ORIGINAL

LIBRARY
SUPREME COURT, U. S.
WASHINGTON, D. C. 20543

In the

Supreme Court of the United States

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.,

PETITIONERS

V.

ALBERT EDWARD GLINES,

RESPONDENT.

No. 78-1006

Washington, D. C.
November 6, 1979

Pages 1 thru 44

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

HAROLD R. BROWN, SECRETARY OF DEFENSE, ET AL.,

Petitioners

v. No. 78-1006

ALBERT EDWARD GLINES,

Respondent.

Washington, D. C.

Tuesday, November 6, 1979

The above-entitled matter came on for argument at 11:00 o'clock a.m.

BEFORE:

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

APPEARANCES:

KENT L. JONES, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioners

DAVID M. COBIN, Hamline University School of Law, 1536 Hewitt Avenue, St. Paul, Minnesota 55104; as Court appointed Counsel for Respondent

C O N T E N T S

MR. CHIEF JUSTICE BURGER: Let's begin. Brown against Glines.

Mr. Jones, you may begin.

ORAL ARGUMENT OF KENT L. JONES, ESQ.,

ON BEHALF OF PETITIONERS

MR. JONES: Mr. Chief Justice, three years ago when Greer v. Spock this Court upheld an Army regulation that required the approval of the base commander before written materials could be distributed on base. The court held that the regulation was facially valid and valid as applied to the distribution of political leaflets by civilians on base.

In this case the Ninth Circuit has held that essentially identical Air Force regulations are invalid when applied to the distribution of petitions by servicemen upon base. The case arose in 1974 when respondent was on active duty in the Air Force Reserves. He prepared petitions addressed to members of Congress and to the Secretary of Defense opposing military hair length standards. He was informed by a military attorney at Travis Air Force Base in California where he was stationed that on base distribution of petitions required prior approval but the off base distribution did not.

Respondent decided simply to distribute the petitions off base in locations near the base. But one week later he took a training plane to Guam and while he was at the base in Guam he distributed copies of his petitions to personnel at the

Guam Air Force Base without seeking command approval. Because of this violation of the regulation he was transferred by the Air Force from active to inactive reserve status.

Respondent then brought this suit and the courts below declared the Air Force regulations to be invalid and ordered Respondent's reinstatement to active duty. The Court of Appeals held that the regulations are unconstitutional as applied to the distribution of petitions in general and are also invalid under 10 U.S.C. 1034 as applied to petitions to members of Congress.

We seek reversal of these two rulings and I will address the constitutional issue first.

The District Court in this case entered declaratory relief. We haven't sought a stay of that. They also ordered reinstatement but that judgment presumably is held in abeyance pending the review in this Court.

QUESTION: There isn't an order oustanding enjoining the enforcement of these regulations?

MR. JONES: Not precisely in this case. In the case that follows, Huff v. Secretary of the Navy, there is an injunction. In this case what the Court of Appeals enjoined the Navy from doing was when Respondent is returned to active duty the Navy cannot -- I don't mean the Navy -- the Air Force cannot apply its regulations to restrain distribution of the particular petition to restrain distribution of the particular

petition that was involved in this incident.

QUESTION: You don't challenge the right of the particular Respondent in this case to make the petitioning that he did do?

MR. JONES: No, we don't.

QUESTION: Do you challenge his right to be reinstated?

MR. JONES: Well, we haven't sought review of that issue. If we are correct that the regulations are lawful, then he would not be reinstated. The judgment of the Court of Appeals is based upon the theory that the regulations were unlawful.

QUESTION: I may have the two cases confused, but the Government had in effect conceded that the regulations were improperly applied to the particular litigants in the case.

MR. JONES: No, that is the other case.

QUESTION: That is the other; not this case. I am sorry.

MR. JONES: In this case he directly violated the prior approval requirement by distributing without seeking approval

QUESTION: The distribution was on the base.

MR. JONES: It was on the base

QUESTION: In violation of the statutes -- the

provision of the Air Force.

MR. JONES: Yes, it was.

QUESTION: The only question remaining is whether that violates the Constitution?

MR. JONES: Or U.S.C. 1034.

QUESTION: The distribution as well by Sergeant Wolf as well as Captain Glines.

MR. JONES: Well, the District Court found that the -- that Captain Glines violated the regulation and I think if you look at the affidavit that was filed by the serviceman in connection with the complaint, attached to the complaint you will see that what he said happened is that Captain Glines approached him in a service bay area, gave him a copy of the petition --

QUESTION: That is him, Sergeant Wolf?

MR. JONES: Yes, sir. Gave Sergeant Wolf a copy of the petition, told him he ought to sign it and get other people to sign it and after it is signed to send it to an address in California.

There hasn't been any dispute that if the regulations are lawful he violated the regulations. He may have been in dispute at the complaint stage but it is not in dispute at this point.

QUESTION: Well, again, his violation was handing the piece of paper, not the oral statements; is that right?

MR. JONES: That is correct.

QUESTION: He can make the oral statements. If he didn't have the piece of paper in his hand wanting people to sign this, he could have said to the man, "I would like you to draft a letter saying the same thing my letter said"?

MR. JONES: Yes. I don't think there is any question about that.

QUESTION: And is the reason there is no question about it that it is not prohibited by the regulation or that it is protected by the Constitution or the statute? Which is your reason?

MR. JONES: Well, I think the reasons come very close together and I think that that will be more evident as I get into my argument.

The regulations in this case concern only the public solicitation of signatures and the distribution of petitions on military bases. Under these regulations any servicemen they privately solicit and may distribute petitions off base as Respondent Glines did in this case without seeking or requiring or needing command approval. But when solicitation or distribution occurs on base the approval of the base commander must be sought and here as in Greer v. Spock the commander must approve on base distribution unless it would clearly endanger military discipline, loyalty or morale or materially interfere with a military mission.

Now, we submit that the regulations challenged in this case are constitutional for the same reasons stated by the Court in Greer v. Spock. The Court held in Greer that military bases such as the Guam Air Base and Travis Air Base are not public forums, that is unlike parks and city streets, military bases should not traditionally serve as places for public assembly and expression. Their traditional function, as the Court stated in Greer is to train soldiers to fight or to be prepared to fight and not to provide a forum for public speech activities.

Because of this, as the Court held in Greer, there is no historical or constitutional basis for right of access or use of military bases for public speech purposes. And military regulations that conditionally authorize public solicitation and distribution of petitions on bases thus do not entrench upon, abridge or deny any preexisting constitutional right. To the contrary, they establish a conditional regulatory right that previously did not exist and it is because of this that the Court rejected in Greer without comment the claim that the regulations are an over-broad or a prior restraint on speech. The regulation's don't interfere with preexisting right.

As the Court indicated in the Lehman case, when a non-public forum is opened on a conditional basis for public speech, it is the equal protection clause that determines

whether the conditions of access or use are constitutional. And here as in Lehman, it isn't arbitrary, capricious or invidious for the military to choose to authorize on base petitioning activities, only when they do not clearly endanger military loyalty, discipline and morale and will not materially interfere with assigned military missions.

The limitation, to use the Court's language in the Police Department v. Mosley is tailed to serve a substantial Government interest. It focuses precisely on the abuse to be controlled.

The Court of Appeals reasoned that this case was distinct from Greer because this case involves servicemen who want to exercise speech rights on military bases, while Greer concerns civilians. But for servicemen, as for civilians, military bases have not served traditionally as forums for public expression and certainly not as forums for the distribution of leaflets and petitions. These and other forms of on base public expressive activities such as demonstrations and picketing have always been subject to command approval and indeed are subject to similar regulatory restrictions as those involved in this case.

The fact that servicemen rather than civilians are involved in this case supports the regulation. The military's authority over the speech and conduct of servicemen is necessarily far broader than its authority over similar conduct

by civilians on military bases. For one thing, servicemen are Government employees and this Court has held that the Government may reasonably limit speech and various forms of political activity by its employees when necessary to achieve effective government. And, in particular, in the context of soldiers the Court has held in Parker v. Levy that military may properly prohibit speecy by servicemen that undermines discipline and order.

It would be incongruous to conclude that servicemen have a greater right of public expression on military bases than do civilians.

The Court was of course aware in Greer v. Spock that servicemen were subject to the Army regulation as well as civilians and there is no basis for distinguishing this case from Greer on the ground that servicemen as well as civilians are involved here.

Well, even if we are wrong about that and even if Greer is wrong, that military bases should be or are open to public speech activities, the challenge regulations would not be unconstitutional even under the principles applicable to public forums. The substantive goal advanced by the regulations is undeniably of great importance. The prohibition of on base distributions that clearly endanger effective military performance is obviously related to a fundamental --

QUESTION: Before you leave entirely your first submission, do I correctly understand your first submission is that the First Amendment simply has no application to military bases and therefore even oral statements back and forth between servicemen may be prohibited?

MR. JONES: No, our submission is that the First Amendment doesn't create a right of use of public speech on military bases. Now, the private speech of servicemen would be subject to regulation under the Parker v. Levy standard.

QUESTION: But if it is speech that does not create any clear and present danger or interference of discipline or anything else, it would be constitutionally protected on the base?

MR. JONES: Private individual communications between servicemen would certainly we think be constitutionally protected except to the extent that Parker v. Levy allowed the military a broader scope to regulate --

QUESTION: You don't have anything as in Parker v. Levy where it is in effect you might say almost treasonable or at least advocating a course of action. Somewhere you said something you said, I think we ought to do something about the lousy food here. You say that that is a constitutionally protected comment?

MR. JONES: I think it would be; yes.

Even in a civilian context the Government could

refuse any use of a public facility that would create a clear danger of disorder and the regulation is quite narrow in its effect. Servicemen are free to discuss political ideas both on and off bases. They are free to petition as individuals while they are on bases; when they are off duty under current military procedures they can leave, they don't need a pass; like civilians, they can go off the base and engage in public petitioning activities.

As Mr. Justice Powell stated in his concurrence in Greer, in view of the availability of these other avenues of expression the military prior approval requirement is justified in this narrow context by the unique need of the military to insist upon a respect for duty and discipline that has no counterpart in civilian life. We think this need is equally important at the advance Strategic Air Base in Guam where this case arose and at the combat ready marine facility in Japan where the Secretary of the Navy v. Huff arose as at the basic training facility in New Jersey involving Greer v. Spock. The regulations are thus constitutional even if military bases were a public forum.

The Court of Appeals also held that the Air Force regulations are invalid as applied to petitions addressed to members of Congress under 10 U.S.C. 1034.

QUESTION: Again, before you leave your second submission if I may to be sure I understand it, why would you

concede that you can say orally that the food is lousy and we ought to do something about it, and disagree with the motion "Let's all sign a petition to the commanding officer asking him to give better food"? Why is one more disruptive than the other in terms of the clear and present danger test or whatever your standard is?

MR. JONES: Well, you are referring just to the second part of our submission.

THE QUESTION: Yes.

MR. JONES: I am not sure that we would take the position that that petition should be prohibited under the regulation. I think that it would almost certainly be allowed for distribution. So under the second --

THE QUESTION: Well, why does he have to ask permission to do something in writing he need not ask permission to do orally?

MR. JONES: Well, you are referring to what is the inherent distinction then between petitioning and simply private communication and the distinction is obviously we think that the petition has an immediate capacity to reach a far broader audience, to create a far more disruptive effect within the military and more directly impact upon the military's interest in discipline and morale and achieving its missions. It is a difference in quantity, if not in quality, and I think it is a difference in both.

QUESTION: What if he gave this appraisal of the quality of the food to an entire platoon; is that a private communication?

MR. JONES: Well, if you did it, they were all standing together in a public area of the base, I suppose that would be a public communication. It would be hard to --

QUESTION: By a private communication, you meant a couple of G.I.'s grousing in the barracks?

MR. JONES: That would be a typical example of that. Captain Levy's statements in Parker v. Levy, were made in a private context. He spoke to several troops but I don't think that he massed people together and was attempting to have a demonstration. If he had done that it would have been easily sanctionable under some other provision of the Uniform Code of Military Justice.

The problem in Parker was that he did speak privately in a manner that was sanctionable under the Constitution.

QUESTION: I may be dense here, but I still am still a little unclear on the distinction. Say you have got a group of men that are sitting around having dinner in the barracks somewhere. It is a non-work area, it is not a public speech or anything. Do you draw a distinction between asking permission to criticize in a loud voice at the table what is being served on the one hand; and on the other hand,

supplementing that with a written piece of paper saying, Let's all sign and send it to the commander? And why is one more disruptive than the other? That is your distinction, isn't it?

MR. JONES: Our distinction is a practical one. As a practical matter -- I mean I think you are talking about a line drawing problem and I don't dispute that there are going to be occasions when private communications can have just as disruptive effect on base --

QUESTION: Well, the word "private" is a little misleading because both communications are equally either private or public, whichever way you characterize it. There are 35 people there and one time it is totally orally and the other time it is supplemented.

MR. JONES: Well, I think the petition is inherently public because it is designed to be sent somewhere.

QUESTION: Well, the statement to the 35 people is also designed to get them to do something about the lousy food. The petition is designed to get somebody else other than those 35 to do something about the lousy food.

MR. JONES: That is certainly one characteristic that makes the petition inherently more public.

QUESTION: Well, also the petition serves to put in some sort of distributable form the opinion of those 35 people if they all sign it.

MR. JONES: That is right and --

QUESTION: You may orally be able to walk away and say all 35 agreed with me but if they have signed a piece of paper, it is something else again.

MR. JONES: I think those are the distinctions that are involved. I do think that it is not easy on the margin to know which where the effect is going to be greatest. But certainly in -- this is a challenge to the regulations on their face and as a practical matter the regulatory restriction of petitioning is response to the --

QUESTION: I can understand petitioning is more likely to be effective for the reasons that my Brother White identifies. But the question is, which is more disruptive I suppose; and therefore justifies prohibition?

MR. JONES: I certainly think the petitioning is more disruptive. As I mentioned before, if it is designed to be circulated the regulation prohibits the distribution of petitions. If it is designed to be distributed through the facility, then obviously it is going to reach a far broader audience than any group of people sitting around having lunch might talk about a problem.

QUESTION: I just wonder if that is universally true. Here you had a petition with eight people and my example was 35. You are drawing a constitutional distinction now

MR. JONES: Well, the military is drawing a

distinction based on the evil that it has designed its regulation to prevent and I think as a practical matter on an aggregate basis its distinction is defensible. I think that it would be harder to defend a regulation that simply said any form of public expression is subject to regulation. By focusing on petition they focused on a concrete type of expression that is traditionally and I think inherently public in nature.

The statute that the Court of Appeals ruled -- based its ruling on concerning petitions to members of Congress is 10 U.S.C. 1034. That statute is brief, and I will quote it:

"No person may restrict any member of an armed force in communicating with a member of Congress unless the communication is unlawful or violates a regulation necessary to the security of the United States."

Well, from 1951 when this statute was enacted until 1978, the consistent administrative and judicial construction of the statute was that it applies to individual communications such as letters but is inapplicable to group petitioning activity. Indeed, in Carlson v. Schlesinger, decided three years before by the District of Columbia Circuit, the court construed the statute to apply only to individual correspondence. The language and the history of the statute support that interpretation.

There is no question whatever why this statute was enacted.

In 1951 a sailor had been threatened with a courts martial if he wrote a letter to his congressman without sending it through the Navy chain of command as Navy regulations then required. Congressman Byrnes learned of the incident and canvassed the services and determined that only the Navy imposed such a restriction on individual correspondence. The Air Force for example informed Congressman Byrnes, and I quote:

"Any airman's personal correspondence remains a matter entirely of his own choice."

Congressman Byrnes proposed this statute to make the Navy's practice uniform with that of the Army and the Air Force by overturning the Navy's restriction on individual communications.

Congressmen Byrnes and Vinson thus stated twice on the floor of the House that what this statute does is, and I quote:

"Permit any serviceman to sit down and take a pencil and paper and write to his congressman or senator."

The sponsors could not have been more clear in stating the limited objective of this legislation.

The Court of Appeals discarded the statements of legislative intent on the theory that the word "communication"

employed in the statute necessarily include petitions as well as correspondence. But we don't dispute that any individual letter stating a grievance can be characterized as a petition. But what the statute was designed to protect was the individual's private communications to Congress, not public, on base group activity. Nothing in the regulations in this case interferes with any serviceman's individual communications, however they are described. The regulation encompasses only what the statute doesn't: public activities, distribution of petitions on base rather than the communication of the petition, the private communication, to Congress.

When Congress is legislated with respect to group petitioning activity in other contexts,it is done so expressly. 5 U.S.C. 7102 was enacted 40 years before this statute. And it provides that the right of civil service employees, and I quote:

... individually or collectively to petition Congress may not be interfered with or denied."

Congress had a model if it wanted to reach collective group petitioning activities. But in 10 U.S.C. 1034, the language is limited to individual communications because the evil the Congress had before it was interference with the privacy of those communications.

Assuming that the statute applies to group petitioning, the challenge regulations are nonetheless valid because they

don't restrict the communication of the petition. The kind of restriction that Congress was it enacted the statute was on the communication itself on the requirement that the Navy then had that private letters be sent through the chain of command. Well, the regulations don't restrict communications in that sense. Any letter or petition may be sent to Congress wholly without military review.

What the regulations restrict is the use of military bases, ships and aircraft as forms for solicitation and distribution. It is the military's unwillingness to provide a forum for this conduct in limited circumstances.
A restriction on the communication of the petition to Congress. It is only if the statute intended to impose affirmative obligations on the services to open military facilities to conduct traditionally prohibited. Certainly nothing in the statute or in its legislative history indicates that this is what Congress intended.

We agree with Judge Tamm in his dissent in the Huff case that it is inconceivable that Congress in 1951 in the middle of the Korean War intended to create a public forum right for group petitioning activities on military bases. Group action as in the distribution of petitions on military facilities is not mentioned even briefly in the legislative history. And because the regulations don't restrict communications within the meaning of the statute they are

not invalid under 10 U.S.C. 1034.

There are additional points to be made on this issue. The next case to be argued also raises the atatutory issue.

I would like to reserve the balance of my time for rebuttal in this case.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Jones.

Mr. Cobin.

ORAL ARGUMENT OF DAVID M. COBIN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

Does military security require the abridgement of a fundamental right, the right to petition the Government to redress grievances by means of a prior restraining, one of the most extraordinary remedies known to a jurisprudence?

The Government has never demonstrated that it does, not in the District Court and not in the Court of Appeals and not in this Court.

The Government's position is that -- as I understand it, that circulating petitions by its nature somehow leads to a breakdown of military capacity.

QUESTION: How capable are judges deciding that as opposed to base commanders?

MR. COBIN: Well, Your Honor, I think that judges

are in many ways in a better position to decide on a constitutional basis.

QUESTION: They are more neutral, certainly; but as a factual matter how capable are they?

MR. COBIN: I believe, Your Honor, that if the military commanders could separate themselves from their positions, desiring only that activities they desire to take place continue, if they do not have the respect for the right to petition as the commanders involved in these cases have, then they would be in a good position, Your Honor. But, they are not able to separate themselves.

QUESTION: In any event, necessarily the Congress when it put in those conditions required the Judiciary to apply them, didn't they? -- in case of controversy.

MR. COBIN: Yes, Your Honor.

QUESTION: Did Congress really make a declaration -- if I understood your language correctly -- that these episodes lead to or -- or that on the basis they have a tendency to lead to --

MR. COBIN: You mean --

QUESTION: Congress didn't say that every action in violation of this statute leads to breakdown in morale and loyalty in a military organization.

MR. COBIN: Mr. Chief Justice, you used the term "Congress." Do you mean the military commanders in this case

or the Secretaries who drafted the regulations that were enforced?

QUESTION: The regulation that separates. When Congress acted after Congressman Byrnes introduced this provision and what he said in both the introduction and Chairman of the Military Affairs Committee Carl Vinson said, was this was intended to make sure that every service person could sit down with his pencil and write a letter to his congressman. Now, the Congress was saying there that they were preserving that right; Congress didn't think that was going to bring any breakdown. But the regulations are cast in terms of the general tendency and propensity of public activities, are they not?

MR. COBIN: They are directed specifically -- the Air Force regulation of course is directed specifically at the circulation of petitions.

QUESTION: That is quite different from sitting down with your pencil. As Congressman Carl Vinson said --

MR. COBIN: In terms of the acts involved it is certainly different, but in terms of the effect it has on military security I believe that is not true.

The position that the Government has taken I believe contains several fundamental errors. And one of those errors is that somehow petitions lead to grievances rather than grievances leading to petitions. Those who circulate

petitions have a grievance and the question is whether the traditional means of expressing a grievance to the Government by petitioning including the peaceful circulation of petitions is an option. I would like to give an illustration which I think at least demonstrates in these cases that the right to circulate a petition is a less of a danger to military asecurity than the abridgement of it, or it could be.

The USS HANCOCK and the USS RANGER in the years 1972 and 1973 were berthed next to each other at Alameda Naval Air Station when they were not at sea. In fact the trial of Allen v. Monger partially took place on board the USS RANGER. Both ships contained military personnel who didn't want the ships to go to sea. In the case of the USS HANCOCK, one member of the crew requested permission to circulate a petition, it was denied, he circulated it any way, and he was punished for it. Five other members of the ship filed a suit asserting their right to circulate that petition. That ship did sail and it sailed with all five of the servicemen aboard.

QUESTION: Well, don't you think there is a tendency in a case like that for the military complement on the ship to be less willing to obey orders if they just had a petition circulated to them saying let's cut out this business of sailing?

MR. COBIN: No, Your Honor. The petition in the particular case was asking Congress to look into the necessity

of making a cruise.

QUESTION: What if the petition had simply been not to Congress but to other servicemen into the base or to the commanding officer of the ship saying, We think it is a terrible idea to sail tonight and we want you to call the thing off?

MR. COBIN: The question is whether that would have a tendency to make the members of the ship less mindful of orders?

QUESTION: To participate in the maneuver which had been ordered.

MR. COBIN: I would suggest that the trained members of the service would not have that tendency.

However, if there were a petition it is certainly possible for a petition to be inflammatory as any statement could be inflammatory, but the Uniform Code of Military Justice would permit stopping of that petition if it had such a tendency in the punishment of the petitioner without the regulations that are challenged here.

QUESTION: How? By trial after it was circulated?

MR. COBIN: Trial after the initiation of circulation.

QUESTION: Well, so if the military mission would still be interfered with.

QUESTION: No, Your Honor, I do not believe that

is true. This Court in Parker v. Levy and in Middendorf v. Henry insured the power, the ability of a military commander to bring -- to swiftly control any disturbance.

QUESTION: Well, but you just said that under the Uniform Code of Military Justice all that can be done is to punish after the petition is circulated and you conceded that that is all that can be done, as I understand, even with an inflammatory petition that could impair the willingness to obey orders.

MR. COBIN: Well, Mr. Justice Rehnquist, Article 134 authorizes punishment, and I am quoting, of "all disorders and neglects to the prejudice of good order and discipline."

I do not believe that an extensive circulation would be required for a commanding officer to act under that provision.

At the first sign of danger, that through the authority given commanders under the Uniform Code of Military Justice by means of non-judicial punishment or summary court martial with informal procedures or a special or general court martial with formal procedures that the person causing the problem could be punished and the acts could be stopped.

QUESTION: Wouldn't it be better assurance of the security of the Nation in its performance to require advance clearance?

MR. COBIN: No, Your Honor, and that is because

the -- since grievances do not go away the person who would circulate a petition peacefully may choose some other means of expressing the grievance. And the illustration that I want to give is on the USS RANGER the serviceman who did not want the ship to leave didn't circulate a petition but dropped a wrench in the gears, and that ship didn't go out for four months and it cost the Government $800,000 to repair the damage.

QUESTION: You say this is kind of an outlet for throwing monkey wrenches into the machinery?

MR. COBIN: It is the outlet that was selected by history and by the Constitution and remains to be the legitimate outlet for the expression of grievances. The distinction that was made by Professor Calvin in the Law Review article that was cited by both the Government's brief and in my own. It distinguishes between three ways of expressing grievances. One Professor Calvin calls a revolutionary act, and Captain Levy in Parker v. Levy did such a revolutionary act. Another is civil disobedience. And the third is peaceful protest. Professor Calvin calls peaceful protest the purest exercise of First Amendment freedoms. And the peaceful circulation of a written petition is the most -- is the purest form of exercising peaceful protest.

Referring to the speech of Mr. Justice Rehnquist I quoted in my brief, I understood two points relevant to this

case to be made in that speech.

One of those points was that orderly expression serves constitutional goals. And the other is that everyone must recognize that that right of orderly expression belongs to all.

QUESTION: Well, no one really doubts that orderly expression serves those purposes in a public place by civilians. The question is much narrower than that here.

MR. COBIN: But Mr. Chief Justice, for a serviceman the place where the serviceman lives and works and does day to day activities is on a military base. In the case of Allen v. Monger for instance the place where circulation was attempted was a ship. That ship was at sea eight months of the year. The only place that the expression of grievances could take place during that eight months is on board a ship. For servicemen the ship is -- the public place is on board the ship, is the public forum. I do not believe a public forum must be found to the exercise of the right to petition. However, for the serviceman this is the public forum.

The Government has made the distinction between public acts and public speech and private speech. But the particular facts of this case indicate how circulation of petitions can very well be a private speech and how the particular regulation completely eliminates the ability to

enage in that speech.

The Respondent in this case was on an overnight stop-over in Guam. He was on Guam only for eight hours, from midnight until 8:00 in the morning. The ground crew came aboard the plane to clean the plane and one of them was handed a copy of the petition. He took it back to his barracks and eight signed it. This is the normal kind of speech activity that the Constitution was designed to protect. It was done peacefully, it was done privately, it created no disorder until the commanding officer reacted to the exercise.

It is the Respondent's position that the role of commanding officer should not be to restrain peaceful petitioning but to encourage it. The Respondent does not dispute the authority of commanding officers to make appropriate time, place and manner restrictions. Peckham in the lower court decision in Allen v. Monger specifically listed time, place and manner restrictions that would be appropriate for an aircraft carrier.

QUESTION: What does Judge Peckham know about an aircraft carrier?

MR. COBIN: Well, Judge Peckham toured the USS RANGER to assist him in making that determination, Your Honor.

QUESTION: Well, does he know as much as a commanding officer of an aircraft carrier?

MR. COBIN: No, Your Honor, I am sure that he does

not.

However, what Judge Peckham did conclude was that --

QUESTION: Even though Judge Peckham knows a little bit more about constitutional law.

MR. COBIN: Yes, sir, a good deal more about constitutional law.

And Judge Peckham concluded that there were places on board that ship that peaceful petitioning without face to face proselytizing could take place peacefully without disrupting the ship.

MR. COBIN: We are talking about two different things and I certainly agree with my Brother Stewart that Judge Peckham undoubtedly knows more about constitutional law than the commanding officer of the ship; and I take it that my Brother Stewart probably agrees with me that the commanding officer of the ship knows more about the ship than Judge Peckham does.

Isn't this basically a factual inquiry where would petitioning be appropriate on this particular ship?

MR. COBIN: Yes, Your Honor; and I believe that the regulations would be effected by the commanding officers of the ship.

QUESTION: Didn't Judge Orrick decide this case?

MR. COBIN: Yes. Judge Peckham decided the Allen v. Monger case which is pending before the Court.

QUESTION: Judge Orrick I think does know something about the Navy, if I am not mistaken.

MR. COBIN: Your Honor, one of the -- the basic problem with the regulations as urged by Respondent is that they enable a prior restraint to take place. At each of the times a request has been made to circulate a petition that that restraint has been exercised and that no circulation was allowed to take place.

It is not the role of the commanding officer to determine the bounds of the Constitution and in an individual case the commanding officer because of his role is bound to deny petitions. And in the Huff case which will be argued this afternoon the Government has conceded that those denials were wrongful.

QUESTION: Mr. Cobin, do you think there is a material distinction between circulating a petition in a peaceful manner and orally soliciting support for a position and suggesting that others write letters in a form that you hand out or something like that?

MR. COBIN: Yes, Your Honor, that the circulation of a written petition is more effective.

QUESTION: How about in terms of potential disruption to discipline?

MR. COBIN: No, Your Honor, I do not.

QUESTION: You think the only difference is

that one is more effective than the other.

MR. COBIN: As a general basis, that is true.

I believe that Captain Levy's statements to the troops under his command before him which was punished after the fact under the Uniform Code of Military Justice was much more disruptive than any of the petitions that had been brought.

QUESTION: Are you suggesting that maybe the right test should be based on the content of the communication rather than the form in which the time, place and manner kind of --- which the appeal takes?

MR. COBIN: I believe that the proper standard would be a time, place and manner -- a reasonable time, place and manner restriction being allowed and the provisions in the Uniform Code of Military Justice enable a commanding officer to stop petitioning and to punish disruption if it occurs.

QUESTION: You think for example a petition by say a member of the Ku Klux Klan who happens to be in the Navy saying that no white should serve under black officers, or something like that, might be disruptive?

MR. COBIN: No more than a speech to the same effect, Your Honor.

The role of the commanding officer rather than restraining a petitioning -- restraining a petitioning will not eliminate racist attitudes. Nor will it eliminate anger

or belief in oppression or any other kind of feeling that brings forth the grievance. If a commanding officer used his authority to encourage peaceful petitioning, to encourage a proper respectful attitude towards the First Amendment and a recognition of the importance of civility, if I may use the word,for expression of speech, then that would maximize -the ability of both satisfying the Constitutional protections and protecting military security.

QUESTION: And yet is there any doubt in mind -- I am reminded simply because of the play Julius Caesar was on television I think Sunday night and first Brutus speaks to the crowd and the crowd is very sympathetic to Brutus in justifying his slaying of Caesar. And then Mark Anthony speaks and completely turns the crowd around. Is there any doubt in your mind that large groups of people confined in close quarters can have their moods altered rather quickly by communications?

MR. COBIN: No, I have no doubt of it, Your Honor. However, you will note that that change occurred because of oral expression and not the circulation of a petition.

QUESTION: Right.

MR. COBIN: And also that the limitations of the numbers of the persons gathering is a part of a reasonable time, place and manner restriction. And that a commanding officer at the first sign of that kind of problem can stop

it.

If I may refer you to the case of Parker v. Levy again, Captain Levy engaged in a number of speeches that were highly prejudicial to the military. Nonetheless, the commanding officer there appeared not to have any problem in taking care of the matter. At first the thought was to give non-judicial punishment after Captain Levy was cautioned. Later it was determined that a court martial was appropriate. If that case didn't cause problems to the command, I cannot conceive of a petition that could cause greater problems.

Unlike the civilian life there is an obligation of members of the military service to inform a commanding officer of a danger to military security.

In addition to the abilities under the Uniform Code of Military Justice --

QUESTION: Do they need a petition to do that?

MR. COBIN: No, Your Honor.

QUESTION: All they have got to do is ask for leave to speak to the commanding officer, don't they?

MR. COBIN: That would depend on the grievance, Your Honor.

In this case and in all of the cases that are brought to Federal courts the grievances have been directed to members of Congress or in this case also in addition to the Secretary of Defense.

QUESTION: Isn't this as someone suggested, perhaps in briefs or argument that preceded, that this is a matter of line drawing; and this Court has said and many courts have said whenever you draw the line you can always have a hypothetical case which is on one side of the line when it really ought to be on the other. That works both ways.

MR. COBIN: The line the Respondent is seeking to have this Court draw is a line between a prior restraint and time, place and manner regulations with a power of punishment.

QUESTION: But if you are against prior restraint, then it wouldn't make any difference how inflammatory an utterance was. That is the only test.

MR. COBIN: The Uniform Code of Military Justice permits the commanding officer to intervene whenever there appears to the commanding officer a danger to military order. And whether that be inflammatory or be through some other kind of problem, the commanding officer can take authority to prevent the disorder from occurring.

QUESTION: Mr. Cobin, you have talked about several decisions, particularly Parker v. Levy. I don't know that you have mentioned the case upon which the Government primarily relies, Greer v. Spock, have you, which did involve of course a prior restraint?

MR. COBIN: I have not.

QUESTION: And that is the prime reliance of the

Government.

MR. COBIN: Respondent's position is that that case obviously does not apply to this case because it involves -- both the speech interest involved and the policies involved were entirely different, that that decision permitted a commanding officer to keep civilians off of a military base. And it is that primary ability plus the policy of maintaining a neutral political -- politically neutral military that seems to me to be the basis of that decision.

On the other hand, this is the right of persons already on a military base with a right and an obligation to be on a military base to engage in speech activities that are protected by the Constitution.

QUESTION: When Greer v. Spock was argued, and I think the briefs reflect that during the Civil War -- toward the end of the Civil War when an election was coming up there was great activity on the part of officers and others -- junior officers -- lining up votes for Mr. Lincoln. Now, do you think that is less a problem when a member of the military personnel does it than when a stranger from off the base does it?

MR. COBIN: I think that the problem of -- I believe that it is not so much the problem that that would be different but the ability of the commanding officer to take charge without a prior restraint that is different. A commanding officer

has very limited authority over a political candidate who is on the base. The only authority is to make a candidate leave and perhaps initiate civilian prosecution.

QUESTION: Well, if he leaves, then that is prior restraint, isn't it, if he forces the civilian to leave?

MR. COBIN: Not if the basis for ordering the civilian to leave is the improper activities commenced on the base. But the power of a commanding officer over a member under his command is greater than the authority of anyone else in this country.

QUESTION: Does he have the same right to circulate petitions an enlisted man would have?

MR. COBIN: I would hope so, Your Honor.

QUESTION: The gentleman could have circulated petitions saying, "Please nominate me for President."

MR. COBIN: I think there may well be other provisions that restrict --

QUESTION: We have a constitutional right to do that?

MR. COBIN: I would believe that you would have the constitutional right to circulate a petition. If that petition involves something that interfered with another --

QUESTION: He wants to be President. Can you understand my example?

MR. COBIN: I understand the example, Your Honor.

I am not sure I understand all the implications of it.

QUESTION: Well, that is part of the difficulty with this case. I mean, what are the implications of giving a constitutional protection to the right to circulate petitions? I suppose you may give the military leader the same right and it may give him a political weapon of some consequence. That is what I am suggesting.

QUESTIONS: The colonels and majors and captains that were lining up votes for President Lincoln among the Union soldiers were certainly more effective than Dr. Spock coming on the base, wouldn't you think?

MR. COBIN: Yes, Your Honor, I think a specific limitation upon commanding officers might be appropriate because of a particular problem that their circulation of petitions might --

QUESTION: How about top sergeants?

MR. COBIN: No, Your Honor.

QUESTION: They wouldn't be effective at all?

MR. COBIN: I don't see that top sergeants circulating petitions peacefully, that by their nature do not cause a problem -- present any constitutional problem as suggested by the example.

QUESTION: You don't suggest that rights are based on rank?

MR. COBIN: No, Your Honor, what I am saying is I

certainly haven't thought out the problem of a commanding officer seeking to be President and using his authority to do so through the use of a petition.

QUESTION: An enlisted man is much more in fear of the top sergeant than he is of the commander. Take it from one who served as an enlisted man.

QUESTION: I take it you read Beatle Bailey?

MR. COBIN: Pardon me?

QUESTION: I take it you read Beatle Bailey?

MR. COBIN: Only on occasion.

The essential position of Respondent is that military security is adequately and indeed better served by time, place and manner restrictions on peaceful petitioning.

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock.

(Whereupon, at 12 o'clock noon, the Court recessed to reconvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION

1:00 P.M.

MR. CHIEF JUSTICE BURGER: Mr. Cobin, you have about three minutes left, I understand.

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

I would like to respond to the question of a base commander, a General MacArthur or base commander or even a top sergeant circulating a petition that would influence their election to a political office. These regulations that are challenged here are not designed to deal with that problem. They are not designed to deal with command influence and they do not speak about such questions. But Articles 133 and 134, conduct unbecoming an officer and a gentleman, the general article, and other laws that were enacted such as the Hatch Act, are designed to deal with that. And that we are not asking that this Court rule there are no limitations that can be placed upon the right to petition, only that a prior restraint is unconstitutional.

QUESTION: The regulation on page 3-A of the Government's petition says members of the Air Force. Now, certainly that includes base commanders as well as privates, doesn't it?

MR. COBIN: The regulation says that solicitation of signatures shall not take place on an Air Force facility

without the approval of the base commander.

QUESTION: But isn't the base commander the chief executive officer and all the privates and sergeants all within the definition of the words "members of the Air Force" as used in that regulation?

MR. COBIN: But a base commander has a commander himself. And there is nothing to prevent the commanding officer over a base commander from taking charge and punishing or stopping an illegal, improper solicitation of signatures by a base commander, just as General MacArthur was removed from the Army by the Chief Executive of the Armed Forces, the President.

QUESTION: Who was not a member of the Armed Forces.

MR. COBIN: However, who is Chief Executive.

The point I am trying to make is that there is the power under the Uniform Code of Military Justice by commanding officers to deal with persons under their command who prejudice good order and military discipline, or who perform conduct unbecoming an officer and a gentleman.

QUESTION: Yes, but depending upon the nature of that alleged conduct might not they have First Amendment defenses?

MR. COBIN: Not that would be altered by the decision of this Court as Respondent requests.

QUESTION: I am not sure that is right. You are saying that the regulation is unconstitutional as a prior restraint. Say the military redrafted the regulation and said commanding officers cannot circulate any petitions without getting approval of some committee or something like that or approval of the President of the United States. And wouldn't the commanding officer there be able to make precisely the same constitutional argument that you are making on behalf of a lower-ranking military personnel?

MR. COBIN: There may be other issues that were involved, Your Honor. And the --

QUESTION: Maybe another justification there --

MR. COBIN: Yes, Your Honor.

QUESTION: -- that would justify a prior restraint?

MR. COBIN: It is possible, Your Honor.

QUESTION: Mr. Justice Brennan in dissenting in Greer v. Spock said there is no longer room under any circumstance for the unapproved exercise of public expression on a military base. If he is right in so characterizing the decision in Greer v. Spock, I guess you lose, don't you?

MR. COBIN: That would be "yes," except, Your Honor, that that could not be taken literally.

QUESTION: Well, he wrote it literally, I suppose. That is what he understood the decision in

Greer v. Spock, so he said, there is no longer room under any circumstance for the unapproved exercise of public expression on a military base. That is the way he described the decision in Greer v. Spock.

MR. COBIN: Your Honor, I think that would depend upon the definition of "public expression."

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Jones?

Thank you, gentlemen, the case is submitted.

(Whereupon, at 1:07 o'clock p.m., the case was submitted.)