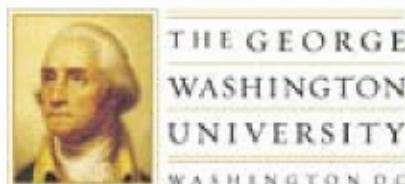


The Burger Court Opinion Writing Database

Greer v. Spock

424 U.S. 828 (1976)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



To: Mr. Justice Brennan
 Mr. Justice Black
 Mr. Justice Black
 Mr. Justice Marshall
 Mr. Justice Stewart
 Mr. Justice Powell
 Mr. Justice Stewart
 Mr. Justice Marshall

From: The Chief Justice
 Circulated: MAR 16 1976

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 74-848

Thomas U. Greer, Commander, Fort Dix Military Res- ervation, et al., Petitioners, <i>v.</i> Benjamin Spock, et al.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.
---	---

[March —, 1976]

MR. CHIEF JUSTICE BURGER, concurring.

I concur fully in the Court's opinion, and also in Part III of MR. JUSTICE POWELL's concurring opinion.

Permitting political campaigning on military bases cuts against a 200-year tradition of keeping the military separate from political affairs, a tradition that in my view is a constitutional corollary to the express provision for civilian control of the military in Art. II, § 2, of the Constitution.

As MR. JUSTICE POWELL notes, however, Reg. 210-27—at least to the extent that it permits some political leafletting on military bases—cannot be justified as implementing this policy of separation. I am persuaded that it is fully justified by the requirements of military life and the mission of the Armed Forces, and I would add only a note of caution. History demonstrates, I think, that the real threat to the independence and neutrality of the military—and the need to maintain a true "wall" of separation—comes not from the kind of literature that would fall within the prohibition of Reg. 210-27, but from the risk that a military commander might attempt to "deliver" his men's votes for a major-party candidate. This record, as MR. JUSTICE STEWART notes, presents no

To: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

2nd DRAFT

Recirculated: MAR 22 1976

SUPREME COURT OF THE UNITED STATES

No. 74-848

Thomas U. Greer, Commander,
Fort Dix Military Res-
ervation, et al.,
Petitioners,
v.
Benjamin Spock, et al.

On Writ of Certiorari
to the United States
Court of Appeals for
the Third Circuit.

[Manab 2]

I concur in the Court's opinion and

Permitting political campaigning on military bases cuts

Permitting political campaigning on military bases cuts against a 200-year tradition of keeping the military separate from political affairs, a tradition that in my view is a constitutional corollary to the express provision for civilian control of the military in Art. II, § 2, of the Constitution.

As MR. JUSTICE POWELL notes, however, Reg. 210-27—
at least to the extent that it permits distribution of some
political leaflets on military bases—cannot be justified
as implementing this policy of separation. I agree that
the regulation, insofar as it permits a military commander
to avert a clear threat to the loyalty, discipline or morale
of his command, is justified by the requirements of mili-
tary life and the mission of the Armed Forces. But a
commander could achieve this goal in another way as
well, by banning the distribution on base of *all* political
leaflets; the hard question for me is whether the Constitu-
tion requires a ban on all distributions in order to
preserve the separation of the military from politics.
Although there are dangers in permitting any distribu-

— or even as consistent
with our tradition
of separation.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 7, 1976

RE: No. 74-848 Greer v. Spock

Dear Thurgood:

I'll be glad to try my hand at a dissent in the above.

Sincerely,



Mr. Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 8, 1976

RE: No. 74-848 Greer v. Spock

Dear Potter:

I shall in due course circulate a dissent in the
above.

Sincerely,



Mr. Justice Stewart

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 2/11/76

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-848

Thomas U. Greer, Commander,
Fort Dix Military Res-
ervation, et, al.,
Petitioners, } On Writ of Certiorari
v. } to the United States
Benjamin Spock, et al. } Court of Appeals for
the Third Circuit.

[February —, 1976]

MR. JUSTICE BRENNAN, dissenting.

Only three 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. Despite that decision in *Flower v. United States*, 407 U. S. 197 (1972), the Court today denies access to those desirous of distributing leaflets and holding a political rally on similarly unrestricted streets and parking lots of a military base. In so doing, the Court attempts to distinguish *Flower* from this case. That attempt is wholly unconvincing, both on the facts and in its rationale. I, therefore, dissent.

According to the Court, the record here is "indisputably to the contrary" of that in *Flower*. *Ante*, at 8.¹

¹ In support of its characterization of the record as "indisputably to the contrary," the Court points to the Fort Commander's response to respondent Spock's initial request to campaign at the Fort. *Ante*, at 8 n. 7. According to the Court, the Commander's refusal to permit Spock's rally indicates that the military authorities had not "abandoned any claim [of] special interests in who walks, talks, or distributes leaflets" See *id.*, quoting *Flower v. United States* *supra*, at 198. The response, however, came subsequent

STYLISTIC CHANGES

✓ RR 13,5-620

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: 2/19/76

3d
2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-848

Thomas U. Greer, Commander, Fort Dix Military Reservation, et, al., Petitioners, <i>v.</i> Benjamin Spock, et al.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.
---	---

[February —, 1976]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL concurs, dissenting.

Only three 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. Despite that decision in *Flower v. United States*, 407 U. S. 197 (1972), the Court today denies access to those desirous of distributing leaflets and holding a political rally on similarly unrestricted streets and parking lots of a military base. In so doing, the Court attempts to distinguish *Flower* from this case. That attempt is wholly unconvincing, both on the facts and in its rationale. I, therefore, dissent.

According to the Court, the record here is "indisputably to the contrary" of that in *Flower*. *Ante*, at 8.¹

¹ In support of its characterization of the record as "indisputably to the contrary," the Court points to the Fort Commander's response to respondent Spock's initial request to campaign at the Fort. *Ante*, at 8 n. 7. According to the Court, the Commander's refusal to permit Spock's rally indicates that the military authorities had not "abandoned any claim [of] special interests in who walks, talks, or distributes leaflets" See *id.*, quoting *Flower v. United*

M. 8, 9, 17, 20, 21, 22

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

Recirculated: ~~3/12/76~~

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-848

Thomas U. Greer, Commander,
 Fort Dix Military Res-
 ervation, et al.,
 Petitioners,
 v.
 Benjamin Spock, et al.

On Writ of Certiorari
 to the United States
 Court of Appeals for
 the Third Circuit.

[February —, 1976]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MAR-
 SHALL concurs, dissenting.

Only three 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. Despite that decision in *Flower v. United States*, 407 U. S. 197 (1972), the Court today denies access to those desirous of distributing leaflets and holding a political rally on similarly unrestricted streets and parking lots of another military base. In so doing, the Court attempts to distinguish *Flower* from this case. That attempt is wholly unconvincing, both on the facts and in its rationale. I, therefore, dissent.

According to the Court, the record here is "indisputably to the contrary" of that in *Flower*. *Ante*, at 8.¹

¹ In support of its characterization of the record as "indisputably to the contrary," the Court points to the Fort Commander's response to respondent Spock's initial request to campaign at the Fort. *Ante*, at 8 n. 7. According to the Court, the Commander's refusal to permit Spock's rally indicated that the military authorities had not "abandoned any claim [of] special interests in who walks, talks, or distributes leaflets" See *id.*, quoting *Flower v. United*

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: JAN 6 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-848

Thomas U. Greer, Commander, Fort Dix Military Res- ervation, et al., Petitioners, v. Benjamin Spock, et al.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.
--	---

[January —, 1976]

MR. JUSTICE STEWART delivered the opinion of the Court.

The Fort Dix Military Reservation is a United States Army post located in a predominantly rural area of central New Jersey. Its primary mission is to provide basic combat training for newly inducted Army personnel. Accordingly, most of its 55 square miles are devoted to military training activities. The Federal Government exercises exclusive jurisdiction over the entire area within Fort Dix, including the state and county roads that pass through it.¹ Civilian vehicular traffic is permitted on

¹ See 52 N. J. Stat. Ann. 30-2 (1955):

"Exclusive jurisdiction in and over any land . . . acquired by the United States is hereby ceded to the United States for all purposes except the service of process issued out of any of the courts of this state in any civil or criminal proceeding."

See also 27 N. J. Stat. Ann. 5A-1 (1966):

"Whenever any public road or highway is located wholly or in part within the limits of a United States military reservation, the United States military authorities shall have the power, within the limits of such reservations, to police such roads and highways, to regulate traffic thereon, and to exercise such supervisory powers

PP. 3, 11

To: The Chief Justice
 Mr. Justice Clark
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: _____
 JAN 27 1976
 Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-848

Thomas U. Greer, Commander, Fort Dix Military Res- ervation, et al., Petitioners, <i>v.</i> Benjamin Spock, et al.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.
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[January —, 1976]

MR. JUSTICE STEWART delivered the opinion of the Court.

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"Exclusive jurisdiction in and over any land . . . acquired by the United States is hereby ceded to the United States for all purposes except the service of process issued out of any of the courts of this state in any civil or criminal proceeding."

See also 27 N. J. Stat. Ann. 5A-1 (1966):

"Whenever any public road or highway is located wholly or in part within the limits of a United States military reservation, the United States military authorities shall have the power, within the limits of such reservations, to police such roads and highways, to regulate traffic thereon, and to exercise such supervisory powers

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 28, 1976

Re: No. 74-848 - Greer v. Spock

Dear Potter:

I had my doubts about the regulations insofar as the distribution of political literature is concerned, but I join your circulation of January 27, subject to what is written in dissent on the literature issue.

Sincerely,



Mr. Justice Stewart

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 4, 1976

Re: No. 74-848, Greer v. Spock

Dear Bill:

Please join me in your dissent.

Sincerely,

JM

T. M.

Mr. Justice Brennan

cc: The Conference

1/18
MAR 18 1976

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-848

Thomas U. Greer, Commander,
Fort Dix Military Res-
ervation, et al.,
Petitioners, } On Writ of Certiorari
v. } to the United States
Benjamin Spock, et al. } Court of Appeals for
the Third Circuit.

[March —, 1976]

MR. JUSTICE MARSHALL, dissenting.

While I concur fully in **MR. JUSTICE BRENNAN**'s dissent, I wish to add a few separate words. I am deeply concerned that the Court today has taken its second step in just a few days toward establishing a doctrine under which any military regulation can evade searching constitutional scrutiny simply because of the military's belief—however unsupportable it may be—that the regulation is appropriate. We have never held—and, if we remain faithful to our duty, never will hold—that the Constitution does not apply to the military. Yet the Court's opinions in this case and in *Middendorf v. Henry*, — U. S. — (1976), holding the right to counsel inapplicable to summary court-martial defendants, go distressingly far toward holding that fundamental constitutional rights can be denied to both civilians and servicemen whenever the military thinks its functioning would be enhanced by so doing.

The First Amendment infringement that the Court here condones is fundamentally inconsistent with the commitment of the Nation and the Constitution to an open society. That commitment surely calls for a far more reasoned articulation of the governmental interests

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Marshall

Circulated: _____
Recirculated: MAR 19 19

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-848

Thomas U. Greer, Commander,
Fort Dix Military Res-
ervation, et al.,
Petitioners,
v.
Benjamin Spock, et al.

On Writ of Certiorari
to the United States
Court of Appeals for
the Third Circuit.

[March 24, 1976]

MR. JUSTICE MARSHALL, dissenting.

While I concur fully in MR. JUSTICE BRENNAN's dissent, I wish to add a few separate words. I am deeply concerned that the Court has taken its second step in a single day toward establishing a doctrine under which any military regulation can evade searching constitutional scrutiny simply because of the military's belief—however unsupportable it may be—that the regulation is appropriate. We have never held—and, if we remain faithful to our duty, never will hold—that the Constitution does not apply to the military. Yet the Court's opinions in this case and in *Middendorf v. Henry*, *ante*, at —, holding the right to counsel inapplicable to summary court-martial defendants, go distressingly far toward holding that fundamental constitutional rights can be denied to both civilians and servicemen whenever the military thinks its functioning would be enhanced by so doing.

The First Amendment infringement that the Court here condones is fundamentally inconsistent with the commitment of the Nation and the Constitution to an open society. That commitment surely calls for a far more reasoned articulation of the governmental interests

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 17, 1976

Re: No. 74-848 - Greer v. Spock

Dear Potter:

I shall await Lewis' concurrence.

Sincerely,



Mr. Justice Stewart

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 9, 1976

Re: No. 74-848 - Greer v. Spock

Dear Potter:

Please join me.

Sincerely,



Mr. Justice Stewart

cc: The Conference

✓/

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 17, 1976

No. 74-848 Greer v. Spock

Dear Potter:

Please join me in your opinion for the Court.

I do plan to write something in concurrence, but it will be a few days before I can accomplish this.

Sincerely,

Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

J

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice William J. Black
Mr. Justice Stevens

From: Mr. Justice Powell

1st DRAFT

Circulated: MAR 2 1976

SUPREME COURT OF THE UNITED STATES

No. 74-848

Thomas U. Greer, Commander,
Fort Dix Military Reservation, et al.,
Petitioners,
v.
Benjamin Spock et al.

On Writ of Certiorari
to the United States
Court of Appeals for
the Third Circuit.

[March —, 1976]

MR. JUSTICE POWELL, concurring.

I join the Court's opinion, and express these additional thoughts.

I

This case presents the question whether campaign activities and other face-to-face distribution of literature on a military base can be regulated and even prohibited because of the unique character of the government property upon which the expression is to take place. Candidate respondents propose to use streets and other areas of Fort Dix that are open to the public for partisan political rallies and handbilling. Noncandidate respondents seek to distribute literature in these areas without prior approval by Fort Dix officials.

Although no prior decision of the Court is directly in point, the appropriate framework of analysis is settled. As the dissenting opinion today recognizes, even First Amendment rights are not absolute under all circumstances. They may be circumscribed when necessary to further a sufficiently strong public interest. See *Pell v. Procunier*, 417 U. S. 817 (1974); *Adderley v. Florida*, 385 U. S. 39 (1966); *Cox v. Louisiana*, 379 U. S. 559 (1965). But our decisions properly emphasize that any

4, 5, 6

Stylistic Changes Throughout.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Powell

Circulated:

Recirculated: MAR 19 1976

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 74-848

Thomas U. Greer, Commander,
Fort Dix Military Res-
ervation, et al.,
Petitioners,
v.
Benjamin Spock et al. } On Writ of Certiorari
to the United States
Court of Appeals for
the Third Circuit.

[March 24, 1976]

MR. JUSTICE POWELL, concurring.

I join the Court's opinion, and express these additional thoughts.

I

This case presents the question whether campaign activities and face-to-face distribution of literature for other causes on a military base can be regulated and even prohibited because of the unique character of the government property upon which the expression is to take place. Candidate respondents propose to use streets and other areas of Fort Dix that are open to the public for partisan political rallies and handbilling. Noncandidate respondents seek to distribute literature in these areas without prior approval by Fort Dix officials.

Although no prior decision of the Court is directly in point, the appropriate framework of analysis is settled. As the dissenting opinion today recognizes, First Amendment rights are not absolute under all circumstances. They may be circumscribed when necessary to further a sufficiently strong public interest. See *Pell v. Procunier*, 417 U. S. 817 (1974); *Adderley v. Florida*, 385 U. S. 39 (1966); *Cox v. Louisiana*, 379 U. S. 559 (1965). But our decisions properly emphasize that any

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 7, 1976

Re: No. 74-848 - Greer v. Spock

Dear Potter:

Please join me.

Sincerely,

W.W.

Mr. Justice Stewart

Copies to the Conference