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Legal Sidebar

Haranguing in the Court

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"I rise to reclaim our democracy, one person, one vote," said the first person to stand up and interrupt the proceedings occurring prior to oral arguments at the Supreme Court of the United States on April 1, 2015. Others, in succession, stood to state the same. The protesters are members of an organization known as 99Rise, and they were expressing their disagreement with the Supreme Court's recent campaign finance law decisions. Each was arrested and charged with violating a federal law that prohibits anyone to "make a harangue or oration, or utter loud, threatening, or abusive language in the Supreme Court Building or grounds." The protesters have moved to dismiss the charges against them. They claim that the statute violates the First Amendment to the Constitution, which prohibits the government from making any law that abridges the freedom of speech. The U.S. District Court for the District of Columbia heard oral arguments on the motion to dismiss in late September, 2015.

The government's ability to restrict speech on public property depends on the type of forum where the speech is occurring. Public forums, spaces like public parks and sidewalks that have long been held open for speech activity, receive the highest degree of speech protection. Designated public forums, spaces that the government has affirmatively decided to open to speech activity, also receive the highest degree of protection. Limited public forums are spaces that the government has opened only for speech on particular topics, or at particular times. Speech restrictions within limited public forums are permissible so long as they are reasonable and viewpoint neutral, a less strict standard than that applied to public and designated public forums. Nonpublic forums are forums that are not held open for speech activity, though they may be open to the public for other reasons. The government has wide latitude to restrict speech in nonpublic forums in order to preserve the property for its intended purpose. Speech restrictions in nonpublic forums are permissible so long as they are reasonable and viewpoint neutral.

The interior of the Supreme Court Building is a nonpublic forum, as the protesters acknowledge in their motion to dismiss. Consequently, the ban on making harangues and engaging in loud speech (which are two separate offenses) need only be reasonable and viewpoint neutral to be upheld. According to the prosecution at oral argument, a "harangue" is "forceful or angry speech." The judge presiding over the case wondered what was disruptive about "forceful or angry speech" if it did not need to be loud in order to violate the law. Consider an angry whisper, for example. On its face, the statute would appear to prohibit such speech. The government argued that restricting a whispered harangue would not serve the government's interest in preventing the appearance of influence on the Justices or maintaining decorum at the Court, and consequently should not be considered when evaluating the constitutionality of the statute as it is being applied in this case.

Hodge v. Talkin, a recent decision by the U.S. Court of Appeals for the D.C. Circuit, may shed light on whether the restrictions on harangues and loud speech violate the First Amendment. In that case, the court upheld the constitutionality of a statute that prohibits displaying signs and assembling for protests on the plaza outside the Supreme Court building. After holding, definitively, that the plaza outside the Supreme Court is a nonpublic forum, the court found that the restrictions at issue were viewpoint neutral, and went on to analyze whether they were also reasonable. The government's interests in imposing the restrictions were to maintain the decorum befitting a court and to preserve the appearance and actuality of a judiciary free from the influence of public opinion and pressure. For the restrictions on display and assembly to reasonably achieve these asserted goals, they need not be the only reasonable restriction, nor the most reasonable restriction available to the government. "Congress may prophylactically frame prohibitions at a level of generality as long as the lines it draws are reasonable, even if particular applications within

those lines would implicate the government's interests to a greater extent than others." In the court's opinion, Congress reasonably concluded that prohibiting assembly and displays on the Supreme Court plaza would serve the interests of preserving decorum and the appearance of a court free of the influence of public opinion.

Consequently, if the court reviewing the plight of the protesters arrested for their speech within the Court building does reach the question of whether it is reasonable to prohibit "harangues," precedent indicates that the prohibition probably would be upheld under the First Amendment. While there might be applications of the statutory language that serve the government's interests to a lesser degree, it was arguably reasonable for Congress to conclude that "harangues" and loud speech in general would interfere with the preservation of the decorum befitting the highest Court in the land.

Separate and apart from the First Amendment question, the prohibition on "harangues" might also raise concerns under the Fifth Amendment vagueness doctrine. A statute is void for vagueness if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited." The Supreme Court has noted that statutory words that call for "wholly subjective judgments" to determine their application might be unconstitutionally vague. The Court noted that words like "annoying" or "indecent" required subjective judgment on the part of law enforcement and are generally unconstitutionally vague. "Harangue" was defined by the government at oral argument as "forceful or angry" speech, regardless of its volume. There may be an argument that criminalizing speech because it is "angry" requires a subjective judgment on the part of law enforcement that may raise vagueness concerns. In the end, however, this might not be the ideal case to resolve possible ambiguities in the application of the prohibition against "harangues" or any other speech within the Supreme Court building. The protesters in this case disrupted the actual proceedings at the Supreme Court. If any speech reasonably can be restricted within the Supreme Court Building, it seems likely to be speech that is loud enough to interrupt the business of the Court itself. Therefore, the district court may decline to decide any possible vagueness issues related to the application of the "harangue" clause of the statute, and hold instead that the prohibition against "loud, threatening, or abusive language" is sufficient to punish the speech at issue.

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