 establishing a reasonableness of enforcing this bar
23 letter, that it was reasonable to enforce it against
24 Respondent who, only two months before he reentered
25 Hickham for the open house, had engaged in what he

1 himself described as a clear-cut case of civil
2 disobedience that involved a sensitive area of another
3 base on Hawaii.

4 QUESTION: Was a bar letter then -- the
5 justification is something he did elsewhere, over at
6 Camp Smith?

7 MR. STRAUSS: The justification could be
8 something he did elsewhere. If he had committed some
9 minor disdeed in 1972 and had done nothing between 1972
10 and 1981, I would agree that he would have a very strong
11 argument that it would be unreasonable to apply the bar
12 letter to him in 1981.

13 But nothing like that is the case. His act in
14 1972 was quite serious, and by his own admission, quite
15 apart from anything we might show where we put to the
16 test of proving reasonableness, he committed a series of
17 illegal entries and acts of civil disobedience between
18 1972 and 1971, which furnished reasonable ground for
19 extending the bar letter.

20 QUESTION: May I just ask, because there's
21 reference to the March incident, is Camp Smith part of
22 Hickham Air Force Base?

23 MR. STRAUSS: My understanding is it's a
24 separate -- it's a separate installation.

25 QUESTION: So that even if there was such a

1 bar letter, that wouldn't really apply to this
2 installation.

3 MR. STRAUSS: He was -- he had a bar letter
4 from Camp Smith as well as from Hickham.

5 QUESTION: In '72. And then you also mention
6 in your brief, and they say it's outside the record, and
7 I was a little puzzled about it, that in March of '81
8 there was a bar letter mailed that he said was returned
9 or he didn't get, or something like that.

10 But that would be from Camp Smith, but not
11 Hickham?

12 MR. STRAUSS: No. Hickham sent him, as a
13 result of his actions at Camp Smith, the commander of
14 Hickham sent him another bar letter in March of 1981.

15 QUESTION: Mr. Strauss, was the same commander
16 involved here?

17 MR. STRAUSS: I believe it was a different
18 commander in 1971.

19 QUESTION: I don't think it matters, but I
20 just wanted to know.

21 MR. STRAUSS: I believe it was a different
22 commander in '72 and '81.

23 QUESTION: It was different?

24 MR. STRAUSS: That's right.

25 QUESTION: It seems to me if it was the same

1 one, it would be very hard to say it had died.

2 MR. STRAUSS: Well, I think that's right,
3 although I certainly don't think it should be necessary
4 for a new commander to go through the formality of
5 reissuing all bar letters on file when he takes office.

6 QUESTION: Did the Defendant in this case --
7 it was a bench trial, wasn't it?

8 MR. STRAUSS: That's right.

9 QUESTION: Did the Defendant make any argument
10 to the District Court as to the staleness of the bar
11 letter?

12 MR. STRAUSS: He moved before trial to dismiss
13 the indictment on the ground that the bar letter was
14 stale. That motion was denied and the case was tried on
15 the premise that the bar letter was sufficient.

16 QUESTION: Does the record offer any
17 explanation as to why the second bar letter was returned
18 to the sender?

19 MR. STRAUSS: The only explanation is
20 Respondent's statement when he was asked did you get a
21 bar letter for your actions in March '81, and he said I
22 never received one; no.

23 That is the state of the record.

24 QUESTION: Any question as to the correctness
25 of the address?

1 MR. STRAUSS: Not that I know of, although I
2 have to say those matters were not gone into this record
3 because it was assumed that the early bar letter was
4 sufficient.

5 That would, of course, bear on the
6 reasonableness of applying the earlier bar letter to
7 Respondent in '81.

8 QUESTION: May I just ask you to comment on
9 one other aspect of this? If the Government
10 acknowledges, as I think you did in response to Justice
11 O'Connor, that there is an issue open on remand as to
12 the staleness, possible staleness of the bar letter, why
13 should that issue not be resolved before we go forward
14 and address th constitutional question?

15 MR. STRAUSS: It's quite possible, and in fact
16 I can see no reason why the Court of Appeals should not
17 have resolved it before it addressed the constitutional
18 question.

19 I would point out, though, that if the Court
20 of Appeals' constitutional holding stands, not only can
21 we not retry Respondent, which is not the case if it's
22 merely found that the bar letter was stale in this
23 record, but that has quite serious implications for the
24 open house program elsewhere in the Ninth Circuit which
25 is now constitutionally precluded from keeping off bar

1 letter holders who want to demonstrate.

2 QUESTION: Mr. Strauss, is there any procedure
3 at the base on open house days to try to exclude from
4 those who are coming in holders of bar letters?

5 MR. STRAUSS: My understanding, Justice
6 Brennan, is that while the base regulations forbid bar
7 letter holders from entering, so many people come on the
8 base during the open house, that unless an officer is
9 lucky and spots someone whom he knows to have a bar
10 letter, there is no practical way to screen.

11 QUESTION: Well, if there's no procedure at
12 all, I wonder about your argument that it's necessary to
13 prevent serious security risks.

14 MR. STRAUSS: Well, this is an instance,
15 Justice Brennan, in which we have to rely principally on
16 the possible deterrent effect and on people's
17 willingness to obey the law rather than on being able to
18 pluck these people from the stream of entrants onto the
19 base.

20 It may also be that there are other
21 circumstances in which bases do not have so many people
22 and can screen. And, of course, it give us an
23 additional basis for prosecuting someone if he does
24 enter the base with an eye toward engaging in some kind
25 of --

1 QUESTION: Incidentally, now that I have you
2 interrupted, the Court of Appeals relied on Flower
3 rather heavily, didn't it?

4 MR. STRAUSS: That's right.

5 QUESTION: And do I correctly now read your
6 brief -- I looked back at your brief in Flower, and you
7 didn't concede the unconstitutionality of the bar letter
8 in that case at that time when we decided Flower.

9 Do I now read you as conceding that the use of
10 the bar letter in Flower was unconstitutional?

11 MR. STRAUSS: We understand that to be the
12 burden of the Court's holding in Flower, and we accept
13 the Court's enlightenment on that.

14 QUESTION: So you now do concede that
15 predicate.

16 MR. STRAUSS: In light of Flower. Yes, that's
17 right.

18 QUESTION: And how do you distinguish this
19 case?

20 MR. STRAUSS: I think this case is quite
21 unlike Flower in at least two respects, Justice
22 Brennan. In the first place, the Court in Flower made a
23 point of the fact and the Court in Greer made even more
24 of a point of the fact that the area in which Mr. Flower
25 was handing out leaflets was completely

1 indistinguishable from any other street in San Antonio,
2 which was where the base was located. It was, for all
3 intents and purposes, just another street that happened
4 to run through a military base.

5 That's not the case here. This was still very
6 much a military base, even though it had large numbers
7 of civilians on it.

8 And the other distinction is that --

9 QUESTION: Well, excuse me. Was that the
10 reason that you suggest in your brief now that there
11 they were engaged in constitutionally protected activity?

12 MR. STRAUSS: No, that's the additional --

13 QUESTION: That's additional.

14 MR. STRAUSS: Well --

15 QUESTION: But you also, at page 35 of your
16 brief, if I read you correctly -- perhaps I don't -- I
17 thought you were conceding there that a person can't be
18 prosecuted on the basis of a bar letter that was issued
19 because he engaged in constitutionally protected
20 activity.

21 I'm reading from your brief.

22 MR. STRAUSS: Yes, that is the other -- that
23 is the second way in which Flowers differs from this
24 case.

25 QUESTION: Well, if that's true, weren't

1 Albertini's companions also engaged in constitutionally
2 protected activity?

3 MR. STRAUSS: That is --

4 QUESTION: Maybe not he, but were not they?

5 MR. STRAUSS: That is a question that's not
6 presented by this case because --

7 QUESTION: No, but I'm asking you here.

8 MR. STRAUSS: Our view is no, that they were
9 not engaged in constitutionally protected activity.

10 QUESTION: Well, it was just a peaceful
11 protest, wasn't it?

12 MR. STRAUSS: That's right, but it was on a
13 military base. But I hasten to add that that is not in
14 any way an issue in this case now.

15 QUESTION: I know it's not, but I'm asking you
16 your view of it.

17 MR. STRAUSS: Our view for the issue -- for
18 the reasons we explained in a somewhat lengthy footnote
19 in our brief -- are that they did not have a First
20 Amendment right to demonstrate during the open house.
21 Th situation was sufficiently comparable to Greer v.
22 Spock that the military should not be put in the
23 position of having to referee between possibly competing
24 groups of demonstrators on its own base.

25 QUESTION: Now, they didn't write across

1 Albertini's notation, "antiwar demonstrator."

2 MR. STRAUSS: They did, Justice Brennan. The
3 testimony at trial was that that was something done by
4 the desk clerk, although I have to say that when we were
5 preparing --

6 QUESTION: Well, wasn't there also testimony
7 that the officer who detained him had been told to stop
8 the activities of persons carrying "anti-defense
9 banners"?

10 MR. STRAUSS: The commanding officer told the
11 officer who made the apprehension two things. He said
12 there is some anti-defense demonstrating going on;
13 please do something about it. And he --

14 QUESTION: Doesn't that smack of prosecuting
15 him for a political activity?

16 MR. STRAUSS: I think not, Justice Brennan. I
17 don't think there is sufficient evidence that he was --
18 that anyone was apprehended for that reason. I think it
19 is quite clear on the basis of --

20 QUESTION: Incidentally, Albertini had been on
21 and off the base several times. He even taught there.

22 MR. STRAUSS: He says that he had been on and
23 off the base several times; that's right.

24 QUESTION: Well, didn't he teach there?

25 MR. STRAUSS: According to his testimony. We

1 have no record that he ever taught there. But he says
2 he taught there. He never -- what he did not say was
3 that he ever reentered the base with the permission of
4 the commander or anyone else on the base.

5 He simply, to judge from his testimony,
6 slipped on without being detected.

7 QUESTION: Well, the printed advertisements
8 inviting the public to attend the open house, isn't that
9 something like a written permission? Everybody to come
10 in?

11 MR. STRAUSS: I think clearly not, Justice
12 Brennan. I think the entire -- it's perfectly clear
13 from the bar letter that the purpose of the written
14 permission requirement is to explain to the recipient
15 that he's in a different category from the general
16 public; that whatever might be true of the general
17 public, he has to obtain written permission to enter.

18 There are open bases such as Ft. Dix, the base
19 involved in Greer v. Spock, that have a sign over the
20 portals of the base, "Visitors Welcome." And Respondent
21 concedes explicitly in his brief that a bar letter
22 holder couldn't enter such a base without written
23 permission.

24 It seems to me to make no difference that
25 Hickham decided to promote the open house by sending out

1 press releases instead of putting a sign up saying "Open
2 House, Visitors Welcome.

3 QUESTION: "Everybody come."

4 MR. STRAUSS: Or even a sign up saying,
5 "Visitors Welcome" it seems to me is as close to
6 "Everybody Come" as one can get. And it seems to make
7 no difference that they sought to publicize it in one
8 way instead of the other way.

9 Justice Brennan, let me say about the antiwar
10 demonstrator notation on the form which you mentioned.
11 When we were presenting the case to the court, we
12 inquired of Hickham how many bar letters they had on
13 file and why they were issued, and what the various
14 reasons were, and we got a breakdown. The number of bar
15 letters issued for activities relating to demonstrations
16 was very small, but it's possible that the notation was
17 for some reason such as that, some benign reason such as
18 that.

19 QUESTION: Was anybody else prohibited from
20 attending? Obviously nobody but those with bar
21 letters.

22 MR. STRAUSS: That's right, Justice Marshall,
23 people who have been barred from the base; which, of
24 course, would include people who had been convicted of
25 quite serious crimes on the base, as well as people

1 like --

2 QUESTION: Well, if you're convicted of
3 assault, murder, treason and bribery, if you didn't have
4 bar letter, you could go on that base?

5 MR. STRAUSS: That's right, although I would
6 think if you were --

7 QUESTION: I thought that was right.

8 MR. STRAUSS: If you were convicted of those
9 things and you were in the area of the base and did not
10 receive a bar letter, it would be an oversight of major
11 proportion.

12 QUESTION: May I just ask about this? Does
13 the statute only apply to written orders not to
14 reenter? What if a sentry intercepts someone going in
15 the base and tells him to get out? He sneaks back in
16 and is thrown out again by the sentry.

17 MR. STRAUSS: I think it's clear from both the
18 wording and legislative history that such a case would
19 be covered.

20 QUESTION: So the bar letter doesn't have to
21 be written.

22 MR. STRAUSS: That's right.

23 QUESTION: And if a person had received such
24 kind of treatment from a sentry, I take it you'd say
25 there's kind of a reasonableness standard on how long

1 the prohibition would apply?

2 MR. STRAUSS: Oh, yes. Absolutely.

3 QUESTION: But it doesn't have to be written.

4 MR. STRAUSS: That's right.

5 QUESTION: I thought this was limited to an
6 order of the commandant.

7 MR. STRAUSS: The statute says --

8 QUESTION: I mean are you saying that a
9 private can say you can't come back on here, and that's
10 it?

11 MR. STRAUSS: You're quite right, Justice
12 Marshall. The statute is limited to orders by the
13 commandant, but the phrasing of the statute is after
14 having been removed therefrom or ordered not to reenter
15 -- ordered not to reenter by the commanding officer.
16 And the legislative history shows that that phrasing was
17 not inadvertent, that Congress was concerned about
18 situations when people would come on the base, be thrown
19 off, and a day later show up back on the base.

20 And if people could do that before the
21 commanding officer could process the paperwork to get
22 them a bar letter, we would say that Section 1382
23 covered their conduct. But you're quite right, that as
24 far as the order not to reenter, that has to be issued
25 by the commanding officer.

1 QUESTION: Well, or the person in charge. The
2 duty officer could do it, I suppose. It doesn't have to
3 be the commanding officer.

4 MR. STRAUSS: That's right. The person in
5 charge of the base.

6 QUESTION: It could be the duty officer.

7 MR. STRAUSS: That's right.

8 QUESTION: Mr. Strauss, do you think that a
9 commanding officer could issue a valid bar order or
10 letter solely because the commanding officer disagreed
11 with the political views of the person barred?

12 MR. STRAUSS: Oh, certainly not, Justice
13 O'Connor.

14 QUESTION: And none of that is at issue in
15 this case?

16 MR. STRAUSS: That's right; none of it is at
17 issue in this case.

18 QUESTION: Wouldn't the commandant allow a
19 parade through the base advertising the candidates for
20 president or governor or whatever?

21 MR. STRAUSS: I believe there are regulations
22 that at least authorize him to prohibit that and may
23 require him to prohibit that, regulations which are
24 upheld in Greer v. Spock.

25 They don't require him to prohibit that, but

1 they certainly authorize him to prohibit it. And I
2 think it would be uniformly prohibited.

3 Respondent's two arguments on the statutory
4 issue in addition to the one about the staleness, the
5 other argument Respondent makes is that Section 1382
6 didn't apply because Hickham was open to the public
7 during the open house.

8 The problem with this argument has come out to
9 some extent in my colloquy with Justice Marshall, is
10 that many bases are always open to the public. And
11 Respondent concedes that the holder of a bar letter
12 cannot enter those bases without permission.

13 QUESTION: Mr. Strauss, when was 1382
14 enacted?

15 MR. STRAUSS: 1908, I believe.

16 QUESTION: 1908.

17 MR. STRAUSS: No, 1909. Enacted March 1909.

18 QUESTION: What does the legislative history
19 show the reasons that the Congress enacted it? What was
20 the abuse that it called for? I'm sure it was not
21 demonstrations or entering bases on open houses.

22 MR. STRAUSS: It was not demonstrations, and
23 Mr. Albertini did not receive his bar letter for
24 demonstrating. The abuse was --

25 QUESTION: Why did the Congress enact it?

1 MR. STRAUSS: The legislative history is
2 fairly clear. The problem was that people would come
3 onto bases for various bad --

4 QUESTION: To recruit soldiers for
5 prostitution?

6 MR. STRAUSS: For prostitution, for saloons.

7 QUESTION: That was the reason, wasn't it?

8 MR. STRAUSS: That's right. That's right.
9 And they would be thrown off the base, and then before
10 you knew it, they would be back on the base. And
11 Congress had to implement some way to enforce, wanted to
12 implement some way to enforce the commanding officer's
13 warning.

14 QUESTION: That was the -- those were the
15 abuses, the limited abuses which led Congress to enact
16 the statute; right?

17 MR. STRAUSS: Those were the specific things
18 that gave rise to the statute, although even Respondent
19 eschews any argument that you have to show that a person
20 was on the base in order to promote drinking or
21 prostitution in order to issue him a bar letter.

22 And it's certainly clear, and Respondent has
23 never suggested otherwise, that he can be issued a bar
24 letter for destroying government property on the base.

25 Let me turn briefly to the constitutional

1 question on which we petitioned. I think the central
2 point on the First Amendment issue is that the Court of
3 Appeals and, to some extent, Respondent analyzed this
4 case as though the question were the right of the public
5 to demonstrate on the base during an open house.

6 As I hope is clear, it's our view that this
7 case does not involve that question at all; because
8 Albertini is not just any old member of the public; he
9 is a bar letter holder. And he was not convicted for
10 demonstrating. He was convicted for reentering the base.

11 In fact, as we explain in our brief, it's
12 really only a slight overstatement to say that this is
13 not a First Amendment case at all, because Albertini
14 received his bar letter for reasons unrelated to speech,
15 and he was prosecuted for reasons unrelated to speech.

16 The most that can be said is that Section 1382
17 has an incidental impact on his right to come back on
18 the base and to demonstrate. But in view of the
19 extraordinary historical pedigree of the commanding
20 officer's authority to exclude civilians from the area
21 of his command and of the fact that Albertini was the
22 author of his own restriction -- this is not a
23 restriction unilaterally imposed on him by the
24 Government; he engaged in the conduct that led to this
25 being restricted in this way -- we think it's clear that

1 any such incidental impact is more than outweighed by
2 the very important Government interest at stake.

3 If there are no further questions, I'd like to
4 save the rest of my time.

5 CHIEF JUSTICE BURGER: Mr. Sims.

6 ORAL ARGUMENT OF CHARLES STEPHEN SIMS, ESQ.

7 ON BEHALF OF THE RESPONDENT

8 MR. SIMS: Mr. Chief Justice and may it please
9 the Court, criminal punishment for Respondent's
10 activities in this case would amount to an unprecedented
11 expansion of Section 1382 in three separate but related
12 respects.

13 With the Court's permission, I plan to briefly
14 address the facts and to clarify some confused facts, I
15 think, which are particularly relevant to two statutory
16 arguments; first, that this bar letter was stale; and
17 second, that Respondent didn't have the requisite
18 knowledge to be guilty of the crime.

19 And then I'll address those two statutory
20 arguments and the constitutional reasons why the
21 judgment below must be affirmed.

22 Five facts are particularly critical.

23 First, although for some years now Hickham, as
24 a matter of fixed policy, has not allowed any indefinite
25 bar letters or indeed any that last longer than three

1 years, Respondent's indefinite bar letter was issued
2 more than nine years before the 1981 open house.

3 Second, the record is undisputed that he did
4 not in fact believe, as a matter of fact, that the bar
5 letter was in effect.

6 QUESTION: When you say the record is
7 undisputed, what do you mean by that?

8 MR. SIMS: I mean that there is a wealth of
9 testimony by the Respondent asserting that fact.

10 QUESTION: The District Court, of course, was
11 entitled to disbelieve him in toto, was it not?

12 MR. SIMS: This is not a case where the
13 District Court did disagree.

14 QUESTION: How can you tell that?

15 MR. SIMS: Because the District Court said
16 scienter or knowledge wasn't relevant. This case would
17 be in far different posture if the District Court had
18 disbelieved him.

19 QUESTION: Well, to say that scienter or
20 knowledge -- did you say the District Court simply made
21 no finding?

22 MR. SIMS: No. No, no. The District Court
23 specifically said, and we've cited it in brief, that
24 whether or not he believed the bar letter was in effect
25 was irrelevant.

1 QUESTION: So it made no finding on whether it
2 believed the Respondent.

3 MR. SIMS: That's right. There is no finding
4 because the District Court said the issue was
5 irrelevant. In our position on this record, it would be
6 impossible for a reasonable fact-finder to find that he
7 did believe it. But if the Court disagrees, then
8 obviously a remand would be in order for a finding of
9 fact.

10 Now, third -- and this particularly critical
11 -- Respondent's bar letter which was issued for a
12 misdemeanor was issued without any standards. And this
13 conviction rests solely and squarely on that 1972 bar
14 letter, without any more, issued in the base commander's
15 unlimited discretion.

16 The Government takes that 1972 bar letter as
17 sufficient to warrant perpetual exclusion on base open
18 houses. The case was tried only on that theory. There
19 is no evidence in the record that there ever was any
20 subsequent bar letter from Hickham. The only indication
21 in the record is -- there is a question from the
22 prosecutor saying, "Did you ever get another bar letter
23 from Hickham?" And the answer was no.

24 A prosecutor's question is certainly not
25 evidence that there was a second bar letter. There is

1 not a single other whisper of evidence in this record
2 that there was one. The Government never tried to put
3 it into evidence, and it's plain from the entire record
4 of the case that the only question below -- and the
5 Government's theory was that the 1972 bar letter was
6 sufficient, and that's all the case was tried on.

7 QUESTION: Is it your position, Mr. Sims, that
8 every three years the commandant must issue a new bar
9 letter if he wants to continue the impact?

10 MR. SIMS: No, that is not my position, Mr.
11 Chief Justice. That's the Government's position. At
12 present, as I've indicated, Hickham as a matter of
13 policy doesn't allow any bar letters longer than three
14 years.

15 Now, whether or not it's additional policy of
16 Hickham that the can, on the basis of one of those
17 expired letters, simply reissue it without any
18 subsequent conduct, the record doesn't say.

19 But the Government does not deny that in fact
20 no bar letters, as a matter of policy --

21 QUESTION: Does the statute put any limit on
22 the time?

23 MR. SIMS: I believe that the statute does,
24 and I take issue with my colleague's position that the
25 plain language plainly is violated here.

1 I think the plain language is ambiguous, and
2 it depends largely on the use of the word "after." If I
3 tell someone that I'm going to meet them after this
4 argument on the steps of the courtroom, and I meet them
5 in nine years, I don't think that they will have thought
6 that we reached agreement on the meaning of the word
7 "after."

8 I think, therefore, that it's plain that the
9 word "after" might mean any time subsequent, or might
10 mean some reasonable time subsequent. And as I'll set
11 out when I get to that portion of my argument, I think
12 the legislative history and the administrative practice
13 makes plain that the plain meaning cannot be relied on
14 in the way the Government says.

15 QUESTION: Well, I still want, if I can, it's
16 not clear to me in your idea as to when this letter
17 expires of its own weight. Days, hours, or minutes?

18 MR. SIMS: Our position does not provide that
19 kind of bright line, Your Honor. I think the
20 legislative history makes plain that the purpose of the
21 statute was to vindicate an order to terminate unwanted
22 conduct, and therefore that the bar letter expires, I
23 would submit, after a duration of reasonably necessary
24 determinant.

25 QUESTION: Well, then we'll have to decide as
29

1 to one day or 20 years.

2 MR. SIMS: I think in this case it's not
3 necessary for the Court to make any such determination.
4 The only question squarely before you, of course, would
5 be whether this bar letter, nine years old, is too late.

6 Now, obviously, that --

7 QUESTION: Is eight okay?

8 MR. SIMS: Well, Your Honor, obviously there
9 are line drawing problems involved here, but the
10 Government's recent practice --

11 QUESTION: And that's what I'm asking help
12 on.

13 MR. SIMS: Well, I think the Government's
14 recent practice largely makes those problems evaporate.
15 Since, as a matter of practice, the Government has for
16 some years now been issuing only time-limited bar
17 letters and for short periods of time, it seems to me
18 that the Court would be in a position in those cases
19 generally to defer to those kinds of determinations;
20 whereas in this case, with an indefinite bar letter,
21 that kind of deference, I think, would not be in order.

22 QUESTION: Mr. Sims, it sounds like you and
23 Mr. Strauss aren't too far apart on determining how long
24 a bar letter like this that gives no definite expiration
25 date is valid. You both appear to agree that it's a

1 question of reasonableness.

2 Is that right?

3 MR. SIMS: That's right, Your Honor, but I
4 think we're in quite --

5 QUESTION: All right. And the court below
6 simply dealt with the constitutional issue and did not
7 resolve the question of the reasonableness of the
8 duration. Isn't that correct -- in the Court of
9 Appeals?

10 MR. SIMS: The Court of Appeals did not
11 resolve that question.

12 QUESTION: So why should we try to resolve
13 that kind of an issue here? Shouldn't we focus on the
14 constitutional issue as it came to us?

15 MR. SIMS: Well, Your Honor, I think there are
16 two responses to that. First, under the Ashwander
17 doctrine, if the Court can decide the case on a
18 nonconstitutional basis, I think it's obligated to.

19 Second, and this is where Mr. Strauss and I
20 are in some disagreement, the question of whether it
21 might have been reasonable to extend this bar letter is
22 obviously a fact-intensive question that I can
23 understand this Court not wanting to get involved in.
24 but that's not this case.

25 This case was not tried on the theory that it

1 was reasonable to extend this bar letter or that the bar
2 letter was in fact extended. The case was tried only on
3 the theory that the mere issuance of the bar letter in
4 1972 in the commander's standardless discretion was
5 sufficient. And under those circumstances, it seems to
6 me the Court is faced with a very simple or reasonably
7 simple question of law and not the kind of
8 fact-intensive question that might warrant remand.

9 QUESTION: Well, where would the facts be
10 adduced to thrash this thing out in the first instance?
11 At the trial in the District Court?

12 MR. SIMS: At the trial in the District Court,
13 if in fact the Government's theory had been, if the case
14 had been tried on the proposition that it was reasonable
15 to keep this bar letter in effect.

16 QUESTION: But he was tried the way an
17 ordinary criminal defendant is tried. He was indicted
18 on a particular account; evident was introduced; the
19 judge made a finding of guilty.

20 There has got to be evidence having been
21 introduced at the trial that took place, isn't there, if
22 you're going to argue about a factual question.

23 MR. SIMS: That's correct, Your Honor. But
24 since the Government's position was nothing that
25 happened after 1972 was relevant, there was in fact no

1 reason for the Government to try to make that kind of
2 position.

3 The case comes to this Court on the theory and
4 record that the Government made. Since the case was
5 tried on the theory that the mere receipt of a 1972 bar
6 letter was sufficient, that's the only question before
7 this Court; whether it's reasonable to keep a 1972 bar
8 letter in effect without any more. There are no
9 subsequent relevant facts, I think, as this criminal
10 case comes to the Court.

11 QUESTION: May I ask, Mr. Sims, does the
12 record -- you've mentioned the fact that Hickham now has
13 a policy, or maybe the whole military does, of issuing
14 three-year bar letters or no longer than that.

15 Does the record tell us when that policy was
16 initiated and whether it was in effect at the time of
17 this proceeding?

18 MR. SIMS: No. The only thing that the record
19 indicates is that Respondent -- and I'll get to this
20 when I get to the scienter point -- knew in fact that
21 recent bar letters from Hickham -- and they are in the
22 record and I'm not sure of their age -- I think they're
23 from the early 1980s. He knew that recent bar letters
24 were time-limited, but we do not know when the policy
25 went into effect. The Government hasn't brought forth

1 that information.

2 I might say it's our understanding that a
3 fixed period is overall military policy, but there's
4 some discretion between bases as to how long that should
5 be. The three-year policy is Hickham's policy. I'm not
6 sure that it's precisely that year.

7 And one other fact about that: The three
8 years is the maximum at Hickham. Many bar letters are
9 issued for two years or one year.

10 Now, briefly finishing my summary of the
11 relevant facts, this base was not open the way Ft. Dix
12 was. It was expressly open through special public
13 invitations, widely disseminated in the media, inviting
14 the entire population of Hawaii, without exception.

15 I suppose the Government could have, but it
16 did not, say bar letter holders not invited. The
17 invitation simply invited everyone, without exception.

18 And the educational, entertainment, and public
19 relations events that the military organized at the open
20 house were quite different from what goes on at a base
21 like Ft. Dix. They were organized for the benefit of
22 the public, not for the benefit of the military. They
23 included not only the Air Force's own communicative
24 activity, but were compatible with communicative
25 activity by civilians in attendance.

1 Fifth and finally, Respondent's own activity,
2 as the Government concedes, was not disruptive or
3 violative of any rules or regulations at the open
4 house. He did what everyone else did, and he did it
5 peacefully.

6 Now, for a number of different reasons, this
7 conduct was not and cannot be made a crime. First, the
8 bar letter issued in 1972 simply was no longer effective
9 to bar his entrance in 1981 and without an operative bar
10 letter, there is no crime under Section 1382.

11 The statute makes no sense without an
12 operative order not to reenter. The crime is entering
13 in violation of an operative bar letter, not one that is
14 stale or expired or rescinded.

15 Under the Government's literalistic reading of
16 the statute, a crime is committed even if the bar letter
17 on its face is expired because someone has entered after
18 having received the bar order. But that plainly is not
19 what Congress had in mind, and therefore we think --

20 QUESTION: Well, Mr. Sims, that doesn't
21 accurately characterize Mr. Strauss's position as I
22 heard him. I understood him to say if the bar letter
23 were no longer in effect, then that's a different
24 question.

25 MR. SIMS: Well, if that's a different --

1 QUESTION: I think you're characterizing it
2 differently.

3 MR. SIMS: Your Honor, if that's a different
4 question, it's because one has to go past the plain
5 meaning of the statute. The literal words of the
6 statute do suggest that result, and my position here
7 simply is the literal words can't be taken that way, and
8 one has to go a little bit further and look at
9 legislative history and administrative construction.

10 QUESTION: I'm not sure I got your responses
11 to Justice Marshall's question as to just when this bar
12 letter expired. When did it lose its vitality?

13 MR. SIMS: Well, this bar letter is not
14 effective nine years afterward, and the precise day, I
15 can't tell you the precise day, Mr. Chief Justice, but I
16 think it relates to the duration necessary to effectuate
17 the commander's order.

18 The commander was concerned about anti-Vietnam
19 war conduct, and he issued an order precluding that kind
20 of conduct. There's no question that the Vietnam War
21 has long since ended. There was long since -- it's
22 years ago, and it simply can't be said that exclusion of
23 Mr. Albertini in 1981 was necessary to vindicate the
24 commander's order in 1972.

25 QUESTION: You described his purpose by his

1 testimony as engaging in an act of civil disobedience.
2 Civil disobedience about what?

3 MR. SIMS: Your Honor, are you referring to
4 the 1972 bar order?

5 QUESTION: Uh-huh. 1981. You said that he
6 conceded that he was engaged in an act of civil
7 disobedience in 1981, unless I misunderstood you.

8 MR. SIMS: Mr. Albertini's political views are
9 that the defense establishment of this country is too
10 large. He was engaged in conduct, as the Government
11 concedes, that consisted merely of being at the base and
12 taking photographs. There is no question in this case
13 as to whether or not he could have lawfully been
14 leafleting or holding a banner.

15 The Government has conceded that he wasn't
16 doing any of those things.

17 Now, the Government is --

18 QUESTION: Mr. Sims, do I understand that part
19 of the airstrip at Hawaii is within the limits of this
20 base?

21 MR. SIMS: That's true, Your Honor.

22 QUESTION: Does that mean that if Albertini
23 were on a plane within that airstrip, he'd violate the
24 statute?

25 MR. SIMS: Well, I can't believe, Your Honor,

1 that it would be the Government's position that he
2 violates the statute by virtue of being on the Honolulu
3 International Airport, but if that's so, I take it that
4 that has to do with the meaningfulness of the fact that
5 at least that portion of the base was open to the
6 public.

7 Now, as I've indicated, the core situation
8 that 1382 was intended to deal with is shown in a case
9 like United States v. May or United States v. Holdridge,
10 when misconduct occurs, a bar order is given, and people
11 return shortly thereafter. Enforcement of the bar
12 letter in that situation puts force behind the
13 commander's order to leave.

14 Now, administrative practice confirms our view
15 that nine years is simply much, much longer than the bar
16 letter is effective for. There is not a single reported
17 case in the United States reports that involves any bar
18 letter issued more than a year, in force more than a
19 year after its issuance.

20 Under these circumstances, we simply think
21 that enforcement of this bar letter can't be said to
22 fulfill the congressional purpose, effecting the initial
23 exclusion from the base.

24 Now, the Government has suggested that even if
25 nine-year-old bar letters might generally be stale, it

1 should be allowed an opportunity to show at a remand or
2 at a retrial that this one was or could have been
3 extended. But the record the Government freely made
4 below is insufficient to make out its statutory case
5 under that view, and then the double jeopardy clause
6 would bar further proceedinngs, trying to make out the
7 Government's case.

8 Both Burks and Hudson v. Louisiana could have
9 given the Government a second bite at the evidentiary
10 apple. Nor can this conviction be upheld on the ground
11 that the present record is sufficient to justify the
12 continuation of the bar letter. Due process bars an
13 appellate court from upholding a conviction on what the
14 Government might have proved or on a theory that could
15 have been but was not advanced at trial.

16 The court held that --

17 QUESTION: Mr. Sims, suppose that the bar
18 letter had been issued a week before your client
19 reentered the base. Now, on the constitutional issue, is
20 there a constitutional inability of the Government to
21 prosecute him under this Section 1382?

22 MR. SIMS: Leaving aside the motive question
23 which Justice Brennan touched on, I would say yes,
24 Your Honor, although I think the case would be
25 materially different, and materiall different in this --

1 QUESTION: And of course that was the position
2 taken by the Court of Appeals below that we have to
3 address, isn't it?

4 MR. SIMS: Well, Your Honor, assuming for the
5 moment that O'Brien is the right analysis, and the
6 Government suggests that it is, the relevant question --
7 and I would focus my argument on four criterion of
8 O'Brien -- whether the enforcement of bar letters
9 generally is greater than essential to fulfilling the
10 Government's interests. And it seems to me under the
11 Court's recent decisions in Heffron and Clark v. CCNV,
12 when the Court has said you have to look not just at the
13 particular case, but the general enforcement of this
14 non-content-related rule, it seems to me plain under
15 these circumstances that enforcement of bar letters
16 generally is much greater than essential for the
17 Government's -- fulfilling the Government's interest.

18 I'll come back to that. But if I could, I'd
19 like to touch briefly on the scienter question because I
20 think it's plain that Congress intended to prohibit
21 reentry only in violation of a -- only a knowing
22 violation of an operative violator.

23 Again, every court prior to this case has
24 required the Government to shoulder that burden. In
25 this case, as I've indicated, the District Court

1 expressly held that such proof was not required, and it
2 made no finding in that regard.

3 Now, both the United States Gypsum and the
4 Moriisette case make plain that the lower courts which
5 have unanimously required knowledge of an operative
6 order not to enter have correctly construed the
7 statute.

8 Morisette is particularly relevant. There,
9 the Court held that no crime had been committed where a
10 defendant who collected spent shell case things on a
11 base believed they were abandoned, even in fact they
12 hadn't been legally abandoned. In this case similarly,
13 no crime was committed if the Defendant believed that
14 the bar letter had been effectively abandoned by the
15 military, whether or not that belief is legally correct.

16 Now, as I have indicated, the testimony is
17 that this man taught college courses on this base, had
18 conducted tours on the base, he had receipt of an
19 invitation in the newspapers and the radio inviting
20 everyone, without exception.

21 He knew of a recent decision of the District
22 Court there, Butler v. United States, involving a visit
23 by President Nixon to the base which had appeared to
24 hold that when the base is open to the public for this
25 kind of an event, the public can come on, without

1 exception.

2 QUESTION: Well, how does one come on and
3 teach a class on a base that's normally closed, without
4 some sort of permission?

5 MR. SIMS: Your Honor, it's inconceivable to
6 me that it would be possible to do it without
7 permission. This record doesn't answer the question
8 specifically whether he had the written permission of
9 the commander.

10 QUESTION: Because I take it that the rule is
11 at Hickham that people have to have permits to come on
12 the base.

13 MR. SIMS: That's what Mr. Strauss says. At
14 the time he went to teach these courses, it was -- I
15 think the record indicates five or six years after the
16 issuance of the bar letter. And under those
17 circumstances, it just seems to me plain, as I've
18 indicated, that in fact he believed and reasonably, if
19 reasonable belief is the test --

20 QUESTION: Of course, that isn't the basis
21 that the case was decided on.

22 MR. SIMS: That's true, Your Honor. And that
23 would leave this Court with a non-constitutional basis
24 for decision, but it was not the basis reached by the
25 Ninth Circuit.

1 QUESTION: I'm not sure it leaves us with a
2 non-constitutional ground, but it might have been a
3 ground that should be addressed below.

4 MR. SIMS: It might better have been,
5 Your Honor.

6 Now, turning to the constitution --

7 QUESTION: May I just ask this question? I
8 may have missed it, but in response to Justice Rehnquist
9 earlier, did you say the trial judge ruled that his
10 knowledge was totally irrelevant?

11 MR. SIMS: That's correct, Your Honor. The
12 case does not come here on a finding that he believed it
13 was effective. The case comes on a legal determination
14 that that knowledge is irrelevant.

15 QUESTION: And the Court of Appeals not only
16 didn't decide the staleness question, but also didn't
17 decide that question.

18 MR. SIMS: That's correct, Your Honor.

19 QUESTION: So there were two
20 non-constitutional issues they bypassed in order to
21 reach out and decide a constitutional question.

22 MR. SIMS: That's correct, Your Honor, and we
23 think that this Court can dispose of the case on either
24 of those grounds.

25 Now, we think that the Court, as I've

1 indicated, should decide this case on statutory
2 grounds.

3 QUESTION: You mean we should decide either of
4 those --

5 MR. SIMS: There's no question that you can.

6 QUESTION: Without remanding?

7 MR. SIMS: And I think that you can, without
8 remanding.

9 But if the constitutional arguments are faced,
10 we think that the judgment still has to be affirmed.

11 QUESTION: Well, was there a conviction in
12 this case?

13 MR. SIMS: There was a conviction,
14 Your Honor.

15 QUESTION: And what was the Defendant's
16 submission to the District Court?

17 MR. SIMS: The submission to the District
18 Court was that the bar letter was stale and that since
19 he believed the bar letter was ineffective, the crime
20 hadn't been committed --

21 QUESTION: But you've submitted your
22 constitutional ground?

23 MR. SIMS: And the constitutional claims were
24 submitted as well. Yes.

25 QUESTION: And the District Court reached the

1 constitutional ground and so did the Court of Appeals.

2 MR. SIMS: Well, the District Court held that
3 the bar order was not stale.

4 QUESTION: Right.

5 MR. SIMS: And that scienter was not
6 required. Knowledge was not required.

7 QUESTION: And upheld the --

8 MR. SIMS: And rejected the constitutional
9 challenge.

10 QUESTION: And the Court of Appeals just
11 reversed on the constitutional?

12 MR. SIMS: That's correct, Your Honor. I
13 think the Court of Appeals was correct on that ground as
14 well, whether or not it should have reached it.

15 As we've indicated in greater detail in the
16 brief, the total exclusion of an individual from a
17 public forum is subject to rigorous First Amendment
18 scrutiny under the compelling interest test. And since
19 the Government has brought this case here,
20 notwithstanding that footnote, essentially on accepting
21 that this was a public forum and arguing that O'Brien
22 nevertheless requires that the conviction be affirmed, I
23 will follow the Government's lead and assume that it is
24 a public forum and argue that O'Brien does not in fact
25 help the Government here.

1 Now, there is not a single case where the
2 Court has held that reasonable time, place, and manner
3 restrictions permit the exclusion of individuals from
4 forums and repeated cases, such as Heffran and Shad v.
5 Modifium and the City of Madison case, suggest precisely
6 the opposite.

7 The reason the Court had imposed a more
8 lenient First Amendment test under time, place, and
9 manner restrictions is precisely because the impact on
10 First Amendment rights is much less severe. The essence
11 of those regulations is that they do not respect
12 persons, and that they channel but do not forbid
13 expression within a forum.

14 QUESTION: This argument, Mr. Sims, on the
15 idea that there was a non-stale bar order issued.

16 MR. SIMS: That's right. Once I get to the
17 constitutional claims, I'm obviously assuming that
18 you've either not reached or decided the statutory
19 claims differently.

20 QUESTION: Mr. Sims, how do you draw the line
21 between that and the criminal case where you're given a
22 sentence and you're put on probation and told that you
23 can't go near a bank?

24 MR. SIMS: Well, I'm not sure what the First
25 Amendment interest is in that case, Your Honor.

1 QUESTION: Well, don't you have a First
2 Amendment right to go to a bank?

3 MR. SIMS: Well, assuming that you do,
4 Your Honor, it seems to me that under O'Brien, the
5 relevant question is whether the Government is
6 fulfilling its interest and in your situation --

7 QUESTION: Do you see anything wrong with
8 that? It's done every day.

9 MR. SIMS: I think it might well be
10 permissible, Your Honor.

11 QUESTION: It's done every day.

12 MR. SIMS: It might well be permissible and it
13 would be permissible under O'Brien, assuming that there
14 was a First Amendment interest precisely because the
15 Government interest was narrowly tailored.

16 QUESTION: He's told not to associate with
17 known criminals. It's done every day.

18 MR. SIMS: That's correct, Your Honor, and --

19 QUESTION: And they certainly have a First
20 Amendment right to associate with people.

21 MR. SIMS: That's correct, Your Honor. And if
22 in this case the Government had excluded Mr. Albertini
23 because of any similarly focused determination that he
24 presented a particular danger of harm at this open
25 house, there's no question, I think, under O'Brien that

1 the Government might well prevail.

2 I mean if he was engaged in this conduct at
3 the base and excluded, he would -- I take it -- have a
4 First Amendment claim. But there is no question it
5 would be rejected precisely because the governmental
6 interest would be furthered precisely -- would be
7 furthered precisely.

8 And therefore, whatever incidental impact on
9 the First Amendment right would be no greater than
10 essential to fulfilling that interest.

11 Now, I think it's inconceivable that this
12 Court would permit the Government to permit public
13 officials to exclude individuals from the mall or from
14 public auditoriums, such as in the Southeastern
15 Promotion case, merely on their say-so that they had
16 engaged in -- even if they're correct -- misconduct nine
17 years ago in the past.

18 And I don't think the Court would permit
19 criminal punishment if the legislature or Congress
20 permitted a statute authorizing punishment for violating
21 that kind of --

22 QUESTION: Mr. Sims, aren't you, for the
23 purposes of your constitutional argument, assuming we
24 have a valid bar letter and the reentry was within
25 reason -- you know, a prompt reentry?

1 MR. SIMS: I am, Your Honor, but I do think
2 it's relevant that bar letters are issued without
3 standards, and therefore that this case, aside from the
4 military base, is not materially different from a case
5 like Coons v. New York.

6 QUESTION: No, but the statute only applies to
7 military bases, and that's like saying -- that's the key
8 to the case.

9 MR. SIMS: Well, let me turn in a more focused
10 way to the bar letter practice which I think makes plain
11 that O'Brien doesn't cover this case.

12 Bar letters are issued, as we have indicated
13 in some detail in the brief, in extremely broad manner.
14 At some bases they're issued for all less-than-honorable
15 discharges, so that, for example, all homosexual --
16 people who are homosexual servicemen would get barred.

17 There's a regulation which apparently
18 contemplates the issuance of bar letters against people
19 who are misusing recreational jeep and snowmobiles on
20 military property.

21 QUESTION: This bar letter was not for
22 purposes such as that, however.

23 MR. SIMS: That's correct, Your Honor, but
24 this case comes to the Court simply on the ground that a
25 1972 bar letter for a misdemeanor -- which is what this

1 was -- is sufficient. And I think as the Court has
2 indicated in Clark and Heffran, the Court has to look at
3 the general question and not only at the specific
4 thing.

5 I mean the fact is that bar letters are
6 issued, as we've indicated, extremely broadly. And the
7 question under O'Brien, as this Court has gone through
8 that analysis in Taxpayers for Vincent and Grace, is
9 whether or not the enforcement of this content neutral
10 rule is broader than necessary to fulfill the
11 Government's interest.

12 Now, in Clark and Taxpayers for Vincent, in
13 finding the O'Brien test was essentially satisfied, the
14 Court was able to find that the O'Brien test was
15 absolutely satisfied because the determination of the
16 Court was that every additional demonstration overnight
17 or every additional sign was a marginal addition to the
18 precise evil that the Government had a right to
19 terminate, the esthetic evil, the protection of the
20 parks.

21 In this case on the other hand, if the
22 Government is correct that bar letters generally can be
23 enforced at open houses, there is no such focused
24 matching of the Government's interest and the First
25 Amendment right.

1 In fact, what will happen is that thousands of
2 people will be excluded, even though they don't present
3 the evil that the Government has a right to protect
4 itself from

5 Finally, the Respondent here was apprehended,
6 detained, and expelled together with his companions,
7 none of whom had previously been issued bar letters.
8 Their joint apprehension and expulsion makes plain, as
9 does the incident report on its face and the testimony
10 of Major Jones, that they were excluded because of
11 disagreement with what they were saying and their views.

12 On the facts of this case, therefore, we think
13 it's clear that the Respondents were subjected to 1382
14 because the commander objected to what was being said
15 and with the objectives of their protest.

16 This case would obviously be quite different
17 if the --

18 QUESTION: What form did that protest take, Mr
19 Sims?

20 MR. SIMS: Well, some of the individuals were
21 holding a banner and others were --

22 QUESTION: How many individuals were there?

23 MR. SIMS: There were six altogether,
24 Your Honor, and others were passing out leaflets, but
25 it's undisputed --

1 QUESTION: And the banners carried some
2 message?

3 MR. SIMS: Yes. There's a picture of the
4 banner in the joint appendix.

5 QUESTION: Don't bother. I'll find it.

6 MR. SIMS: At page 58.

7 QUESTION: Mr. Sims, you're referring to
8 Respondents, plural. I had thought we only had Mr.
9 Albertini before us.

10 MR. SIMS: You only do have Mr. Albertini
11 before you, Your Honor. The relevance of those other
12 individuals is that it makes nonsense, I think, of the
13 Government's claim that Mr. Albertini was proceeded
14 against, was apprehended and expelled.

15 QUESTION: Well, that sounds like a selective
16 prosecution claim you're talking about now. Did you
17 raise that argument below?

18 MR. SIMS: Your Honor, it's not a selective --
19 it might also be a selective prosecution claim, but in
20 this Court's cases involving --

21 QUESTION: Was that a claim you made below or
22 that was made below by Mr. Albertini?

23 MR. SIMS: Not in the form of a selective
24 prosecution claim, but we did argue below that the --
25 that this is impermissible for content based reasons;

1 that is, that he was apprehended and expelled and
2 detained and proceeded against because of disagreement
3 with his views.

4 It's raised in the Court of Appeals' brief at
5 page 32 and in the transcript in the District Court.

6 Now, as I've indicated, the relevance of the
7 fact that he was treated the same as those other
8 individuals is precisely that it shows that they were
9 treated the way they were treated because of a
10 disagreement with their views, what Major Jones called
11 the anti-defense character of their speech.

12 In cases even where the Court has found no
13 public forum, such as Greer and Adderly, the Court has
14 repeatedly said that if the rules were being enforced
15 because of that kind of disagreement, that the First
16 Amendment would be violated. And I think the record
17 fully supports the Court of Appeals' view here --

18 QUESTION: Your time has expired, Mr. Sims.

19 MR. SIMS: -- that it was that content that
20 precipitated it.

21 CHIEF JUSTICE BURGER: Do you have anything
22 further, Mr. Strauss?

23 MR. STRAUSS: One or two brief points, Mr.
24 Chief Justice.

25 ORAL ARGUMENT OF DAVID AARON STRAUSS, ESQ.

1 ON BEHALF OF THE PETITIONER - REBUTTAL

2 MR. STRAUSS: We brought the case here because
3 of the First Amendment issue, and it's our view that
4 that's the only issue that the Court need resolve and
5 should resolve.

6 As I said, the staleness question will be open
7 on remand, and before Respondent's position on that
8 question could possibly be accepted, we think we have
9 several substantial arguments that would have to be
10 considered. For example, it's not at all clear to us
11 that Respondent was entitled simply to ignore his bar
12 letter and go ahead and violate it.

13 If he thought it was stale, the bar letter
14 itself told him what he should do; he should seek the
15 permission of the commanding officer. And if the
16 commanding officer refused him permission, he could then
17 challenge that decision which we concede is reviewable
18 in court under a properly deferential standard.

19 QUESTION: May I ask you about the other
20 statutory issue, the intent issue. Do you agree with
21 your opponent's interpretation of the record that the
22 District Court ruled as a matter of law that intent was
23 irrelevant?

24 MR. STRAUSS: No, I disagree with that,
25 Justice Stevens. On page 41 of the Joint Appendix, the

1 District Court stated that the intent that is needed is
2 the intent present in intentionally and voluntarily and
3 knowingly entering the base and not stepping across a
4 line unwittingly.

5 Respondent conceded that he knew he had a bar
6 letter and that he knew he was on a military base. And
7 our view is that is the intent; that it's --

8 QUESTION: What if -- just assume that the
9 other court might have taken the view that the Defendant
10 had to be aware of the fact that the bar letter had not
11 become stale and that he did convince the judge -- just
12 assume it for a moment -- that he had gone on several
13 times and therefore reasonably assumed that it was no
14 longer in effect, that there's a policy of three-year
15 bar letters and so forth.

16 Would that not present an issue of law that
17 ought to be decided before the conviction is finally
18 final?

19 MR. STRAUSS: It would present an issue of
20 law. I would have two points to make, Justice Stevens.
21 One is that I'm not sure it was preserved on appeal. I
22 don't think it was among the issues raised on appeal by
23 Respondent.

24 And the other is that while it is an issue of
25 law, I think the answer is extremely obvious, that a

1 defendant in a criminal case, especially in a
2 prosecution under a statute like this, does not have a
3 reasonable mistake defense, a sort of Harlow v.
4 Fitzgerald defense, that while he actually -- his
5 conduct was illegal, he has the substantial argument
6 that it was not illegal, and therefore he should escape
7 from the liability.

8 QUESTION: Even if -- in other words, there's
9 no distinction between what in fact is reasonable and
10 what he might have thought was reasonable in your view?

11 MR. STRAUSS: The question whether it was
12 reasonable to continue the bar letter in force is an
13 objective legal question to be determined on all the
14 facts. If it's determined that it was reasonable to
15 continue it in force, then Respondent is liable, and the
16 fact that he has a substantial argument in the other
17 direction is not a means for him to escape from the
18 liability.

19 I know of no such principle in the law, and
20 certainly there's no reason to think Congress wanted
21 every defendant prosecuted under Section 1382 to be able
22 to say in his defense, well, I know I violated the
23 statute, but for this reason, and this reason, this
24 reason, and this reason I thought that perhaps my
25 conduct was legal. And if his view was in good faith,

1 he would escape punishment. There's no reason to think
2 that that was Congress's intent.

3 But as I say, these are the sorts of issues
4 including the question of whether that issue was even
5 preserved on appeal, that quite clearly we think should
6 be sorted out in the Court of Appeals on remand and not
7 by this Court at this time.

8 QUESTION: How long before a bar letter is no
9 good?

10 MR. STRAUSS: We think -- and I think I'm in
11 agreement with Mr. Sims on this point -- that it's a
12 question of reasonableness, Justice Marshall, under all
13 the circumstances.

14 QUESTION: And you leave us between zero and
15 what?

16 MR. STRAUSS: We would certainly leave you
17 between a short period of time and a lifetime. If a
18 person commits a sufficiently serious act or, like
19 Respondent, keeps committing one act after another --

20 QUESTION: Are we obliged to find that date?

21 MR. STRAUSS: Excuse me, Justice Marshall?

22 QUESTION: Are we obliged to find that date?

23 MR. STRAUSS: Certainly not, Justice
24 Marshall. The only question presented in the petition
25 is the constitutional question.

1 QUESTION: How many bar letters have been
2 received by Respondent at other bases?

3 MR. STRAUSS: We don't have the number, but
4 the district judge, in response to a question by the
5 district judge, he said he had collected one from pretty
6 much every base on Hawaii.

7 QUESTION: And Respondent didn't deny it, did
8 he?

9 MR. STRAUSS: No, he said pretty much every
10 base when the district judge asked him how many he --

11 QUESTION: How many bases are on Hawaii?

12 MR. STRAUSS: I'm not sure. At least three or
13 four.

14 QUESTION: More than that.

15 MR. STRAUSS: We also know that he collected
16 multiple bar letters from some bases.

17 QUESTION: Is it clear that for every bar
18 letter, he committed a crime? Or is it possible that
19 some of these bar letters were in response to First
20 Amendment protected activity?

21 MR. STRAUSS: I --

22 QUESTION: Which I assume you would concede
23 would be invalid.

24 MR. STRAUSS: If it were --

25 QUESTION: So you don't know whether any of
58

1 the other bar letters are valid or not, do you?

2 MR. STRAUSS: We don't know about the other
3 bar letters. It wasn't developed in the record.

4 If there are not further questions, thank you.

5 CHIEF JUSTICE BURGER: Thank you, gentlemen.
6 The case is submitted.

7 We'll hear arguments next in Northeast Bancorp
8 v. Federal Reserve.

9 (Whereupon, at 11:04 o'clock a.m., the case in
10 the above-entitled matter was submitted.)
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CERTIFICATION.

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#83-1624 - UNITED STATES, Petitioner V. JAMES VINCENT ALBERTINI

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BY Paul A. Richardson

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