In the

Supreme Court of the United States

SECRETARY OF THE NAVY, ET AL.,

PETITIONERS,

V.

FRANK L. HUFF, ET AL.,

RESPONDENT.

No. 78-599

Washington, D. C.
November 6, 1979

Pages 1 thru 35

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

IN THE SUPREME COURT OF THE UNITED STATES

SECRETARY OF THE NAVY, ET AL., Petitioners,	:	
v.	:	No. 78-599
FRANK L. HUFF, ET AL., Respondents.	:	

WAshington, D. C.,

Tuesday, November 6, 1979.

The above-entitled matter came on for oral argument at 1:08 o'clock p.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
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., Office of the Solicitor General, Department of Justice, Washington, D. C.; on behalf of the Petitioners

ALAN DRANITZKE, ESQ., Rein, Garfinkle & Dranitzke, 1712 N Street, N. W., Washington, D. C.; on behalf of the Respondents

- - -

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear oral argument next in 78-599, Secretary of the Navy v. Huff.

I think you may proceed whenever you are ready, Mr. Jones.

ORAL ARGUMENT BY KENT L. JONES, ESQ.,

PRO HAC VICE

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

This case is being argued in tandem with Brown v. Glines, in which the Court just heard argument. The respondents brought this case as a class action on behalf of all Marine Corps personnel stationed at the combat-ready Marine Corps Air Station at Iwakuni, Japan. Here as in Brown v. Glines, respondents sought declaratory and injunctive relief against military regulations that require the prior approval of the base commander before petitions may be distributed on base, and here as in Brown v. Glines, the Court of Appeals held that the regulations are invalid under 10USC 1034, as applied to the on-base distribution of petitions to members of Congress.

The Court of Appeals limited its holding both to the statutory issue and to the Iwakuni Base itself. It did not reach any constitutional issue.

I have already made two points about the statute: First, that it was designed to protect private individual

communications rather than group petitioning. We think the legislative history on that is clear.

Second, even if group petitioning were communication within the meaning of the statute, the Navy and Air Force regulations do not restrict the communication of such petitions to Congress.

The military's unwillingness to open military facilities to public activities traditionally prohibited is not a restriction on the communication of the petition itself. If the Court agrees with either of those submissions, it need not reach the third issue under the statute which I will discuss at this time.

Assuming for the purposes of discussion that the regulations in some sense restrict the communication of petitions to Congress, the statute allows restrictions imposed under regulations that are necessary to the national security. The only legislative history concerning this particular language in the statutes refers, of course, to individual communications.

Congressman Vinson stated that the statute lets any serviceman "write his Congressman on any subject if it does not violate the law or if it does not deal with some secret matter." Well, we concede that it is difficult to know what restrictions Congress thought the words in the statute might permit for group petitioning, and that is because Congress

didn't think the statute applied to this group petitioning activity.

But the Court of Appeals both here and in the Glines case recognized that the regulatory objective of insuring a discipline prepared military force is essential to national security. The courts held, however, that the prior approval requirement is necessary to achieve this objective only in a combat zone, and that outside a combat zone post-distribution punishment is sufficient.

The implication of the court's reasoning as we see it is that the need for troops to be fully prepared for immediate action is materially less outside a combat zone than within one. But the problem with that reasoning is that as a practical matter it is unrealistic.

The military cannot know today and doesn't know today where troops stationed at the strategic air base in Guam involved in the Glines case or at the combat ready marine station in Japan involved in this case, where those troops may be called upon to serve tomorrow. It is simply admonistic to suggest in an age of jets and missiles that only troops in a combat zone must be fully prepared for immedite action. Certainly the court's reasoning is incorrect as applied to the advanced defense bases involved in these two cases.

Gen. Brown said in his affidavit that was filed in the Huff case that an effective military force cannot be

prepared only on the eve of battle or during combat. He testified that the highest standards of discipline and morale are essential for readiness as well as for combat itself.

Well, there wasn't any contrary evidence, expert or otherwise, in the record. But the Court of Appeals simply disagreed with the military assessment. It's difficult, we concede that it's difficult to know with certainty what is necessary in any particular situation to insure military preparedness.

As Judge Leventhal said in an analagous context, in Culver v. Secretary of Air Force, however, "Whereas in this case the military determination is based on reasoned policy rather than on capriciousness, it should be sustained." And we think that's especially so under a statute in which Congress never thought would apply to group petitioning activity.

If there are no questions, I would like to reserve the balance of my time for rebuttal.

QUESTION: Mr. Jones, just one question. Under either of your first two submissions on the statute, you would require us to reach the constitutional issue, wouldn't you?

MR. JONES: I am sorry, I didn't understand. Under our submissions we would?

QUESTION: Yes. You are saying the statute does not protect the communications?

MR. JONES: That's right. If the statute --

QUESTION: Then we must decide, if you are right, whether or not the Constitution, independently of the statute?

MR. JONES: You must decide it in the Glines case.

QUESTION: Or the Huff case, this case?

MR. JONES: Well, in the Huff case, you could decide it if it wasn't decided below.

QUESTION: If we construe the statute the way you construe it --

MR. JONES: Yes.

QUESTION: -- then are we not necessarily confronted with the constitutional question? Or would you suggest we remand and ask the lower court to --

MR. JONES: Well, all I'm saying is that our petition in the Huff case only brought up the statutory issue because that's all the Court of Appeals decided.

QUESTION: I know, but --

MR. JONES: There was no cross petition. Certainly it's within the Court's discretion to reach the constitutional issue. We briefed it fully. I think it's fair to say that the respondent in Huff only briefed the statutory issue.

QUESTION: But if you went on the statute, the case can't be finally decided until --

MR. JONES: That's right, final judgment couldn't be rendered.

QUESTION: And is it your suggestion that we then

remand to the -- what do we do with the constitutional issue?

MR. JONES: Well, I think that regulations should be upheld under the statute and under the Constitution. I'm not saying the Court lacks power to render final judgment. I'm just saying it's a matter of discretion, the Court could send that back if it wanted to.

QUESTION: Then if the ntatute doesn't apply and if the regulation is attacked as unconstitutional, which I understand it is, then don't we have to decide it? That's what I'm trying to -- you're saying --

MR. JONES: You don't have to decide it at this time in the sense that it wasn't raised in our petition, it wasn't raised in a cross petition, it hasn't been aired below.

QUESTION: So it should be decided by the lower court, is what you're saying, in the first instance?

MR. JONES: I think that it perhaps should be.

QUESTION: Respondents do have a right to support the judgment below on an alternate ground, it was argued --

MR. JONES: Yes, they have that right, and I don't think they raised that claim, though, in their brief.

QUESTION: In what respect is the constitutional issue different in this case from the preceding case? If at all?

MR. JONES: Well, I don't think that the eventual constitutional issue is different at all. I think the same principles apply.

QUESTION: So if that were decided in your favor, we certainly wouldn't have to address it here again?

MR. JONES: If it were decided in Glines in our favor, it wouldn't have to be addressed here as well.

QUESTION: And vice versa?

MR. JONES: And vice versa.

QUESTION: Is there this difference: In the other case, as I understand it, you contend the communication was improper, but here wasn't there a request for command approval which was denied?

MR. JONES: Well, all of the underlying facts in the case are not relevant to the judgment. The judgment was a declaratory judgment and an injunctive relief, so the facts that underlie the case are not important.

QUESTION: Well, but they are --

MR. JONES: The regulations were held to be facially invalid, that is to say no application can be given to them at all.

QUESTION: And with respect to the actual litigant, they got the relief they wanted here, and you don't challenge that?

MR. JONES: They have obtained --

QUESTION: Apart from the declaratory judgment holding it -- but I mean in terms of, I am trying to remember the facts here: You conceded here that either under the regulation or

under the Constitution, I can't remember which, the military could not prevent the communication?

MR. JONES: Well, the record is mixed on that. We conceded that some of the petitions should not have been prohibited from distribution under the regulation. We didn't concede anything about the Constitution. The concessions weren't relevant.

What the facts in this case are designed to do are to show how the regulations in some situations apply. But what -- the judgment they sought was declaratory and injunctive relief that the regulations cannot be applied in any situation at the Iwakuni Station, and that's the judgment that the Court of Appeals entered.

QUESTION: What was it that the man -- I am trying to remember the facts of this case -- what was it that he distributed here?

MR. JONES: Well, there were several distributions. There was a court martial that was involved in this case, and he sought review, in addition to the declaratory and injunctive relief that they sought, this one individual also sought to have his court martial expunged. But he lost that case because the distribution that was the basis for his court martial was a distribution off-base, which was in violation, as the District Court and Court of Appeals agreed, it was in violation of the status of forces agreement with Japan.

QUESTION: Yes.

MR. JONES: And so that individual aspect of the case is definitely out. He lost that in the District Court. He didn't even appeal on that, and he certainly didn't cross petition on it. So the only issues left in the case are the declaratory and injunctive relief that the regulations are invalid on their face, can't be applied at all.

QUESTION: But he has standing because it might be applied to him sometime in the future?

MR. JONES: Well, it's a class action.

QUESTION: I see. I am sorry.

MR. CHIEF JUSTICE BURGER: Mr. Dranitzke.

ORAL ARGUMENT OF ALAN DRANITZKE, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The issue in the Huff case, unlike the Glines case, is simply a statutory issue. The question is whether certain Marine and Navy regulations require prior command approval for circulation of petitions to Congress by service personnel on base overseas violate 10 U.S. Code Section 1034.

Our position, as summarized, is first, that Section 1034 includes within its scope both individual and collective petition activities, and that secondly, the regulations under attack here are not necessary to our national security.

I think it's important to note first that there are four regulations at issue. There is a First Marine Aircraft Wing Order, a Marine Corps Air Station Order, Fleet Marine Force Specific Order, and a Commander-in-Chief Pacific Fleet Instruction.

These four regulations cover the entire Western Pacific for both Marines and Navy, including Hawaii, the fleet in those waters and any of those ships that are in port in the western United States.

In pertinent part they read as follows: "No personnel will originate, sign, distribute, or promulgate petitions anywhere within a foreign country, irrespective of uniform or duty status, unless prior command approval is obtained."

In other words, these cover all petitioning activities whether on base, off base, on duty, off duty, in uniform or out of uniform.

QUESTION: In a foreign country?

MR. DRANITZKE: Your Honor, the facts of this case and the regulations in this case make it such that everything we're talking about is in a foreign country. If what you're referring to is the government's footnote in Glines that an on-base petitioning activity, out of uniform and off duty, is permitted without prior command approval, that's a misreading of the regulations.

QUESTION: No, I just meant that, when you were just

summarizing now as to the prohibition, one qualification to the prohibition is that it applies only in a foreign country.

MR. DRANITZKE: The pertinent part applies in a foreign country. The part of the regulation I didn't read also includes prior command approval upon a ship, a craft, aircraft, vehicle, Department of the Navy, any military installation --

QUESTION: But that isn't involved here?

MR. DRANITZKE: It is --

QUESTION: Did the lower court pass on that and did you challenge that, the part you just read?

MR. DRANITZKE: It was unnecessary because the prior approval requests were made on a foreign base.

QUESTION: So that really is what's before us, is something in a foreign country?

MR. DRANITZKE: That is correct, Your Honor.

QUESTION: Were you paraphrasing the 5370.3 with your summary?

MR. DRANITZKE: I was reading directly from the Fleet Marine Force Specific Order, which was the order picked out of the four orders by the Court of Appeals below, and is reprinted both in the government's brief and our brief; yes, sir.

Now, it is our contention that Section 1034, which states no person may restrict any member of an armed force in communicating with a member of Congress, that that language includes within its scope petitioning activities, that if you

give petitioning -- excuse me, communication -- its ordinary meaning, that that encompasses petition; that the traditional method, in fact, for communicating with Congress is petitioning.

QUESTION: Well, now, what you're saying is, Congress meant to include in 1034 petitions?

MR. DRANITZKE: That is correct, Your Honor. And I believe --

QUESTION: Most members of Congress are familiar with the constitutional reference to the right to petition Congress. Isn't it arguable that if they meant petitions, they would have used the term in 1034?

MR. DRANITZKE: Well, Mr. Chief Justice, I think communications is a broader term than petition, and Congress did not want to eliminate somebody who thought they were not writing a petition, and simply a letter, from writing to Congress.

QUESTION: The legislative history suggests that both Chairman Vinson and Congressman Byrnes spoke in terms of a man sitting down with a pencil and writing a letter to his congressman, which is clearly an exercise of the right to petition Congress, is it not?

MR. DRANITZKE: Yes, it is, Your Honor, and I think that admittedly the legislative history here deals with the individual soldier who was trying to write to his Congressman

and the Navy was saying no, you have to send it to the Secretary first. However, we believe that if you look at the word "communication," you take its ordinary meaning, it means petitioning. The Department of Defense agrees with this. In 1325.6 they show this statute as being a basis for the right to petition. At the time of the enactment of the statute here, Article 1248, which was one of the concerns, a Navy regulation was entitled Communications to the Congress, and that article included within its terms the right to petition, so that it seems clear that both in terms of an ordinary meaning, in terms of DOD interpretation, and in terms of the contemporary interpretation today, the word "communication" includes within it petitioning.

It is also clear that contrary to the government's position there is a direct conflict between the regulations in this case and the statute, unlike in the Glines case. The statute says that there shall be no restriction, there shall be no prior review, and the regulation here says that no personnel will originate, sign, distribute, or promulgate petitions.

In other words, an individual member, before he sits down and sends that letter and signs that letter, has to get prior command approval.

QUESTION: You are speaking now of 3(b)?

MR. DRANITZKE: Yes, Mr. Chief Justice.

QUESTION: And you say the prohibition against promulgating petitions, publications, pamphlets, newspapers,

magazines, handbills, flyers, means you can't write an individual letter?

MR. DRANITZKE: Yes, I think that's the clear meaning. It says, "No personnel will sign a petition." How can you sit down and write this letter that Congress is supposedly protecting unless you get prior command approval?

QUESTION: Do we ordinarily think of a letter from a single individual to another individual as a petition, except in the very generic sense?

MR. DRANITZKE: I think that when you're writing to Congress it's certainly a petition, and I think --

QUESTION: Well, you are exercising your right of petition, perhaps, but if you write your congressman, do you regard that as a petition?

MR. DRANITZKE: I think --

QUESTION: Or a letter?

MR. DRANITZKE: I think I regard it as both. And I think that unlike the Air Force regulation before you, in Glines, which specifically speaks to group petitioning activities as requiring prior command approval, the regulation here does not have any exception of that nature, that there is an inconsistency here, a conflict here between the regulation and the statute, which is not present in the other case.

Furthermore it is our contention that the statute encompasses, when we say petitioning, that it encompasses both

individual and collective petition. The language itself is not limiting. There are no restrictions as to what an individual person may do or the type of activity in terms of an individual or collective petition, and there is no requirement in the wording of the individual action.

The intent was clear, and that was to eliminate prior command review. And the court below found that there was no indication that the outer limit was an individual petition, and the court in Allen v. Monger, which is pending before this Court, also looked at the amendment changes to the statute, the historical context, and concluded similarly that the scope of 1034 was beyond an individual letter.

We also believe that the statute must be interpreted as found by the court below in the light of the long and cherished tradition in this country of the right to petition Congress for redress of grievances. The government, we believe, totally ignores this argument. The decisions of this Court have consistently upheld the right to petition, consistently inveighed against prior restraint. And it is our contention that if this statute is to be properly interpreted, it must be interpreted in this light.

The application of the regulations in this case shows that 1034 must be interpreted to include individual and collective petitioning, and that these protections are needed.

There are four separate fact situations that we would

like to refer to. First, respondent Huff requested the commander of the First Marine Aircraft Wing to circulate a petition to Senator Cranston involving the use of military in labor disputes. He wanted to circulate that in the barracks. He was going to circulate it out of uniform, off duty, no use of government materials, he wouldn't interfere with military personnel on duty. In fact, all requests in this case were accompanied by similar language.

Three weeks later that request was denied, the commander saying the petition contained gross misstatements, implications of law as fact, as well as impugning by innuendo the motives and conduct of the commander-in-chief of the armed forces in the exercise of his constitutional responsibilities.

"To authorize permission to circulate such grossly erroneous and misleading commentary would be contrary to my responsibility as a commander to maintain good order and discipline and afford proper guidance to the men under my command."

It's clear from this denial that in fact the commanding officer was denying this request on the basis of the content.

QUESTION: What if we were to conclude that the commanding officer on a base in a foreign country is constitutionally permitted to prohibit or require advance submission, and the Secretary was empowered to issue regulations like this

requiring blanket advance submission? If the regulation is valid on its face, do we need go any further and get into the facts of your case where perhaps the commanding officer exercised his discretion on an improper basis?

MR. DRANITZKE: Well, Your Honor, I think what is important about the facts here is that we have a series of requests, a series of denials, a total misuse of the regulations, concession by the government that all of these were improper, every last one of them, and it shows that in fact, if these regulations or similar type regulations are going to be in existence, that the right to petititon is not a right that is going to exist within the military.

QUESTION: In foreign countries?

MR. DRANITZKE: To the extent that the same requirement is obtained on a state-side base, I think the answer is still the same.

QUESTION: But all your case involves is foreign countries?

MR. DRANITZKE: That is correct.

The second fact situation was, the Respondent Palatine requested permission to circulate a petition to Congressperson Dellums in support of amnesty, and on the same day that the Huff petition was denied, the commanding officer denied that petition under the same regulation with the exact same reasoning. And again, these reasons are not even within the terms of

the regulation that he was supposedly acting under. Again, a clear disagreement of the content of what was being distributed.

Similarly, respondent Gabrielson requested permission to distribute a letter to Senator Fulbright concerning U.S. support for the Government of South Korea. He requested permission to distribute this in the barracks and around the barracks. It was granted with regard to outside the barracks, not inside, and he was told that he couldn't argue or debate while distributing this letter, and no reasons were given for these restrictions.

The fourth example, which I think epitomizes this case, Huff and Falatine separately requested the First Marine Aircraft Wing commander to leaflet the base with a leaflet entitled, "We Hold These Truths To Be Self-evident, But Do The Brass?" It included the Declaration of Independence, the First Amendment, and their commentary. The commanding officer denied Falatine's request, stating that the introductory paragraph is by transparent implication disrespectful and contemptuous of all your superior officers, noncommissioned officers, civilians and the like, and he would consider the distribution a clear hazard to discipline and morale within the First Marine Aircraft Wing, yet on that very same day that same commanding officer permitted Huff to distribute that leaflet.

QUESTION: You don't complain about the refusal in the first case, you simply claim about the -- your claim is based on the disparate treatment between Huff and the first commanding officer?

MR. DRANITZKE: No, we complained about all the denials in the case and, in fact, the court granted declaratory judgment that these denials were unconstitutional and illegal under the statute.

QUESTION: Well, do you think the Constitution permits leafletting a base by a member of the military to the effect that the commanding officer of this base is lazy, corrupt, and engaged in treasonable conduct, even if those statements might be proven true?

MR. DRANITZKE: I think that as long as that activity takes place in a way that does not disrupt the order of the base and the discipline of the base, that can be taken care of through the criminal processes under the Uniform Code of Military Justice, that yes, an enlisted person would have such a right.

QUESTION: But the reaction of people to leaflets like that is going to be disruptive to order on the base.

MR. DRANITZKE: I think that that would, unfortunately in the situation, have to be a command decision. I don't think that you can assume necessarily that that leaflet will disrupt order on that base.

QUESTION: But if the commander says it would?

MR. DRANITZKE: Then the commander would be free to bring criminal prosecution --

QUESTION: But he can't prevent in advance its circulation?

MR. DRANITZKE: Well, I think that the assumption of the question in a lot of the government's argument is that the minute something starts, the whole structure of discipline and morale fall, and I think that is a false assumption. I think for example in the average case, he drew up his leaflet and in fact it never got out the door. He was arrested and dealt with. In Levy, despite the statement that he made, there is no evidence of the fact anyone carried through.

QUESTION: Well, I'm not a psychologist; I have no reason to think you're a psychologist. Whose decision should prevail if it's simply a question of psychological prediction as to what the effect of the distribution of a leaflet will be?

MR. DRANITZKE: I think that if the First Amendment is to have any meaning in the military, then it cannot be a decision solely that the command can see everything ahead of time and pass on it, and engage in prior restraint. I think that what the government's position comes down to is that any time the military says order, preparedness, discipline, that all First Amendment rights disappear, and I think that was the thrust earlier of Mr. Justice Stewart's question to respondent

in Glines concerning Mr. Justice Brennan's dissent in Spock. And that is if every time the military comes in and says order, things stop, then there is no room for the First Amendment in the military. And if this Court --

QUESTION: Well, that's what Spock decided, according to the dissenting opinion, isn't it?

MR. DRANITZKE: I understand that that is what the dissenting opinion says.

QUESTION: And if it did, well then, you lose.

QUESTION: Dissenting opinions usually say things like that.

MR. DRANITZKE: I think that no, not necessarily we lose. I think that that is a constitutional decision --

QUESTION: And I don't mean erroneously, either.

QUESTION: No. And if it's not erroneous, it seems to me you do lose.

MR. DRANITZKE: I think that that is a constitutional decision and we have a statutory question before us. The question that I was addressed by Mr. Justice Rehnquist was a constitutional question. I think we have a statute here, a statute in which Congress said there is not to be prior restraint.

QUESTION: I do not read the government's briefs the way you do, Counsel. Government didn't say that the whole military and defense operation is going to fall apart on circulation on any one of these acts. It said that these

regulations, these prohibitions are there because these kinds of things have a tendency to break down morale, discipline, and so forth, not that any one of them -- the government could never in the world prove that any one of these petitions or any ten of them collectively would destroy the discipline in the particular military unit.

MR. DRANITZKE: And that's our point, Your Honor. That is the point.

QUESTION: Don't you think they can make regulations prohibiting conduct which reasonably has a tendency to produce that result?

MR. DRANITZKE: No. No. I think that the government --

QUESTION: Let me see if I understand you. They can't make regulations which prohibit conduct which has a tendency to produce that result?

MR. DRANITZKE: Mr. Chief Justice, with regard to the petition issue before the Court, the answer is no. The government has stood up here and talked about --

QUESTION: Because of the statute?

MR. DRANITZKE: Yes. You can talk on base, there's been discussion during the prior argument, you can all get together and talk about the lousy food, there are magazines and newspapers that regularly come on base, there are -- any time there is the basis, the factual basis for complaints and

discontent, there is going to be First Amendment activity of one kind or another, and I don't think you can take the position, the government can take the position that somehow petitioner is more dangerous, is going to produce more results in terms of upsetting morale and discipline. I think --

QUESTION: When you refer to the statute in response to that last question, what statute particularly and what language in that statute are you relying on?

MR. DRANITZKE: I am relying on 1034.

QUESTION: What language?

MR. DRANITZKE: The language says no person may restrict --

QUESTION: What else?

MR. DRANITZKE: Any member --

QUESTION: Now, does any member mean anything other than any member?

MR. DRANITZKE: I think, Mr. Chief Justice --

QUESTION: Communicating with a member of Congress, aren't they talking about a one-on-one communication there?

MR. DRANITZKE: I think that first they are not necessarily talking about a one-on-one contact, that as the court below found, that is not the outer limit of the language. I think that they certainly are not talking about what any one member may do versus other members in terms of collecting signatures. I also feel -- although you indicated earlier

you disagree -- that the regulations here would require an individual to obtain the commander's signature before sending off his letter of petition to his Congressman. I think additionally --

QUESTION: I understand that last -- if you will tell me again.

MR. DRANITZKE: It is our contention furthermore that the regulations here and the statute don't mesh the way they do in Glines, that an individual writing his Congressman in this case would require command approval before he signs that letter.

QUESTION: That would be directly contrary to the statute, if you read it that way.

MR. DRANITZKE: Mr. Chief Justice, that is exactly our position.

QUESTION: Don't you read regulations which are promulgated pursuant to a statute in a way that is consistent with the statute if it is possible to do so? Isn't that a rule of construction?

MR. DRANITZKE: Yes, Mr. Chief Justice, it is. And I also think it is a rule of construction that a statute should be read in a way so as not to inhibit First Amendment rights, and that is our contention here. I think furthermore, with regard to the government's contention about national security, that despite the affidavit that they have introduced

in this case, that this is a combat ready base and you need such a regulation, that in fact you had a three and a half year period in this case where the government has never come to court and asked for a stay of the order below, and I think this belies the allegations of the government in this case that national security requires this regulation.

We had a District Court judgein May of '76 decide that all of the four regulations covering the entire Western Pacific are unconstitutional, violated 1034, and specifically enjoined the entire Iwakuni Air Base personnel from requiring prior command approval, and yet the government has never once come into court and asked for a stay of this declaration or of this injunction.

Apparently things have gone on at the Iwakuni Air Base without the government finding the need to come into court and say, oh, no we need these regulations.

QUESTION: I take it your position would also foreclose any regulation that said that anyone who wants to send a petition to his Congressman must first show it to the commanding officer? He needn't get any approval of it at all?

MR. DRANITZKE: Yes, Mr. Justice White, that is correct.

QUESTION: Just so you would know what is going on.

MR. DRANITZKE: That's correct. In fact, that was the rationale that the Navy used at the time this was enacted,

and all they were trying to do was find out what was going on.

QUESTION: And you would also I suppose say that if the commanding officer just happened to find out about the petition and thought that the petition was not protected by the statute, that he nevertheless couldn't take the petition out of circulation pending disciplinary proceedings?

MR. DRANITZKE: No, I think --

QUESTION: Why not? It hasn't been determined judicially. It has just been the opinion of the commanding officer that the petition is unprotected by 1034.

MR. DRANITZKE: I think that our position is the government is not helpless in this situation. The government has two things at its disposal --

QUESTION: You mean the commanding officer, instead of being able to disapprove it, can just bring disciplinary proceedings and stop it?

MR. DRANITZKE: If it is of a nature that would violate one of the code sections of the Uniform Code of Military Justice. In fact, that is what this Court had before it in Average and --

QUESTION: You mean if in the commander's opinion it does?

MR. DRANITZKE: That is certainly the basis on which the commander brings criminal proceedings, yes, Mr. Justice White. The military has a whole range of criminal sanctions

here. They are set out in the beginning of our brief as an appendix to 1325 --

QUESTION: Did the government or anybody else ever claim in this case that a petition such as involved in this case really didn't restrict communications with a Congressman until and unless permission is refused? Is it your position -- does everybody agree that it is a restriction within the meaning of 1034 just to require submission?

MR. DRANITZKE: It is certainly our position, that to require submission, whether approval or showing, is a restriction and that was the whole basis of the statute being passed. I think that furthermore the military is not without the ability to promulgate proper regulations regarding time, place and manner. But to have a prior restraint is not time, place and manner.

QUESTION: Well, it is a pretty prior restraint to take the petition out of circulation pending military disciplins.

MR. DRANITZKE: I think that a commander --

QUESTION: There hasn't been any adjudication or anything, you just take it out of circulation.

MR. DRANITZKE: The military court martial process permits such response and I think that helps prove the correctness of the Court of Appeals opinion below and that is that the military criminal process in fact is quite powerful

and can certainly deal with the issues that the government thinks are necessary here for purposes of national security.

With regard to Greer v. Spock, it is our position that that was a constitutionally based opinion in which the authority of the military to prohibit civilians on base was basically involved, that what you have here is a case of military personnel attempting to circulate petitions. Furthermore, in Greer there was no attempt to request permission, there was not a regulation there which involved petitioning. Here we have a specific enactment by the Congress which was for the benefit of the military for the purposes of giving them the right to freely petition their representatives in Congress.

QUESTION: So what if we disagree with you on the statute, is the case over?

MR. DRANITZKE: No, I believe that this Court is then faced with the constitutional question.

QUESTION: And what then do you say about Greer?

MR. DRANITZKE: Then I think that Greer presents greater problems. I think that Greer is a decision that for the most part had to do with civilians' access to base, it had to do with political neutrality of the military and those factors are not involved in this case.

QUESTION: As between a civilian, a Dr. Spock circulating some material on a base and a major or a captain,

which would the military be entitled to think would be more disruptive of military discipline and morale?

MR. DRANITZKE: I have no idea, Mr. Chief Justice, what the military would think about --

QUESTION: Now, come, come, com.

MR. DRANITZKE: -- which would be more disruptive.

QUESTION: You don't have any idea which?

MR. DRANITZKE: No.

QUESTION: Let's say you were a private first class, which would you be more impressed by, Dr. Spock or the major's view or, as someone suggested in the other case, the master sergeant?

MR. DRANITZKE: I don't know as a private what I would think with regard to those distributions. I certainly think that --

QUESTION: What do you think the military is entitled to think?

MR. DRANITZKE: I don't know what the military is entitled to think, Mr. Chief Justice. I can say that that issue though is not involved in any of these cases because the regulations here in question do not in any way stop a top sergeant or a commander from asking for prior approval to circulate a petition.

QUESTION: But without prior approval is all we are talking about here, aren't we? I take all your remarks to be

directed at the prior restraint, which you have emphasized constantly that requiring prior approval means prior restraint.

MR. DRANITZKE: Yes, Mr. Chief Justice. I am simply saying that any rule which comes out of the decisions of these two cases will have the same effect with regard to a private or a top sergeant or a commander.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Jones.

ORAL ARGUMENT OF KENT L. JONES, ESQ.,

ON BEHALF OF THE PETITIONERS -- REBUTTAL

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

This regulation doesn't apply to letters. There has been no finding on that, no suggestion that it might. It has never been applied that way. There is no ruling to that effect in any court, and it simply doesn't have any application of the kind that respondent suggested.

The regulation does refer to origination and signing of petitions and other documents as well as to the distribution. That language has been construed consistently also to mean the public solicitation and distribution of petitions.

The Court of Appeals centered its holding on the question of whether distribution of petitions can be subjected to the regulation if the --

QUESTION: When you talk about the regulation, you are talking about the --

MR. JONES: The one in the --

QUESTION: -- the one in the directive, 1325.6, that is set out on pages 2, 3, 4, 5, and 6 of your brief?

MR. JONES: No, I'm not. I am referring to the Fleet Marine Corps Pacific Order which is set out on pages 4, 5, and 6.

QUESTION: Pages 4, 5, and 6 of your brief.

MR. JONES: Right. If those words "originate and sign" have any meaning independent of the word "distribution," the issue as presented here, the only holding in the case is the distribution of petitions is not properly subject to the regulations because of the statute.

In any event, the regulation as it has been construed by the military simply applies to distribution and solicitation.

The respondents suggested that the statute must be construed in light of the right of petitioner. Well, we think it should be construed in light of its legislative history, and the legislative history, as I have gone through and I have heard no rebuttal, focuses completely on the individual communications to members of Congress.

And there was, as I have also mentioned before, another statute that Congress could have used as a model if it

had intended to apply the statute to petitioning activities.

QUESTION: Well, it would certainly apply to a letter signed jointly by a sailor and everybody in his division, wouldn't it?

MR. JONES: Well, it is our position that it wasn't intended to.

QUESTION: Or by two ensigns who room together on a ship?

MR. JONES: I think that the regulation wouldn't apply to them. Whether the statute --

QUESTION: But the statute would.

MR. JONES: I think the question of whether the statute would be applicable there is a question that we haven't addressed and I am not sure what the answer would be. The legislative history definitely focuses on the individual, the communication of an individual serviceman. But I think the more important point, in response to your question, is that the regulation doesn't restrict the communication or that kind of a letter. So even if the statute were applied there, ti wouldn't have any bearing on the disposition of this case.

The respondents also mentioned that the regulation has been misapplied on some occasions and we conceded that, but the misapplication of the regulation doesn't make it patently invalid. And we don't know how many rightful denials they were. Those haven't been litigated and they aren't here.

I think, as in Parker v. Levy, the regulation, like the statute in Parker v. Levy, the regulation has a substantial core context in which it clearly applies and should not be held patently invalid.

Thank you.

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

(Whereupon, at 1:54 o'clock p.m., the case in the above-entitled matter was submitted.)

- - -