

Obama administration urges Supreme Court to dismiss First Amendment suit brought by anti-Bush demonstrators

By Eric London
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The US Supreme Court heard oral arguments last Wednesday in connection with a civil suit filed by anti-Bush protesters who were forcibly removed and sequestered by police and Secret Service agents during a presidential visit to Jacksonville, Oregon in 2004.

The case, *Wood v. Moss*, reached the Supreme Court after the Obama administration appealed from the 9th Circuit Court of Appeals, which ruled in 2012 that the demonstrators' claims met certain legal standards and should therefore proceed to trial.

The administration has sought to prevent the case from going to trial, and so the question before the Supreme Court is whether the plaintiffs' claims are sufficiently "plausible" to advance past the government's request for the court to throw the case out entirely.

The outcome of the case bears important implications for the First Amendment, as shown by an examination of the case's factual background. In October 2004—the month before that year's presidential election—President Bush's visit to the small town of Jacksonville sparked demonstrations, pro and anti. Two to three hundred anti-Bush demonstrators were exercising their right to free speech on Jacksonville's main thoroughfare, while a similarly sized group of pro-Bush demonstrators gathered nearby.

When Bush decided to eat dinner at a nearby restaurant, local police and Secret Service agents began ordering the removal of the anti-Bush protesters, who, they claimed, were disturbing Bush with antiwar chants as he ate his meal. The anti-Bush demonstrators were first moved one block away, then two blocks, while the pro-Bush demonstrators were allowed to remain at their initial location close to the president.

Such efforts to arrest and sequester anti-Bush demonstrators were a regular tactic of the Bush

administration, which arrested workers, students and several grandmothers for carrying signs outside of so-called "free speech zones."

These moves—including the one at issue before the court—were made in blatant violation of the decades-old First Amendment legal concept of "viewpoint discrimination," which prevents the government from treating individuals differently on the basis of their political viewpoint.

The Obama administration, however, is arguing that the decision to quarantine the anti-Bush protesters was necessary as a measure of "national security," implying that peaceful anti-Bush demonstrators might have hurled a bomb or otherwise threatened the president's life.

During Wednesday's oral arguments, several members of the Supreme Court indicated their agreement with the Obama administration and insisted that First Amendment free speech rights could be limited in the name of "national security" concerns.

Justice Stephen Breyer, a Democratic appointee, reassured counsel for the Department of Justice by saying, "I know everyone understands the importance of guarding the president in this country. Everyone understands the danger. You can't run a risk."

All of the justices accepted the legitimacy of the government's claim that the anti-Bush demonstrators posed a threat to the president's safety and even his life. Justice Elena Kagan, an Obama appointee, mentioned on five different occasions the possibility that demonstrators might throw grenades at the president.

At one point, she demanded of plaintiff's counsel: "Do you concede that...there is an objective security rationale here, that they are standing at the foot of the alleyway, that you could throw a grenade into the patio area [where Bush was dining]?"

The most deprecating treatment of plaintiff's counsel came from Chief Justice John Roberts, who interrupted questioning and demanded: "Let's say something happens back in the patio area where you—you're the head of the Secret Service Detail. You've got to evacuate the president right away. Do you go through the anti-Bush crowd or through the pro-Bush crowd? You've got to decide right now quickly. I'm serious. You have to make a split-second decision. Which way do you go?"

When plaintiff's counsel hedged, Justice Roberts leapt on him: "It's too late. You've taken too long to decide. It's a serious point."

Justice Antonin Scalia interjected, "You're the farthest thing from a security expert if you don't know the answer to that one."

After the courtroom and the justices enjoyed a round of laughter at the expense of plaintiff's attorney, Justice Sotomayor, another Obama appointee, added, "That's actually not much of an answer for lots of reasons," and declared that it was beyond the purview of the court to question the executive branch on questions of national security.

Justice Scalia, for his part, scolded the Obama administration attorney for not asserting more strenuously the absolute right of the government to remove protesters on the basis of their political viewpoint.

"It seems to me you want to win this case, but not too big," he said to another round of laughter from the court.

However, the Obama administration's legal logic is far from moderate. Scalia's criticism was based on the fact that the administration's oral argument placed heavy emphasis on the principle of "qualitative immunity." Stated simply, the government spuriously asserted that monetary relief could not be sought from Secret Service or police agents in this case because the First Amendment did not "clearly establish" a rule prohibiting the removal of protesters with antigovernment beliefs as of 2004, when the incident occurred.

The antidemocratic content of the administration's legal argument became clearer over the course of the oral arguments. The government asserted not only that the plaintiffs were barred from going to trial on the basis of the doctrine of qualitative immunity, but also that the president's Secret Service could take almost unlimited action against protesters in order to protect the president.

The Obama administration extended this claim to situations in which the Secret Service was intentionally acting against demonstrators solely because of their political beliefs.

"If you have an objective security rationale for the action, the retaliatory animus would not render that unconstitutional," argued Ian Gershengorn, counsel for the Department of Justice.

The Obama administration claimed that since "a legitimate security rationale is likely to be in every case," and since "the Court has recognized that it is valid at times to take into account the nature of one's speech in making arrests and other security situations," the Secret Service would be acting within the confines of the US Constitution even if it acted without any degree of suspicion or probable cause.

In other words, the Obama administration asserts that the government can arrest or sequester protesters without probable cause on the grounds that they pose a hypothetical threat to the safety of the president entirely because of their political viewpoint. Such a rationale is a blatant violation of the First and Fourth Amendments and is entirely compatible with police state dictatorship. This pseudo-legal position is the negation of freedom of speech and political expression.

Wednesday's oral arguments mark another attempt by the Obama administration to carve out a gaping "exception" to the Bill of Rights under the banner of "national security." Such efforts are inextricably linked to the numerous other constitutional violations of the executive branch, ranging from blanket NSA surveillance of the population, to detention without charges or trial, to extralegal drone assassinations, to the role of the CIA and the White House in covering up the Bush administration's state torture policy.

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