AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 9: Liberalism Divided – Democratic Rights/Freedom of Speech

**Greer v. Spock, 424 U.S. 828** (1976)

*The Fort Dix Military Reservation is a 55-square-mile United States Army post in central New Jersey. The post is under the exclusive jurisdiction of the federal government, but some civilian traffic is allowed on the base and some roads through the reservation are posted with signs but unguarded. Base regulations prohibited political speeches on base or the distribution of any literature without the permission of the base commander.*

*In 1972, the presidential candidates of the People’s Party and the Socialist Workers Party, including Benjamin Spock, a well-known activist, pediatrician and author, sought permission to distribute literature and give speeches on the base but were rejected. They filed suit in federal district court seeking an injunction against the base commander from enforcing the base regulations relating to speeches and handbills on the grounds that they violated the First Amendment rights of the political candidates. The trial court eventually granted the injunction, and Spock delivered a speech on base. A circuit court later affirmed that ruling, and the military appealed to the U.S. Supreme Court. In a 6-2 decision, the Supreme Court reversed the lower courts and upheld the regulations.*

JUSTICE STEWART delivered the opinion of the Court.

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In reaching the conclusion that the respondents could not be prevented from entering Fort Dix for the purpose of making political speeches or distributing leaflets, the Court of Appeals relied primarily on this Court's *per curiam* opinion in *Flower* v. *United States* (1972). In the *Flower* case the Court summarily reversed the conviction of a civilian for entering a military reservation after his having been ordered not to do so. . . .

The decision in *Flower* was . . . based upon the Court's understanding that New Braunfels Avenue was a public thoroughfare in San Antonio no different from all the other public thoroughfares in that city, and that the military had not only abandoned any right to exclude civilian vehicular and pedestrian traffic from the avenue, but also any right to exclude leafleteers—"any claim [of] special interests in who walks, talks, or distributes leaflets on the avenue."

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The Court of Appeals was mistaken, therefore, in thinking that the *Flower* case is to be understood as announcing a new principle of constitutional law, and mistaken specifically in thinking that *Flower* stands for the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a "public forum" for purposes of the First Amendment. Such a principle of constitutional law has never existed, and does not exist now. The guarantees of the First Amendment have never meant "that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." "The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Cox v. Louisiana* (1965).

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One of the very purposes for which the Constitution was ordained and established was to "provide for the common defence,” and this Court over the years has on countless occasions recognized the special constitutional function of the military in our national life, a function both explicit and indispensable. In short, it is "the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." And it is consequently the business of a military installation like Fort Dix to train soldiers, not to provide a public forum.

A necessary concomitant of the basic function of a military installation has been "the historically unquestioned power of [its] commanding officer summarily to exclude civilians from the area of his command." The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false.

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What the record shows, therefore, is a considered Fort Dix policy, objectively and evenhandedly applied, of keeping official military activities there wholly free of entanglement with partisan political campaigns of any kind. Under such a policy members of the Armed Forces stationed at Fort Dix are wholly free as individuals to attend political rallies, out of uniform and off base. But the military as such is insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates.

Such a policy is wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control. It is a policy that has been reflected in numerous laws and military regulations throughout our history. And it is a policy that the military authorities at Fort Dix were constitutionally free to pursue.

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*Reversed*.

JUSTICE STEVENS took no part in the consideration or decision of this case.

CHIEF JUSTICE BURGER, concurring.

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JUSTICE POWELL, concurring.

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An approach analogous to that which must be employed in this case was described in *Grayned* v. *City of Rockford* (1972)*.* The Court is to inquire "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time." . . .

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. . . . [C]omplete and effective civilian control could be compromised by participation of the military *qua* military in the political process. There is also a legitimate public concern with the preservation of the appearance of political neutrality and nonpartisanship. There must be public confidence that civilian control remains unimpaired, and that undue military influence on the political process is not even a remote risk.

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At the same time, the infringement on the individual First Amendment rights of the candidates and the servicemen is limited narrowly to the protection of the particular Government interest involved. . . . The candidates, therefore, have alternative means of communicating with those who live and work on the Fort; and servicemen are not isolated from the information they need to exercise their responsibilities as citizens and voters. Our national policy has been to preserve a distinction between the role of the soldier and that of the citizen. A reasonable place to draw the line is between political activities on military bases and elsewhere. The military enclave is kept free of partisan influences, but individual servicemen are not isolated from participation as citizens in our democratic process.

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The noncandidate respondents contest the Fort Dix regulation requiring prior approval of all handbill, pamphlet, and leaflet literature (even if nonpartisan) before distribution on the base. The public interest in military neutrality is not at issue here, but the restriction is more limited and is directed to another concern. . . . [P]ermission is to be denied only where dissemination of the literature poses a danger "to the loyalty, discipline, or morale of troops." This regulation is responsive to the unique need of the military to "insist upon a respect for duty and a discipline without counterpart in civilian life." . . .

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JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Only four years ago, in a summary decision that presented little difficulty for most Members of this Court, we held that a peaceful leafleteer could not be excluded from the main street of a military installation to which the civilian public had been permitted virtually unrestricted access. . . .

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Fort Dix, at best, is no less open than Fort Sam Houston. No entrance to the Fort is manned by a sentry or blocked by any barrier. The reservation is crossed by 10 paved roads, including a major state highway. Civilians without any prior authorization are regular visitors to unrestricted areas of the Fort or regularly pass through it, either by foot or by auto, at all times of the day and night. Civilians are welcome to visit soldiers and are welcome to visit the Fort as tourists. They eat at the base and freely talk with recruits in unrestricted areas. Public service buses, carrying both civilian and military passengers, regularly serve the base. . . .

The inconsistent results in *Flower* and this case notwithstanding, it is clear from the rationale of today's decision that despite *Flower* there is no longer room, under any circumstance, for the unapproved exercise of public expression on a military base. The Court's opinion speaks in absolutes, exalting the need for military preparedness and admitting of no careful and solicitous accommodation of First Amendment interests to the competing concerns that all concede are substantial. It parades general propositions useless to precise resolution of the problem at hand. . . .

. . . . But the Court overlooks the equally, if not more, compelling generalization that—to paraphrase the Court—one of the very purposes for which the First Amendment was adopted was to "secure the Blessings of Liberty to ourselves and our Posterity,” and this Court over the years has on countless occasions recognized the special constitutional function of the First Amendment in our national life, a function both explicit and indispensable. Despite the Court's oversight, if the recent lessons of history mean anything, it is that the First Amendment does not evaporate with the mere intonation of interests such as national defense, military necessity, or domestic security. . . .

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It bears special note that the notion of "public forum" has never been the touchstone of public expression, for a contrary approach blinds the Court to any possible accommodation of First Amendment values in this case. In *Brown* v. *Louisiana* (1966), for example, the First Amendment protected the use of a public library as a site for a silent and peaceful protest by five young black men against discrimination. . . .

Those cases permitting public expression without characterizing the locale involved as a public forum, together with those cases recognizing the existence of a public forum, albeit qualifiedly, evidence the desirability of a flexible approach to determining when public expression should be protected. . . .

Not only does the Court's forum approach to public speech blind it to proper regard for First Amendment interests, but also the Court forecloses such regard by studied misperception of the nature of the inquiry required in *Flower.* In particular, this Court found controlling in *Flower* the determination that the military command of Fort Sam Houston had "abandoned any claim that it has special interests in who walks, talks, or distributes leaflets on the avenue." That was to say, that the virtually unrestricted admission of the public to certain areas of the Fort indicated that an exercise of public expression in those areas, such as distributing pamphlets, would not interfere with any military interests. Absent any interference, there could be no justification for selectively excluding every form of public expression, particularly a form no more disruptive than the civilian traffic already permitted. The abandonment required by *Flower* was not tantamount to a wholesale abdication of control, but rather was the yielding of base property to a use with which the exercise of the challenged form of public expression was not inconsistent. . . .

As applied in this case, the foregoing considerations require that the leaflet-distribution activities proposed by respondents be permitted in those streets and lots unrestricted to civilian traffic. Those areas do not differ in their nature and use from city streets and lots where open speech long has been protected. . . .

Unlike distributing leaflets, political rallies present some difficulty because of their potential for disruption even in unrestricted areas. But that a rally is disruptive of the usual activities in an unrestricted area is not to say that it is necessarily disruptive so as significantly to impair training or defense, thereby requiring its prohibition. Additionally, this Court has recognized that some quite disruptive forms of public expression are protected by the First Amendment. In view of respondents' willingness to submit to reasonable regulation as to time, place, and manner, it hardly may be argued that Fort Dix's purpose was threatened here. Without more, it cannot be said that respondents' proposed rally was impermissible.

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. . . . I could not agree more that the military should not become a political faction in this country. It is the lesson of ancient and modern history that the major socially destabilizing influence in many European and South American countries has been a highly politicized military. But it borders on casuistry to contend that by evenhandedly permitting public expression to occur in unrestricted portions of a military installation, the military will be viewed as sanctioning the causes there espoused. . . .

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. . . . [I]f any significant distinction remains between the cases, it is that in *Flower* the private party was an innocuous leafleteer and here the private parties include one of this country's most vociferous opponents of the exercise of military power. That is hardly a distinction upon which to render a decision circumscribing First Amendment protections.

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