

LIBRARY

PREMIER COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, 1969

LIBRARY
 Supreme Court, U. S.
 MAY 20 1970

In the Matter of:

Docket No. 7

-----X

LESTER GUNN, ET AL.,

Appellants;

vs.

UNIVERSITY COMMITTEE TO END THE
WAR IN VIETNAM, ET AL.,

Appellees.

-----X

PT. 1

RECEIVED
 SUPREME COURT, U.S.
 MARSHAL'S OFFICE
 MAY 19 4 57 PM '70

Duplication or copying of this transcript by photographic, electrostatic or other facsimile means is prohibited under the order form agreement.

Place April 29, 1970

Date Washington, D. C.

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ORAL ARGUMENT OF:

P A G E

David W. Louisell, Esq., on behalf
Appellants

2

- - -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

----- x

LESTER GUNN, ET AL.,

Appellants;

vs.

UNIVERSITY COMMITTEE TO END THE
WAR IN VIETNAM, ET AL.,

Appellees.

----- x

No. 7

Washington, D. C.
April 29, 1970

The above-entitled matter came on for argument at
2:41 p.m.

BEFORE:

- WARREN E. BURGER, Chief Justice
- HUGO L. BLACK, Associate Justice
- WILLIAM O. DOUGLAS, Associate Justice
- JOHN M. HARLAN, Associate Justice
- WILLIAM J. BRENNAN, JR., Associate Justice
- POTTER STEWART, Associate Justice
- BYRON R. WHITE, Associate Justice
- THURGOOD MARSHALL, Associate Justice

APPEARANCES:

DAVID W. LOUISELL, Esq.
655 San Luis Road
Berkeley, California 94707
Counsel for Appellants

SAM HOUSTON CLINTON, JR., Esq.
308 West 11th Street
Austin, Texas
Counsel for Appelles

P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: We will hear arguments in
3 No. 7, Gunn against the University Committee.

4 Mr. Louisell?

5 ARGUMENT OF DAVID W. LOUISELL, ESQ.

6 ON BEHALF OF APPELLANTS

7 MR. LOUISELL: Mr. Chief Justice, may it please the
8 Court:

9 In some ways this is the most unusual of all the three-
10 judge cases, because, as I think I can show, the one issue
11 that was at least arguably involved here, the three-judge court
12 insisted explicitly on ignoring. An issue that wasn't at all
13 involved, they insisted on rendering the advisory opinion on it.

14 After I argued this case in January of 1969, in
15 reflecting immediately afterwards on some of the questions from
16 the Bench, I realized that I hadn't probably early enough in my
17 argument made it very clear just who the parties are, and that
18 the State of Texas as such is not a party to this case.

19 This was a three-judge suit brought by the committee
20 and by three individuals, apparently purporting to represent
21 classes of people, and the suit was brought under the Dombrowski
22 case here basically.

23 The defendants, the County Attorney of the county
24 involved here and the other two defendants shall -- and the
25 Justice of the Peace -- are the appellants in this Court. The

1 Attorney General of Texas as the senior law enforcement officer
2 of Texas took over the defense of the three-judge case. But the
3 state itself is not a party to the suit.

4 Now, Your Honor, after the last argument because of
5 some questions addressed from the Bench primarily, we filed a
6 supplemental brief and the only briefs before the Court on the
7 merits here are our opening brief and the brief for appellees
8 that was not replied to as such, and our supplemental brief.

9 It seems to me that it is very important, as always of
10 course, but particularly here because of the nature of what the
11 three judges did below, to be very observant of the facts. On
12 December 12, 1967, President Johnson, and the press of course
13 announced it a little bit ahead of time, so that excitement and
14 interest was aroused, went to make an address and to inspect
15 Fort Hood in Central Texas. The speech was to be a dedicatory
16 speech at Central Texas College.

17 The Secret Service summoned all of the local law enforce-
18 ment people to help prepare for this event. The Sheriffs of
19 Bell County and Coryell, the adjacent county, the local police
20 chiefs were all summoned and urged to lend, of course, their
21 aid in the protection of the President.

22 In an appraisal of the past year the Court, of course,
23 will be aware that this was just about four years of the shadow
24 of Dallas, Texas of November 1963.

25 At least seven members from the University of Texas,

1 and presumably a number of them members of this Committee,
2 organized a protest of the war in Vietnam, came to the premises
3 shortly after the President had begun to speak and they had their
4 protest signs.

5 I perhaps should again remind Your Honors that Fort
6 Hood, I think, is the largest armored fort in the United States.
7 At least 35,000 people are on duty there and at least 25,000
8 gathered to hear the President's address. Many of the people
9 stationed at Fort Hood are veterans who have returned from Viet-
10 nam or who are on their way to Vietnam, personnel on their way
11 to Vietnam.

12 When the protestors, including the three individuals
13 plaintiffs here, arrived at the premises, they started to approach
14 with their signs and there is no claim that there was any impro-
15 priety about the signs and there is no claim that they weren't
16 perfectly within their rights in a peaceful protest. But imme-
17 diately or almost immediately, perhaps not quite, and unfortu-
18 nately one of these cases is tried only on affidavits like our
19 equity practice before 1912.

20 I can't really say that to the extent that there is
21 dispute in the facts, that there is any real resolution of the
22 facts in the opinion of the three-judge court, but most of the
23 facts, most of the significant facts are not really undisputed.
24 Very soon violence started. One of the protesting young men was
25 attacked, a burly sergeant is reported as having said, "They have

1 never seen blood." A terrible commotion commenced and it is
2 important, I think, Your Honors, to note that the first inter-
3 vention was not by the Texas sheriff or the Texas police or any
4 other Texas officials. The first attempt to prevent the serious
5 potential violence was by the Military priest there. The Mili-
6 tary priest took control, took custody of these men and then
7 turned them over to the sheriffs.

8 Apparently there was some momentary dispute -- that is,
9 he turned them over to the deputy sheriff. Actually the sheriff
10 himself was at a distant point near to the presidential stand
11 and when he saw the commotion, he came over to see what could
12 be done about it.

13 These three plaintiffs were turned over to one of the
14 deputy sheriffs. There was some momentary confusion as to whether
15 the exact locus was in Bell County or in Coryell County, but they
16 ended up in Bell County and when it was decided that it had been
17 within the territorial limits of Bell County, the sheriff author-
18 ized a disturbing of the peace charge against these three people
19 who had been taken into custody.

20 It is very important, at least I think it is of inter-
21 est to note that this disturbing of the peace statute as it then
22 existed in Texas and it is recorded on page 12 of our brief --
23 excuse me, page 12 of the joint appendix, and also it also appears
24 in our brief, provides a penalty in the maximum amount of \$200.
25 But there is no provision for a jail sentence.

1 It is more lenient, for example, than some of our other
2 similar statutes. The California statute, for example, has a
3 90-day jail provision in it, too.

4 There were some things that took place and here, of
5 course, you have some conflict in the affidavits. The affidavit
6 of the Sheriff of Bell County denies any brutality, denies any-
7 thing approaching brutality. In fact, he chose relatively, I
8 would say, courteous treatment. They were allowed to continue
9 to watch, for example, television of the President's speech.

10 But there are some things that are unfortunate things
11 from the viewpoint of a precise, correct administration of the
12 law. Of course this is a rural community between Austin and
13 Waco, Texas, a lay justice of the peace and so forth, and the
14 justice of the peace, according to one of the affidavits of one
15 of the young men, fixed a bail of \$500 where the maximum penalty
16 was \$200.

17 The bail was immediately made -- I shouldn't say "imme-
18 diately," but very promptly made, the lawyer came very informally
19 and quickly provided the bail requirement and they were released.

20 Q Are you suggesting possibly, Mr. Louisell, that
21 the absence here at the moment was affected by the fact that the
22 safety and security of the President of the United States was
23 not to be involved and that it wasn't just an ordinary disturbance
24 of the county fair.

25 A It is precisely that, of course, with what had taken

1 place just four years earlier. One can understand the state of
2 even not only concern, but extreme anxiety. But I am also sug-
3 gesting, as the sheriff makes clear in his affidavit, that there
4 wasn't any intention on the part of Texas officials to organize
5 against a reasonable protest. They weren't the ones to seize
6 these people and, as the sheriff pointed out in his affidavit,
7 the one very happy thing about the event was that these people
8 who dared to go into that environment under those circumstances
9 escaped substantially uninjured. One did have, I believe, some
10 bleeding from the mouth for a while.

11 Now this all took place on December 12, 1967, and inci-
12 dentally the bleeding of the mouth was from the assault of one
13 of the soldiers. It had nothing to do with any action of the
14 Texas sheriff or police officials.

15 On December 21st, the three-judge suit was started,
16 invoking the usual sections of the Judicial Code, 1983, the
17 Declaratory Judgment Act, and asking for a declaration and an
18 injunction against the enforcement of the section of the Texas
19 Penal Code I have already referred to, so-called disturbing of
20 the peace section, Article VII(7)(4).

21 The temporary restraining order was granted. This was
22 extended from time to time until the hearing, but before the
23 hearing, which occurred on February 23rd of 1968 -- before the
24 hearing all these charges of disturbing the peace against these
25 three plaintiffs -- and they are reproduced in the joint appendix

1 and you will note, of course, that they were printed forms and
2 merely filled in. Of course, that doesn't show up in the print-
3 ing of them, that is, in the printing in the record. But they
4 simply filled in in this layman language "DIS PEACE."

5 On February 13 all three of these charges were dis-
6 missed by the County Attorney, because he was advised that the
7 actual incidents had taken place on a Federal enclave, a part
8 of the territory appurtenant to Fort Hood, and that the state
9 had ceded jurisdiction and had no state jurisdiction at all, so
10 they were dismissed.

11 In all candor, I think I said at the last argument, and
12 I believe it as firmly now as then, that if they hadn't been
13 dismissed for this reason, they would have been dismissed because
14 of the facts. There had been no disturbing of the peace, at least
15 as far as we can tell from this cold record. Maybe it might have
16 been appropriate to get them with a phrase under the Texas Code,
17 but certainly if the justice of the peace hadn't been for us
18 by the reason of the thing to dismiss these charges, the County
19 Court on appeal where you have a de novo trial from a conviction
20 by the justice of the peace, they would have been violent to
21 throw them out.

22 Q What happened to the temporary restraining order?

23 A The temporary restraining order was continued from
24 time to time and all the instances -- the entries, I should say,
25 of continuing are in the docket orders. It was continued right

1 up until the time of the hearing of February 23rd.

2 Q Was it dissolved then?

3 A There was no explicit dissolution of it that I
4 can find indicated in the record.

5 Q Let me tell you what concerned me. Do we have a
6 judgment here?

7 A Well, this is another unusual thing. Yes, we do
8 have a judgment. Or it is not a judgment, but something equally
9 as appealable. But let me point out to you that we covered this
10 in our supplemental brief on ---

11 Q For example, only recently we dismissed an appeal.
12 It came from a three-judge court in the First Circuit, because
13 while there was an opinion, the conclusion in the opinion was not
14 embodied in the judgment.

15 A That is correct, but a very important distinction
16 is apparent. Is that the Goldstein case?

17 Q No, it is the Richardson case.

18 A Pardon?

19 Q It is the Richardson case, not the Goldstein case.
20 That involved a different question.

21 A It involved a declaratory judgment ---

22 Q No, but the point was that the case that we dis-
23 missed recently, there was an opinion, but the holding embodied
24 in the opinion was not in the judgment, and we held that it was
25 not an appealable judgment and dismissed it.

1 A Well, here is the situation on that, as I see it,
2 Your Honor. First of all, as we show in the supplemental brief,
3 the appeal from a final judgment here is governed -- or from an
4 interlocutory order.

5 Q I agree, but where is it? I can't find either the
6 order or the ---

7 A Well, it is in the last paragraph of the Court's
8 opinion. The Court did not comply with Rule 58 that requires the
9 entry of a separate document of a judgment. This is one of the
10 recent amendments to Federal Rule 58.

11 It did not do that, but it did specify, of course, the
12 entitlement to the injunction and to the declaratory judgment,
13 and ---

14 Q And didn't it then suspend it pending something in
15 the Texas Legislature?

16 A Yes, pending a meeting of the Legislature of Texas.
17 That legislative session did meet and did nothing about this
18 act ---

19 Q And after that nothing was done about the suspension.

20 A Nothing was done about the suspension. But of
21 course that suspension expired of its own weight by the very terms
22 of what the justice, of course, had written.

23 Q And you suggest that that, then, converts the
24 last paragraph into the judgment of ---

25 A Certainly he intended it as a judgment, Your Honor,

1 because the very docket entries shows -- the docket entry of
2 April 10, 1926, "judgment filed and entered."

3 Secondly, even if it isn't the judgment, it is cur-
4 rently an interlocutory order that is explicitly appealable under
5 28 U. S. Code 1253, and certain aspects -- and may I suggest that
6 you also study 2101, which makes even more clear the appeal-
7 bility of this particular order.

8 MR. CHIEF JUSTICE BURGER: I think we will suspend until
9 10 o'clock, Mr. Louisell.

10 MR. LOUISELL: Thank you.

11 (Whereupon, at 3 p.m. the argument in the above-
12 entitled matter recessed, to reconvene at 10 a.m. of the follow-
13 ing day, Thursday, April 30, 1970.)