

# TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of: )

MICHAEL BOOS, J. MICHAEL WALLER, )  
AND BRIDGET BROOKER, )

Petitioners )

v. )

MARION S. BARRY, JR., MAYOR )

DISTRICT OF COLUMBIA, ET AL )

No. 86-803

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2 -----x  
3 MICHAEL BOOS, J. MICHAEL WALLER, x

4 AND BRIDGET BROOKER, x

5 Petitioners x

6 v. x No.86-803

7 MARION S. BARRY, JR., MAYOR, x

8 DISTRICT OF COLUMBIA, ET AL. x

9 -----x  
10 Washington, D.C.

11 Monday, November 9, 1987

12 The above-entitled matter came on for oral argument  
13 before the Supreme Court of the United States at 1:58 p.m.

14 APPEARANCES:

15 RAYMOND D. BATTOCCHI, ESQ., Washington, D.C.; on behalf of  
16 Petitioners.

17 EDWARD E. SCHWAB, ESQ., Assistant Corporation Counsel for the  
18 District of Columbia, Washington, D.C.; on behalf of  
19 Respondents.

20 EDWIN S. KNEEDLER, ESQ., Assistant to the Solicitor-General,  
21 Department of Justice, Washington, D.C., as Amicus  
22 Curiae; in support of Respondents.

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P R O C E E D I N G S

1  
2 CHIEF JUSTICE REHNQUIST: Mr. Battocchi, you may  
3 proceed whenever you are ready.

4 ORAL ARGUMENT BY RAYMOND D. BATTOCCHI, ESQ.

5 ON BEHALF OF PETITIONERS

6 MR. BATTOCCHI: Mr. Chief Justice, and may it please  
7 the Court:

8 This case involves the constitutionality of both  
9 clauses of a District of Columbia statute initially enacted by  
10 Congress in 1938. After stating the case we propose to divide  
11 our argument into three parts.

12 First, we contend that the first clause of the  
13 statute, which prohibits the display of specified flags and  
14 banners, violates the free speech guarantee of the First  
15 Amendment.

16 Second, we contend that the second clause of the  
17 statute, which gives the police the power to disperse  
18 congregations within these 500-foot zones, violates the First  
19 and Fifth Amendments.

20 Our third and narrowest, contention is that both  
21 clauses violate equal protection, because the Legislature has  
22 allowed parties to labor disputes to utter precisely the same  
23 speech and precisely the same conduct that Petitioners cannot.

24 The facts are simple and relatively straightforward:  
25 Petitioners are three young political activists. Each wishes

1 to display signs containing messages critical of foreign  
2 governments and their policies and views on the public streets  
3 and sidewalks of the District of Columbia within 500 feet of  
4 the official government buildings they wish to criticize.

5 For example, some of the Petitioners who wish to  
6 display a pro-Sakharov, or a pro-Solidarity sign on Sakharov  
7 Plaza in front of the Soviet Embassy. One Petitioner wishes to  
8 display the American flag there. Another wishes to display a  
9 "stop the killing" sign in front of the Nicaraguan Embassy.  
10 Each Petitioner also wishes to congregate with two or more  
11 other people within the 500-foot zones, and each Petitioner is  
12 prohibited from either displaying signs or flags or  
13 congregating by Section 1115 of the D.C. Code.

14 There are numerous cases pending in the District of  
15 Columbia courts involving prosecutions under both clauses of  
16 this statute for displays of signs and congregations at the  
17 Soviet and Nicaraguan Embassies.

18 This is a 1983 suit that was instituted in the  
19 district courts seeking declaratory and injunctive relief; the  
20 district court on cross-motions for Summary Judgment, upheld  
21 both clauses of the statute and dismissed the Complaint.

22 The court of appeals in 1973 in the Zaimi case  
23 interpreted the first clause of the statute to apply only when  
24 there is a "display," of a flag or banner that produces one or  
25 more of the enumerated consequences specified later on in the

1 first clause. In this case, the court of appeals, perhaps  
2 narrowing that definition further, construed the first clause  
3 to apply only to demonstrations in which signs are displayed  
4 designed to bring foreign governments into public disrepute or  
5 public odium.

6 So far as we can tell, neither Respondents nor the  
7 federal government challenge that construction. In other  
8 words, under the first clause, the only thing that is  
9 proscribed is the display of a flag or banner or a sign  
10 designed or adapted to bring a foreign government into  
11 disrepute.

12 We note at the outset that under this construction of  
13 the first clause, no violence is proscribed: it is not illegal  
14 for Petitioners to demonstrate or for anybody else to  
15 demonstrate; it is not illegal under the first clause for  
16 anybody to engage in any violent conduct.

17 There is a reference, and maybe several implications  
18 in the brief of the Respondents and the United States'  
19 suggesting that the first clause serves an interest in  
20 protecting a security of foreign persons and property. The  
21 court of appeals itself acknowledged that, in fact, the  
22 security interests asserted by the government in the court  
23 below was insufficient to justify the first clause; according  
24 to the court of appeals, the only conceivable interest that  
25 would sustain the validity of the first clause over a First

1 Amendment challenge was the governmental interest in protecting  
2 the dignity of foreign persons and properties -- excuse me.

3           The essential holding of the court below was that a  
4 dignity interest on the part of foreign governments and foreign  
5 persons -- and by dignity interest, I mean "an interest in  
6 avoiding peaceful political insults," was not only a legitimate  
7 governmental interest, but an interest sufficiently compelling  
8 to override Petitioner's claim to First Amendment rights.

9           With respect to the second clause, the court of  
10 appeals narrowed its terms: the second clause on its face  
11 gives the police the power to disperse any congregation within  
12 the 500 foot zones and sets no limits whatsoever upon that  
13 dispersal power. The court of appeals read the dispersal power  
14 as "limited to those circumstances in which the police  
15 reasonably believed a threat to the security or peace of an  
16 embassy is present," and held that, "so-limited, the second  
17 clause suffers from no constitutional infirmities."

18           In our view, the first clause violates the First  
19 Amendment for several separate and independent reasons. We  
20 note at the outset that what is involved here is political  
21 speech on traditional public forums; Petitioners wish to speak  
22 out on interests -- on issues, involving foreign relations  
23 which are of the utmost public concern; they wish to do so at  
24 the seat of government, and therefore, in our view, this case  
25 involves the exercise of First Amendment rights in their most

1 highly protected form.

2 Our first contention in this regard is that the first  
3 clause violates the First Amendment because it is viewpoint-  
4 discriminatory. The first clause does not prohibit any and all  
5 displays of signs and does not prohibit any and all displays  
6 designed to communicate ideas. The only displays prescribed by  
7 the first clause are those which are "designed to bring a  
8 foreign government or its acts or officers or views, into  
9 public odium or public disrepute."

10 In short, Petitioner Brooker can stand in front of  
11 the Soviet Embassy and wave the Soviet flag: she cannot wave  
12 the American flag.

13 QUESTION: However, the government says that that is  
14 not a viewpoint-discriminatory on any basis established by the  
15 government. It is simply the policy of the particular embassy  
16 in question. And I think also they stated that there are not a  
17 lot of people standing in line waiting to wave an American flag  
18 in front of the Russian Embassy. This statute addresses things  
19 that actually happened, not hypothetical situations.

20 MR. BATTOCCHI: Well, if I can take the first part  
21 first, Mr. Chief Justice, this statute does proscribe an  
22 acceptable and an unacceptable point of view: if someone  
23 stands in front of any embassy with a message designed to  
24 disagree with the acts or policies of a foreign government,  
25 that is proscribed. Of course, the proscription depends in



1 part on a policeman's judgment as to what is designed to  
2 criticize a government and what is not.

3 QUESTION: But it is not enforcing a governmental  
4 point of view on anyone, not on the United States' governmental  
5 point of view on anyone.

6 MR. BATTOCCHI: The United States' governmental point  
7 of view mandated by Congress, is that views critical of foreign  
8 governments are illegal, but views supportive of foreign  
9 governments are not. That "governmental view" is embodied in  
10 the first clause.

11 As construed by the court of appeals, someone could  
12 stand in front of the Nicaraguan Embassy and hold up a sign  
13 saying, "We support Daniel Ortega." But if one word is changed  
14 on the sign, and the message is, "We oppose Daniel Ortega and  
15 we oppose the Contras," that is then proscribed and it becomes  
16 a criminal offense. So in our view, the statute is viewpoint-  
17 discriminatory in a very specific sense.

18 In some cases the Court has indicated that mere  
19 "content-based laws:" as I understand that term it means that a  
20 -- proscription of speech on all subjects except religion, for  
21 example, or all subjects except foreign affairs -- a content-  
22 based distinction is, if not a per-se violation of the First  
23 Amendment, one that raises serious constitutional questions and  
24 requires a compelling governmental interest in order to be  
25 sustained.

1           In this case we have a narrow proscription: this  
2 statute does not prohibit all speech -- it does not prohibit  
3 speech only on the subject of foreign affairs; it in fact  
4 singles out particular points of views.

5           QUESTION: But it does not prohibit speech anywhere  
6 else in the District of Columbia. On Conn -- con or pro on  
7 these things; it simply prohibits a particular kind of speech  
8 in a very narrow place right in front of a foreign mission.  
9 You can go anywhere else in the District of Columbia and say  
10 anything you want about the Nick - Nick -- Nicaraguan  
11 government pro or con, or about the Russian government.

12           MR. BATTOCCHI: That is true. The statute applies  
13 within the 500-foot zones. I do not think it is fair to say  
14 that it applies only in front of these buildings. It applies  
15 only in front of these buildings; the statute applies for a  
16 radius of almost two football fields around every foreign  
17 building in the District of Columbia.

18           It is also true that the statute is irrational in  
19 other ways: there is no proscription against speaking --  
20 individuals --

21           QUESTION: Are you suggesting that the statute just  
22 prohibited a lot diff -- a lot more speech, would be -- fare,  
23 better under the First Amendment?

24           MR. BATTOCCHI: Not at all: no. I make that  
25 argument only because it buttresses our "vagueness" contention,

1 and also shows in our view that the statute is arbitrary in  
2 terms of the way it is both enforced and written. No. We do  
3 not contend that a statute that prohibits more speech could be  
4 better than this one. We could --

5 QUESTION: Would it be more constitutional?

6 MR. BATTOCCHI: That is not our position. Our  
7 position is that, by discriminating between viewpoints, this  
8 statute essentially legitimatizes censorship: that is the  
9 position -- now.

10 QUESTION: Well, what if it just said, "No speech; no  
11 signs at all, within 500 feet of an embassy?"

12 MR. BATTOCCHI: Then the statute would not be  
13 vulnerable on a -- the basis of a viewpoint-discrimination or  
14 censorship attack, but the statute would, in our view, be  
15 invalid because of its overbreadth. If the statute said, and  
16 even as it is written, the statute does say, "there shall be no  
17 criticism of foreign governments," at least on picket signs,  
18 "anywhere within 500 feet of the official buildings of those  
19 foreign governments." That statute as-written, prohibits any  
20 kind of speech anywhere within what amounts to insult-free  
21 zones that cover a substantial portion of Northwest Washington  
22 D.C. in this connection.

23 QUESTION: Each zone covers a different insult?  
24 Right? I mean it is --

25 MR. BATTOCCHI: Each zone covers a different insult

1 free government, correct. But the effect of that kind of an  
2 application of the statute is to insulate foreign governments  
3 from insults against them throughout a substantial part of  
4 Northwest Washington.

5 QUESTION: That is not entirely correct. If you are  
6 talking about the Russian Embassy, for example, they are  
7 insulated within a 500-foot radius of their own building, which  
8 is a tiny fraction of the area of the District of Columbia and  
9 a small fraction of the area of Northwest Washington.

10 And the same is true of every other embassy. It is  
11 just when you lump them altogether in a way which does not  
12 really make much sense constitutionally that you could come up  
13 with a sort of analysis that you do.

14 MR. BATTOCCHI: What you say is absolutely correct,  
15 Mr. Chief Justice, except that in the view of these Petitioners  
16 and many others who depend upon effective picketing to convey  
17 their views, if picketing is going to be effective, it has to  
18 be carried out somewhere where the message conveyed has some  
19 meaning. If people stand 2.5 football fields from the Russian  
20 Embassy and are in front of a faceless office building and hold  
21 up a sign criticizing the Soviet Union, the effectiveness of  
22 that message is substantially diminished and the likelihood  
23 that --

24 QUESTION: The Constitution gives them the right to  
25 have the most effective possible situs for their message?

1           MR. BATTOCCHI: Absolutely not. No. Our contention  
2 in connection with an overbreadth argument is narrow: it is  
3 that (a) this statute prohibits only expression and no conduct;  
4 that is, it prohibits what is most protected by the First  
5 Amendment and does not prohibit what the government has the  
6 most legitimate interest in outlawing, and secondly --

7           QUESTION: What Iranian violence is that?

8           MR. BATTOCCHI: This statute does not prohibit  
9 violence in any way.

10          QUESTION: But are there not other D.C. statutes that  
11 prohibit violence?

12          MR. BATTOCCHI: Yes, and that is the question --

13          QUESTION: Well, does the government have to put  
14 every single prohibition possibly applicable into the same  
15 statute?

16          MR. BATTOCCHI: No, Mr. Chief Justice, but that is  
17 exactly our point: our point is, there are other statutes that  
18 prohibit violence and untoward conduct. And the government's  
19 interest in prohibiting that is fully satisfied by those other  
20 statutes.

21          This statute prohibits only speech in the first  
22 clause, and unless the prohibition of speech is a governmental  
23 interest, there is no reason why this statute should remain on  
24 the books.

25          I would like to go one step further and briefly

1 mention our additional contention that the statute is overly  
2 vague: the only criticism that is prohibited by the very words  
3 of the statute is that which is designed to bring a foreign  
4 government into public odium or public disrepute. Does that  
5 prohibit only the severest criticism or mild criticism of any  
6 kind? Stated differently, does this statute prohibit only that  
7 kind of vigorous, robust, wide-open criticism that has been  
8 constitutionally protected, at least since New York Times v.  
9 Sullivan, or does it prohibit even the most mild-mannered,  
10 gently-conveyed, political difference of opinion that has been  
11 constitutionally protected since Day One? The answer according  
12 to Respondents is, "it prohibits all criticism."

13 Well, that in our view serves to accomplish two  
14 results: first it dramatizes again the sweeping overbreadth of  
15 the scope of the first clause.

16 Secondly, it makes this statute vulnerable because as  
17 applied by these respondents, it is being enforced arbitrarily  
18 and discriminatorially. The Record it not only --

19 QUESTION: Is that before us, is that included in  
20 your Petition for Certiorari?

21 MR. BATTOCCHI: Yet, the issue -- it is encompassed  
22 within the issues in our view, Your Honor. We made that point  
23 in the Petition.

24 QUESTION: But do we have anything in the Record that  
25 goes to that, that the court of appeals passed on?

1 MR. BATTOCCHI: The court of appeals noted this in a  
2 footnote.

3 QUESTION: Yes.

4 MR. BATTOCCHI: Yes. We believe that the fact that  
5 the District of Columbia government and the Respondents are  
6 letting thousands of people violate the statute at the South  
7 African Embassy with impunity. But on the other hand are  
8 prosecuting everybody that demonstrates at the Soviet or  
9 Nicaraguan Embassies, is relevant in two respects:

10 First, it shows that the potential for arbitrary and  
11 discriminatory enforcement of the laws, which is an important  
12 consideration in any vagueness context, is not a theoretical  
13 one, but an active fact.

14 Secondly, in the "equal protection" context, to the  
15 extent the government argues that what is at stake here is a  
16 compelling governmental interest of great constitutional  
17 magnitude, it is relevant in that regard.

18 QUESTION: I frankly do not see which of your three  
19 Certiorari questions presents that issue.

20 MR. BATTOCCHI: Does it violate the First Amendment,  
21 Mr. Chief Justice, the first question? Does it challenge the  
22 statute on "vagueness" grounds? And the court --

23 QUESTION: Does it represent the issue of  
24 discriminatory enforcement?

25 MR. BATTOCCHI: Yes, as we read Kolender and many of

1 the other "vagueness" cases, the primary concern in the  
2 "vagueness" context is the potential for arbitrary and  
3 discriminatory enforcement. In our view here we not only have  
4 the potential for that, but the reality of it.

5 But also, just from a legal standpoint, in the "equal  
6 protection" context, the government's answer to our argument  
7 essentially is that the insult-free interest is one of great  
8 constitutional magnitude, a paramount value in our  
9- constitutional scheme, and in response to that, it is relevant  
10 for us to point out that the Record belies that assertion. If  
11 this interest is as paramount as the government contends, then  
12 how can it be that at the one place in the City of Washington,  
13 where there has been a great deal of exposure and where our  
14 activities are more visible to the world at-large than any  
15 place else, at the South African Embassy, they have let  
16 everybody violate the statute and get away with it. That  
17 certainly is relevant to whether the asserted compelling nature  
18 of this interest is in fact as important as the government  
19 suggests or whether the Record belies that assertion.

20 If I may, I would like to turn to the grounds upon  
21 which the government attempts to defend the first clause: the  
22 first interest asserted is the "dignity interest." As we  
23 understand the government's position, there is no dispute that  
24 this clause cannot be sustained as a reasonable or valid time,  
25 place or matter restriction because it is content-based and



1 therefore, by definition, not a valid time, place or matter  
2 restriction. The government's position is that the first  
3 clause serves to further a compelling governmental interest and  
4 is narrowly tailored to accomplish that end. The compelling  
5 interest is the so-called "dignity interest."

6 Again, the "dignity interest" asserted by the  
7 government is not an interest in the context of speech or the  
8 style of expression; it is not the difference between speaking  
9 through a loudspeaker system and conveying messages in a more  
10 delicate way -- the interest is an interest in avoiding  
11 political disagreements or political insults.

12 In our view, the simplistic view we take of this  
13 issue, the argument that the avoidance of political insults is  
14 a compelling governmental interest which can override First  
15 Amendment rights, is a contradiction in terms. Insofar as we  
16 can tell, even though the Article II makes the President and  
17 Commander in Chief, it is clear in the Court's prior decisions  
18 that members of the public have a right to politically  
19 criticize the President for his conduct in office. Ever since  
20 Bridges v. California through Linmark v. Virginia, it has been  
21 established, as we read the cases, that ordinary members of the  
22 public have a right to politically criticize or otherwise  
23 criticize judges and Justices for the way they carry out their  
24 duties.

25 As on the basis of what we understand about the

1 adoption and gratification of the First Amendment, it seems  
2 difficult to believe that those who wrote and ratified the  
3 First Amendment intended to empower the Congress to enshroud  
4 political opponents like King George or other world leaders, in  
5 an envelope that immunizes them from criticism. There was no  
6 reason two centuries ago why foreign leaders around the world  
7 should be protected from peaceful free speech from American  
8 citizens, and if anything, there is far less reason now.

9 As a practical matter in today's world --

10 QUESTION: Only in their embassies. You can  
11 criticize King George anywhere.

12 MR. BATTOCCHI: That is true, but that cuts two ways,  
13 Mr. Justice. In this connection we are addressing the  
14 legitimacy of the insult-free interest. If the insult-free  
15 interest is a legitimate one, for governments and for foreign  
16 officials, and it is sufficiently important to override First  
17 Amendment rights, then at a minimum, it should be applied  
18 evenhandedly. If it is not applied evenhandedly, if it is  
19 applied to people who depend upon picket signs to convey their  
20 views, it is not applied to others who own newspapers or own  
21 television stations, or who are even able to speak orally  
22 within the insult-free zones -- yes it is true that political  
23 insults are permissible everywhere outside the zones, but  
24 people have a right to be on the public streets and sidewalks  
25 in the District of Columbia --

1           QUESTION: But do you really contend that the  
2 statute -- that your argument would be cured by a statute that  
3 prohibited insults in all media that are available to the  
4 audience?

5           MR. BATTOCCHI: If I said or implied that, I  
6 certainly did not mean to. Absolutely not.

7           QUESTION: Well, if you are not implying it, why is  
8 the statute any better by suggesting that? What is your answer  
9 to it? I do not understand.

10          MR. BATTOCCHI: Could you ask the question again, Mr.  
11 Justice? I am not sure I have it.

12          QUESTION: Well, Justice Scalia asked you about the  
13 discriminatory aspect and you said, "well, it is bad because it  
14 is discriminatory. It only interferes with people who just  
15 have the means to carry a banner around in front of the  
16 embassy." And your cure for that would be, if your argument is  
17 valid, to ban it to everybody who wants to insult the  
18 ambassador.

19          MR. BATTOCCHI: I may have been addressing a narrower  
20 point than I should have: the insult-free interest is not  
21 legitimate anywhere inside or outside the zones --

22          QUESTION: And would the statute not be improved by  
23 broadening its coverage?

24          MR. BATTOCCHI: It would be made worse. It would be  
25 made more vulnerable to an overbreadth attack.

1           QUESTION: There is no "equal protection" problem  
2 here. I mean, the "one step at a time," approach to eliminating  
3 problems is well-established, right? You can reach some of the  
4 evils without having to reach all of the evils, can you not?

5           MR. BATTOCCHI: That is not the way we read this  
6 Court's "equal protection" decisions either.

7           QUESTION: So you are saying, then, that this statute  
8 would be better if it not only prohibited the picketing with  
9 signs within the 500 yards, but also speaking or anything else?  
10 That is a vice in and of itself, but it does not extend broadly  
11 enough within the 500 yards?

12          MR. BATTOCCHI: I certainly do not mean to convey  
13 that implication. This statute is bad (a) because it  
14 discriminates between points of views or between speakers; but  
15 (b) there is no right that prohibits anybody from speaking on  
16 political subjects at any times within these zones where people  
17 have a right to be. And to speak.

18          QUESTION: All right, but you do not say, "(c) if  
19 there is such a right, you cannot apply it just to signs and  
20 ont apply it to speaking?" You do not say (c)?

21          MR. BATTOCCHI: That is not a -- major point.

22          QUESTION: See I thought you were saying (c), major  
23 or minor, I do not care. You are not saying (c) at all?

24          MR. BATTOCCHI: I am saying that further demonstrates  
25 the irrational way in which the --

1 QUESTION: So you are saying (c)?

2 MR. BATTOCCHI: I am saying that that is a fact, not  
3 a major contention, yes.

4 QUESTION: It is a minor contention?

5 MR. BATTOCCHI: It is a matter on which -- upon which  
6 we rely.

7 QUESTION: Do you want to assert (c) or not, just  
8 tell me?

9 MR. BATTOCCHI: No, sir. No. But I would like to  
10 make this clear in case I have not: the "equal protection"  
11 claim we make is based upon the "labor exemption" in the  
12 subsequent statute; that is, Section 1116. The argument we  
13 make with respect to the "viewpoint-discrimination" is  
14 essentially a First Amendment argument, and that argument is,  
15 "some people, whoever they may happen to be, can go over to  
16 these zones and hold up signs expressing one point of view. It  
17 is permitted. If it is a contrary point of view it is  
18 proscribed.

19 QUESTION: Yes, but you cure that by saying, "no  
20 signs at all," and you say that is worse. Your real argument,  
21 as I understand you is, that, "the fact that the listener or  
22 the audience does not like what you have to say is simply not  
23 an acceptable justification for prohibiting speech." That is  
24 your whole argument.

25 MR. BATTOCCHI: It is certainly an important one, but

1 it -- yes, we make that argument. But --

2 QUESTION: Do you make nay other argument? I do not  
3 see it, if you do.

4 MR. BATTOCCHI: I would like to address the "equal  
5 protection" question just to make sure that there is no  
6 misunderstanding about this. The "equal protection" claim is  
7 based upon Mosley and Carey and relies upon a later exemption  
8 in the statute. The "equal protection" claim, qua equal  
9 protection, is based on the fact that the Legislature has said,  
10 "even within these zones, anyone who is a party to a labor  
11 dispute can perpetrate the insults or engage in the conduct  
12 that is otherwise proscribed to anybody else."

13 The "equal protection" argument presupposes, unlike  
14 the First Amendment argument, that it would be legitimate for  
15 the Legislature to enact an all-out all-encompassing ban on  
16 speech. But even in that narrow context, if the Legislature  
17 allows someone to enter the zones and to utter insults under  
18 Mosley and under Carey, everybody else has to be allowed in.

19 If I have not made this clear, I want to make it very  
20 clear: we are not conceding in any way in a First Amendment  
21 contest, that it is proper to prohibit anybody from engaging in  
22 political free speech on any of these streets or sidewalks  
23 where the public has a right to be or which are traditionally  
24 used for expressive activity.

25 Briefly, I would like to mention, again in response

1 to the "dignity-interest" claim, the existence of the federal  
2 statute nationwide which has fulfilled for the past decade or  
3 more the government's interest in ensuring the dignity and  
4 peace of foreign embassies throughout the United States in all  
5 of the 50 states. In connection with that statute, the  
6 Congress in 1972 imposed a ban on picketing that was content-  
7 neutral. In 1976 it came along and repealed the ban because of  
8 its concerns that prohibiting this speech was a violation of  
9 the First Amendment.

10 If Congress has ratified -- has implemented treaties  
11 entered into by the United States and concluded that peaceful  
12 picketing is not something which it can constitutionally  
13 proscribe in any of the 50 states, in our view it follows that  
14 the insult-free interest is no more legitimate in the District  
15 of Columbia.

16 I would like to mention just briefly our claim with  
17 respect to the second clause: the second clause on its face I  
18 think even Respondents concede, is overbroad. It gives the  
19 police completely limitless power to order dispersals of any  
20 congregations within the zone at any time. The court of  
21 appeals has narrowed the second clause. In our view it should  
22 not have done so, since it --

23 QUESTION: Did it narrow it or did it interpret it?  
24 Which do you say?

25 MR. BATTOCCHI: I think it rewrote it.

1           QUESTION: Yes, and you think it did not have the  
2 authority to do that, I suppose, is that one of your  
3 contentions?

4           MR. BATTOCCHI: Yes, Mr. Justice. But in the --

5           QUESTION: Even though the -- Court of Appeals for  
6 the District of Columbia could have?

7           MR. BATTOCCHI: As I understand the unique system we  
8 have here, the Court of Appeals for the District of Columbia is  
9 the functional equivalent of a state supreme court for these  
10 purposes, for purposes of interpreting a law applicable only in  
11 the District. In that context, the only appropriate limiting  
12 construction is one that is readily apparent and one was not  
13 here.

14           But briefly I would like to address the clause as  
15 narrowed by the court of appeals: It can mean one of two  
16 things. It gives the police power to disperse anybody if they  
17 conclude that a threat to the "peace" of the embassy is  
18 present. If that means what it normally means in a domestic  
19 breach of the peace context, then the statute is  
20 unconstitutional for the reasons that have been set forth in  
21 Cox and in many other cases. If the term, "peace" is more  
22 broadly-construed, the way apparently the majority interpreted  
23 it here to apply even to peaceful political insults, then a  
24 fortiori, the power to disperse those is overbroad.

25           QUESTION: Did you ask for a Rehearing in the court



1 of appeals?

2 MR. BATTOCCHI: No, Mr. Justice, we did not.

3 QUESTION: And they did not go to a vote on a  
4 Rehearing sua sponte? On their own?

5 MR. BATTOCCHI: No, Mr. Justice.

6 I would like, if I may, to save a minute or so for  
7 rebuttal.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Battocchi.  
9 Mr. Schwab, we will now hear from you.

10 ORAL ARGUMENT BY EDWARD E. SCHWAB, ESQ.

11 ON BEHALF OF RESPONDENTS

12 MR. SCHWAB: Thank you, Mr. Chief Justice. May it  
13 please the Court:

14 Congress has reached a constitutionally permissible  
15 balance in enacting this statute: the balance is between  
16 strong national interests which support restrictions on  
17 demonstrations in the area of foreign embassies on the one  
18 hand, and on the other hand, the rights of demonstrators who  
19 seek to demonstrate at embassies and other property of foreign  
20 governments. The restrictions on speech are modest. The only  
21 restriction on demonstrations is within the immediate vicinity  
22 of foreign embassies; that is, within 500 feet of them.

23 The statute was enacted 50 years ago by Congress; it  
24 was enacted because the State Department and the Metropolitan  
25 Police Department that existing law was adequate to deal with

1 demonstrations that were then being conducted near a number of  
2 embassies. It had the strong support of the State Department:  
3 Secretary of State Hull requested that the statute be enacted.  
4 It was drafted by the Chairman of the Foreign Relations  
5 Committee, and the statute has been repeatedly upheld in  
6 litigation in the lower federal courts in the District of  
7 Columbia.

8 QUESTION: But Congress and the President apparently  
9 no longer have any interest in it, is that right? I mean, it  
10 was originally a federal statute, but now it is a D.C. statute  
11 and Congress seems to have, with the approval of the President,  
12 seems to have worried about whether it was too broad and  
13 instead of deciding that itself, passed the buck to the D.C.  
14 government, suggesting that they re-examine it.

15 MR. SCHWAB: Congress has delegated this matter to  
16 the City Council and has suggested to the Council that it re-  
17 examine the statute, but the delegation itself indicates that  
18 the obligation of the United States being performed here in  
19 providing protection into these embassies, the statute also  
20 indicates that the Council should seek advice from the  
21 Secretary of the Treasury and the Secretary of State, and in  
22 fact has done that.

23 The Secretary of the Treasury's interest is involved  
24 because the Secret Service provides protection to foreign  
25 embassies. So we do not believe that there has been any

1 congressional abandonment of national interests here; and  
2 certainly the Executive has not abandoned this, because they  
3 have been, the Executive, has been quite heavily involved in  
4 matters before the Council.

5           Representatives from the State Department and the  
6 Department of Justice and the Treasury Department have all  
7 testified; they have all submitted written statements --  
8 Secretary Schultz has submitted a written statement, which is  
9 attached to the government's brief, the U.S. brief, in this  
10 case, and of course, they strongly support the statute as  
11 amicus curiae here.

12           So we do not feel --

13           QUESTION: It just seems to me to be a very peculiar  
14 way for the federal government to vindicate an assertedly vital  
15 federal interest to leave it to a city council to vindicate  
16 this enormous -- this protection, for foreign diplomats. It is  
17 assertedly so important that it warrants the silencing of  
18 speech. Have they delegated this to any other city councils in  
19 New York or elsewhere?

20           MR. SCHWAB: Well, the principal responsibility for  
21 protecting embassies in New York City falls on the New York  
22 Police Department. There is federal reimbursement for that,  
23 but the New York City Police Department is the agency that  
24 primarily protects foreign diplomats who live in New York City.

25           QUESTION: Could New York adopt a municipal ordinance

1 like this and purport to be vindicating a federal international  
2 interest?

3 MR. SCHWAB: Well, New York has adopted procedures  
4 that are very similar to 22-1115. We have discussed them in  
5 our brief. Though those procedures were upheld in litigation,  
6 basically what is done near the Russian Embassy in New York, is  
7 that there is a bull-pen about 120 feet from the Russian  
8 Embassy, the Embassy there to the U.N. where they let a small  
9 number of demonstrators picket in that bull-pen, and then any  
10 other demonstrations have to take place two or three blocks  
11 away from the Embassy. So that --

12 QUESTION: But the federal government has not  
13 intervened to establish any procedures there? They have left  
14 it up to the municipalities?

15 MR. SCHWAB: I am not sure of the extent of their  
16 involvement there. I do know that the current appropriations  
17 Act has a \$7 million reimbursement to the City of New York for  
18 performing these functions. That is the State Department  
19 appropriations. We have discussed that briefly in our brief.  
20 I am sorry I cannot give you the page number, but it is --

21 QUESTION: This is for the U.N. and all that  
22 business?

23 MR. SCHWAB: Yes.

24 QUESTION: Well, that is a whole lot different from  
25 here.

1           MR. SCHWAB: Yes, it is different from this because  
2 in New York they are representatives in our country, but they  
3 are primarily to an international organization, while in the  
4 District of Columbia the representatives from foreign nations  
5 are representatives certified to this government. So there is a  
6 bit of a difference here.

7           And we believe that that difference would support  
8 this statute more strongly.

9           QUESTION: What is the difference in the federal  
10 interest?

11          MR. SCHWAB: I am sorry?

12          QUESTION: Does the city have any interest other than  
13 that of the federal government in this law?

14          MR. SCHWAB: No, other than the same interest that  
15 all citizens have in this country. There is no independent  
16 District of Columbia interest here.

17          QUESTION: Why does the federal government put them  
18 up to it?

19          MR. SCHWAB: The federal government did not enact --  
20 I mean Congress, enacted this statute in 1938. Last year,  
21 Congress considered amending the statute and rather than doing  
22 that, it delegated that authority to the District of Columbia  
23 Council. Now, if the Council alters this law, then of course,  
24 anything that they enact has -- would not be effective until  
25 after a congressional layover period, and the Congress during

1 that period could adopt a joint resolution to alter anything  
2 the Council does.

3 QUESTION: But the Secretary of State sent a letter?

4 MR. SCHWAB: That is correct.

5 QUESTION: And told them to do it?

6 MR. SCHWAB: No, no. The Secretary of State has sent  
7 a letter to the Council, informing the Council that it believes  
8 that strong national interests support the current statute in  
9 that ---

10 QUESTION: Well I said that "he told them they should  
11 do it," and what do you say?

12 MR. SCHWAB: The Secretary of State is saying, "do  
13 not change the law."

14 QUESTION: May I ask, when you refer to the Secretary  
15 of State's letter, he indicates that it is terribly important  
16 to "ensure that the United States missions abroad receive  
17 reciprocal treatment."

18 Are there any other foreign governments that impose a  
19 500 foot buffer zone around our Embassies, or any foreign  
20 governments that prohibit marching in front of one of our  
21 Embassies with a hostile sign?

22 MR. SCHWAB: I do not know of any, Your Honor, but --

23 QUESTION: Then "reciprocal treatment" does not seem  
24 to justify the standard.

25 MR. SCHWAB: I do not think that -- from what I

1 understand about "reciprocal treatment," it is not precise  
2 reciprocity. What it is is comparable protection.

3 QUESTION: What is the buffer zone in any other  
4 foreign country that you are familiar with? Maybe it is not  
5 500. Is it 400?

6 MR. SCHWAB: I am sorry, I cannot answer that  
7 question.

8 QUESTION: What about signs? Do any of them prohibit  
9 anything even similar to signs, flags, parades? Out in front  
10 of our embassies?

11 MR. SCHWAB: I am sorry, I cannot answer that either.

12 QUESTION: Mr. Kneedler, who is representing the  
13 United States, may be able to answer that question. But from  
14 what I understand, the primary concern with regard to  
15 reciprocity, and that is in the declaration of James Nolan, who  
16 is Chief of Foreign -- I believe Chief of Foreign Missions from  
17 the State Department -- what the State Department wants is a  
18 situation where we provide protection at a substantial level in  
19 this country to foreign missions so that these matters can be  
20 negotiated with foreign governments, and that where we believe  
21 that insufficient security is provided around our Embassies  
22 elsewhere, we can -- our representatives, can meet with  
23 representatives with foreign governments and negotiate improved  
24 security, and that if we -- they -- we cannot --

25 QUESTION: Is it our foreign policy to object to

1 hostile signs in front of our Embassies?

2 MR. SCHWAB: I know of only -- I think that there  
3 are some such objections, yes.

4 QUESTION: Unfriendly signs? Pardon me?

5 MR. SCHWAB: I think there have been such objections,  
6 Your Honor.

7 QUESTION: Tell me the process for the D.C. Council's  
8 changing this law. Could it be done by a simple vote of the  
9 Council? Would it have to be approved by the President? Does  
10 the President have any --

11 MR. SCHWAB: The process would be for the Council --  
12 the President has no involvement.

13 QUESTION: None at all?

14 MR. SCHWAB: The Council would enact a provision,  
15 like any other Council law, then that is submitted to the Mayor  
16 of the District of Columbia. The Mayor can either sign or  
17 veto. If the Mayor vetoes, then it goes back to the Council  
18 and then they can override by I believe a two-thirds vote.  
19 Then, if it is signed or the veto is overridden, it is  
20 submitted to Congress and then there is a 30-day period -- I  
21 believe 30 legislative days, or roughly comparable legislative  
22 days, in that the provision sits before Congress, and Congress  
23 can then pass a joint resolution of disapproval. The joint  
24 resolution would require Presidential signature. So the only  
25 time the President would ever get involved is where Congress



1 has voted to disapprove or to somehow alter an act of the  
2 Council.

3 The only presidential involvement that there has been  
4 in this whole area is that the President signs the home rule  
5 legislation, which gave the District Government its limited  
6 home rule.

7 QUESTION: I suppose there may be some question as to  
8 whether he has to sign the disapproval? The congressional  
9 disapproval?

10 MR. SCHWAB: Well, there is some question as to  
11 whether he has to sign, but I mean, as far as the Constitution  
12 is concerned, but I believe the law has been changed so that  
13 the only way to disapprove is by joint resolution, and that  
14 joint resolution requires either a veto or a signature. It  
15 requires presentment.

16 QUESTION: Mr. Schwab, is the Council considering  
17 changes in this statute?

18 MR. SCHWAB: Yes, the Council has introduced a bill  
19 that is a very similar to 18 U.S.C. Section 112.

20 QUESTION: And what has happened to that?

21 MR. SCHWAB: It has held hearings on the bill; it has  
22 heard testimony from many interested organizations in the  
23 District; it has heard testimony from the State Department;  
24 from the Treasury Department and from the Department of  
25 Justice. And it has received Secretary Schultz' letter. As

1 far as I know, nothing further has occurred after the hearings.

2 QUESTION: What changes will it make, Mr. Schwab, if  
3 it becomes law?

4 MR. SCHWAB: Well, the primary change that would be  
5 made, I think, is that picketing would be permitted. Actions  
6 that, of demonstrators, that affect ingress or egress to  
7 embassies would be unlawful -- I mean that impair ingress or  
8 egress -- any acts of coercion or intimidation or threatening  
9 actions -- that would be prohibited by the law.

10 Now, my time is just about up. I would like to say  
11 that we believe that the Decision of the court of appeals  
12 should be affirmed. We believe it is very soundly reasoned,  
13 and now you will hear from Mr. Kneedler, who will state the  
14 interest of the United States. Thank you.

15 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Schwab.

16 Now we will hear from you, Mr. Kneedler.

17 ORAL ARGUMENT BY EDWIN S. KNEEDLER, ESQ.

18 AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

19 MR. KNEEDLER: Thank you, Mr. Chief Justice and may  
20 it please the Court:

21 The Petitioners in this case lose sight of the fact  
22 that the target of the demonstrations in this case is not an  
23 organ of domestic government, as has been true in most of the  
24 cases that this Court has considered, such as the Edwards case  
25 and the Grace case. It concerns the diplomatic representatives

1 of a foreign government and a foreign mission in the seat of  
2 government in the United States. And the function of a  
3 diplomatic mission such as that is not to either participate in  
4 or to be the staging ground for domestic political disputes or  
5 controversies within the United States. It has a quite  
6 distinct function of carrying on that country's diplomatic  
7 mission with the United States Government, and as a matter of  
8 practice, and as a matter of obligation under the Vienna  
9 Convention on Diplomatic Relations, those dealings with the  
10 United States are to be carried on directly with the United  
11 States Government and the foreign embassy has an obligation to  
12 remain removed from the internal affairs of the United States.

13           These considerations set a diplomatic mission in the  
14 District of Columbia apart from the domestic political process.  
15 In our view, that unique status of diplomatic missions under  
16 the Constitution and under the First Amendment means that  
17 Congress may interpose what is here a modest geographical  
18 separation between the diplomatic representative of a foreign  
19 government and persons in the United States who seek to  
20 demonstrate against the position of the foreign government.

21           Or, as Senator Pittman, the principal sponsor in 1938  
22 put it, "all the statute seeks to do is to protect the  
23 representatives and the mission from having criticism of their  
24 government brought to their attention right in their faces."

25           QUESTION: But that is not this statute.

1 MR. KNEEDLER: That is the statute, Your Honor.

2 QUESTION: I thought this was an act of the District  
3 of Columbia.

4 MR. KNEEDLER: No. This statute was enacted by  
5 Congress in 1938 at a time when there was considerable --

6 QUESTION: And then it later was dropped, was it not?

7 MR. KNEEDLER: No, the statute has not been repealed  
8 or affected. There was a proposal in 1986 to repeal the  
9 statute, in fact the Senate passed that. The Congress declined  
10 to repeal it. What Congress did instead was pass a sense of  
11 the Congress' resolution and asked the District of Columbia  
12 government, the Council, to consider whether revisions in the  
13 statute might be appropriate. But the statute as enacted by  
14 Congress remains on the books and Congress declines to repeal  
15 it.

16 QUESTION: Has it been enforced?

17 MR. KNEEDLER: It is being enforced, yes.

18 QUESTION: The statute?

19 MR. KNEEDLER: The statute is being enforced.

20 QUESTION: Who is enforcing it?

21 MR. KNEEDLER: The responsibility under the statute  
22 resides with the Metropolitan Police Department.

23 QUESTION: That is what I thought.

24 MR. KNEEDLER: But that has been true from the  
25 outset. The enforcement of statutes such as this has always

1 been the responsibility of the Metropolitan Police Force.  
2 There is no general federal police force in District of  
3 Columbia. The Metropolitan Police Force, even before home  
4 rule, was the principal entity for these things. The Secret  
5 Service does have backup responsibility. The Secret Service is  
6 very interested in this statute because of its importance in  
7 establishing a security perimeter around embassies. But the  
8 day-to-day enforcement, the arrests under it are made by the  
9 Police Department.

10 QUESTION: Mr. Kneedler, K confess that I am inclined  
11 to view a statute dealing with this subject that is passed by  
12 the Congress quite differently from one that is passed say by  
13 the Omaha City Council, which may desire to protect a consulate  
14 in Omaha. I originally thought that this was a federal  
15 statute; it originally was a federal statute?

16 MR. KNEEDLER: And it still is a federal statute.

17 QUESTION: Well, it is, but when Congress passes I  
18 guess what is referred to as a "Sense of the Congress  
19 Resolution," but which in effect says to the District  
20 government, "you decide what to do with this thing." It may  
21 well violate the Constitution. Is that an expression by  
22 Congress that it really is not calling the shots with respect  
23 to this any more? And leaving it up to the District of  
24 Columbia government?

25 MR. KNEEDLER: I think not. Not completely and not

1 finally. First of all, Congress, as Mr. Schwab mentioned, has  
2 the responsibility and the authority to review statutes passed  
3 by the District of Columbia government, so if this should be  
4 repealed or revised, Congress has the authority to overturn  
5 that.

6 Secondly, when Congress sent it to the District of  
7 Columbia government, it in no way disclaimed the important  
8 national interest and law of nations underlying it. In fact,  
9 it recognized that there were security interests and said that  
10 they may have to be balanced against other interests.

11 And thirdly, Congress quite specifically said that  
12 the D.C. Council should take this into account with the views  
13 of the Secretary of State and the Secretary of the Treasury  
14 because of their diplomatic and security interest in the  
15 matter.

16 QUESTION: But that certainly is an abnegation, at  
17 least, of any views by the Congress on the point. Congress is  
18 basically saying, "well, we really have not made the judgment  
19 that the international interests require this any more."

20 MR. KNEEDLER: No. The judgment -- what Congress  
21 said is, "we have not made the judgment that the interests that  
22 underlay the statute in 1938 are no longer in force." Congress  
23 again -- had before it a proposal to repeal this statute and  
24 declined to do it. So as far as the law, as it now stands,  
25 22-1115 is still on the books as Congress passed it, and the

1 Executive Branch, the Secretary of State, the Secret Service,  
2 and the Justice Department have all strongly opposed any  
3 reduction.

4 QUESTION: Has the Federal Government made New York  
5 City do anything like this?

6 MR. KNEEDLER: Well, the Federal Government has not  
7 attempted to do -- what the United States does in New York is  
8 to cooperate with the city police in New York in establishing  
9 appropriate security perimeters around U.N. missions up there.

10 But the District of Columbia --

11 QUESTION: Have they tried to make New York pass a  
12 bill like this?

13 MR. KNEEDLER: No, they have not tried. But their  
14 alternative --

15 QUESTION: Is there any reason why? It is more of it  
16 in New York than there is here.

17 MR. KNEEDLER: Perhaps Congress could enact a  
18 nationwide statute. It so far has chosen to concentrate on the  
19 seat of government of the United States.

20 QUESTION: Because they ride herd on the District of  
21 government. They have the veto power on the District of  
22 government. Is that not the reason?

23 MR. KNEEDLER: That is one of the principal reasons.  
24 And also as the affidavit of one of the State Department  
25 officials in the Record says, foreign governments attach

1 particular importance to what happens in the District of  
2 Columbia precisely because it is the seat of government of the  
3 United States. We have here not simply consulates but the  
4 embassies of foreign governments which are the symbolic  
5 presence of those governments in the United States. And so any  
6 violation of the security or dignity of an embassy would have  
7 particularly grave consequences as viewed in another nation.

8 QUESTION: Mr. Kneedler, do you think that the court  
9 of appeals has the authority to narrow the construction of a  
10 D.C. ordinance?

11 MR. KNEEDLER: Well, I think that -- I agree with  
12 Justice White. I would not say it is a narrowing, I would say  
13 that it is an interpretation of the statute against the  
14 background --

15 QUESTION: Well, do you think that the court of  
16 appeals has the authority to narrow the construction of a D.C.  
17 ordinance?

18 MR. KNEEDLER: Yes, and in this case we agree with  
19 the District of Columbia on this point. They have a footnote  
20 in their brief in which they say where the statute involved  
21 affects important federal interests rather than purely local  
22 interests, that the D.C. Court of Appeals does have that  
23 authority. And 22-1115 was enacted by Congress to serve  
24 important national and international interests. So yes, we do  
25 think that. And in any event, I think that this Court has that



1 authority to attach the construction that was given to the  
2 second clause by the Court of Appeals.

3 QUESTION: Mr. Kneedler, can I ask a question? The  
4 two -- two justifications for the statute are for security on  
5 the one hand and the dignity interest on the other. Do you  
6 think the security interest by itself is sufficient to justify  
7 the first clause of the statute?

8 MR. KNEEDLER: Perhaps not in every application.  
9 Certainly the sort of demonstrations that -- one category of  
10 demonstrations Congress was responding to in 1938 involved  
11 picketing by 30 or 40 people or even larger demonstrations. I  
12 think at that point the security interests coincide with the  
13 dignity interests. As the, if you get down to a single picket,  
14 then the security interest may be reduced. Although, even so,  
15 a hostile picket at least carries some potential beyond an  
16 ordinary pedestrian.

17 QUESTION: Let me ask the other question, then: do  
18 you think the dignity interest by itself would be sufficient to  
19 support the first clause?

20 MR. KNEEDLER: Yes I do. And the dignity --

21 QUESTION: That is because we do not want to insult  
22 our guests when they are invited here on a diplomatic mission?

23 MR. KNEEDLER: That is a part of it. The Vienna  
24 Convention to which the United States is a party, requires  
25 party-states to take appropriate steps to protect the peace of

1 a mission against impairment, and to protect the dignity of a  
2 mission.

3 Now, "appropriate steps" is something that depends  
4 upon what is appropriate under the laws of that country.

5 QUESTION: Is the Convention essential to justify the  
6 statute in your view?

7 MR. KNEEDLER: Well, the Vienna Convention simply is  
8 a culmination or a codification of a duty to protect the  
9 dignity of foreign missions that antedated it. In fact, when  
10 Congress enacted this statute in 1938 --

11 QUESTION: Would it be constitutional to have a  
12 statute that said that "at no diplomatic gathering in either  
13 the White House or the State Department, shall any guest say  
14 anything offensive to any Ambassador?"

15 MR. KNEEDLER: I do not know that that would be -- I  
16 mean, that would obviously raise separate questions. There may  
17 be --

18 QUESTION: But is that not precisely the same  
19 question that a person walking in front of the embassy with a  
20 sign --

21 MR. KNEEDLER: Well, I think Congress may well have  
22 that authority. It would be quite similar in this unique  
23 context to a "fighting words" sort of statute, which is what we  
24 analogize this statute to, words that are particularly likely  
25 to cause offense, and "something delivered face-to-face," which

1 is the phrase that the Court used in Chaplinski --

2 QUESTION: That is what I am thinking of, a face-to-  
3 face comment to the Ambassador. Could we make it a crime to  
4 say something unpleasant to the Ambassador at a social  
5 gathering?

6 MR. KNEEDLER: Well, it depends -- yes. But again --  
7 unpleasant in the way the statutes speak to --

8 QUESTION: Yes, criticizing his government's policy?

9 MR. KNEEDLER: That is right. And that is not far-  
10 removed from the sort of words that were discussed in  
11 Chaplinski itself, where the Court was referring to words that  
12 were, "damn fascisti" and that sort of thing spoken word-to-  
13 word, or face-to-face, and if a legislature can do that with  
14 respect to two citizens on the street, it can surely do that to  
15 prevent offense to --

16 QUESTION: So you agree that is the same case as this  
17 statute?

18 MR. KNEEDLER: Yes. In this case we are talking  
19 about -- I think that this case is even stronger where we have  
20 a specific diplomatic undertaking in the conventions which  
21 Congress recognized in 1938, not to protect any insults in the  
22 newspaper or anywhere else, but to protect the premises, and  
23 that the purposes of this are related to the diplomatic  
24 immunities that go back 200 years, which are to enable citizens  
25 to -- diplomatic personnel to operate with independence and to

1 be free from intimidation and coercion. And this being free  
2 from picketing that might undermine the independence of  
3 diplomatic personnel is critical to the performance of the  
4 diplomatic function.

5 QUESTION: It would not be violated by someone  
6 standing right at the front door and yelling insults?

7 MR. KNEEDLER: This statute has been construed to  
8 reach that, although there may be a breach of the peace statute  
9 that would separately reach that.

10 I would like to make several other points in closing.  
11 I do not have this much time: with respect to the reciprocity  
12 point that Justice Stevens mentioned, at page 14 of our brief,  
13 we reproduce a paragraph from the Record that explains the  
14 importance that the State Department attaches to this statute  
15 in urging foreign governments to establish a security perimeter  
16 around --

17 QUESTION: Have any done so? Have any established a  
18 500 foot --

19 MR. KNEEDLER: Not in the form of statutes, but this  
20 is -- the Vienna Convention refers to taking appropriate steps,  
21 not to be appropriate in the ---

22 QUESTION: But have any of them taken either of the  
23 two appropriate steps, one a 500 foot buffer zone, or two, no  
24 signs in front of the embassy?

25 MR. KNEEDLER: Not specifically a 500 foot buffer

1 zone. As this passage recites, the State Department has been  
2 successful in establishing some security perimeter, some space  
3 in which demonstrations, including signs, cannot occur. So  
4 that has happened. And when you determine what is appropriate  
5 under the Vienna Convention, it is sensible to take into  
6 account the special sensitivity in this country to giving local  
7 police too much discretion in deciding how far away a  
8 demonstration should be located or how it should be conducted.

9 The Court's Decision last term in Houston v. Hill is  
10 the latest example of a case where the Court was concerned  
11 about testing that discretion. This statute, 22-1115 has as a  
12 virtue of establishing a clear rule that both the Secret  
13 Service can work and respect that diplomatic personnel know  
14 that they are secure within that 500 foot perimeter, and  
15 demonstrators know precisely where the borderline is in terms  
16 of what they can do and what they cannot.

17 And this statute has been on the books for 50 years  
18 and has operated with that 500 foot buffer zone around U.S.  
19 Embassies in the United States, and it has operated  
20 efficiently, and nothing in this Court's First Amendment  
21 jurisprudence requires that that congressional judgment be  
22 overturned.

23 There are other examples where the nature of the  
24 forum allows these sorts of restrictions. The jails in  
25 Adderly, Cox v. Louisiana, with respect to picketing near

1 courthouses, are very similar. In fact, Cox rests on a number  
2 of the same considerations that underlay 22-1115, which is the  
3 importance in that case to protect the judicial function; in  
4 this case to protect the diplomatic function, from both real  
5 and apparent political pressures, and to allow it to function  
6 freely without the outside interference that might be more  
7 appropriately be directed at the political branches of the  
8 United States Government.

9 So as we have set forth in our briefs, Cox v.  
10 Louisiana is dispositive of this case.

11 I would also like to say that, under this Court's  
12 decision in Renton, this is not a case that -- this is not a  
13 statute that should be viewed as resting on any judgment of the  
14 United States with respect to the viewpoint of the content of  
15 what is being said. This is a statute that is not justified on  
16 the content, but is instead justified on the content neutral  
17 consequences that would flow from the sorts of demonstrations  
18 that the statute is directed to.

19 QUESTION: District Police do not enforce the  
20 statute. What does Congress do about that?

21 MR. KNEEDLER: Well, Congress certainly has oversight  
22 responsibilities over the District police. I would like to say  
23 that the claim as I understand that Petitioners have is not  
24 that the statute is not being enforced -- arrests are made at  
25 the South African Embassy. I think they are referring -- they

1 are objecting to whether prosecutions then go forward. And  
2 that issue is not in this case. The court, the panel, declined  
3 to reach that question.

4 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Kneedler.

5 Mr. Battocchi, you have one minute remaining.

6 ORAL ARGUMENT BY RAYMOND D. BATTOCCHI, ESQ.

7 ON BEHALF OF PETITIONERS -- REBUTTAL

8 MR. BATTOCCHI: Mr. Chief Justice, if I have not made  
9 this clear, I would like to. The Vienna Convention of 1961 is  
10 the only treaty that is implicated here. That is the document  
11 that prescribes the international obligation to protect foreign  
12 missions. The Congress implemented that treaty in 1972 through  
13 18 U.S.C. 112, which is the nationwide federal statute. That  
14 statute prohibits conduct, but does not prohibit speech, at  
15 least by implication. Congress, in passing a nationwide  
16 federal statute, has concluded that the First Amendment does  
17 not allow it to proscribe speech that is insulting to  
18 foreigners.

19 As one final point, the District of Columbia has a  
20 police line regulation which was upheld in the Cullinane case.  
21 It allows the police to remove people from areas, to set up a  
22 police line to keep them out of areas when they reasonably think  
23 is necessary to protect persons and property. That police line  
24 regulation would remain standing even if the second clause is  
25 stricken and would give the District of Columbia police all the

1 authority they legitimately need to protect the persons and  
2 property of any foreign governments or forcing officials.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Battocchi.  
4 The case is submitted.

5 THE MARSHALL: The Honorable Court is adjourned until  
6 tomorrow at 10:00.

7 [Whereupon at 2:57 the case in the above-entitled  
8 case was submitted.]

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REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-803

CASE TITLE: MICHAEL BOOS, J. MICHAEL WALLER, AND BRIDGET  
BROOKER v. MARION S. BARRY, JR., MAYOR, D.C., ET AL  
HEARING DATE: November 9, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence  
are contained fully and accurately on the tapes and notes  
reported by me at the hearing in the above case before the  
Supreme Court of the United States,  
and that this is a true and accurate transcript of the case.

Date: November 9, 1987

*Margaret Daly*  
\_\_\_\_\_  
Official Reporter

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