

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

LARRY W. BRYANT
3518 Martha Custis Drive
Alexandria, VA 22302

Plaintiff,

v.

Civil Action No. 1:04-cv-1125

DONALD H. RUMSFELD
Secretary of Defense
United States Department of Defense
Washington, DC 20310

and

LES BROWNLEE
Acting Secretary of the Army
Department of the Army
Washington, DC 20310

Defendants.

**COMPLAINT FOR DECLARATORY JUDGMENT,
PRELIMINARY AND PERMANENT INJUNCTIVE RELIEF, DAMAGES, AND
ATTORNEYS' FEES**

COME NOW the Plaintiff, Larry W. Bryant, by and through his attorneys, Jonathan L. Katz, and the law firm of Marks & Katz, LLC, and represents to this honorable Court as follows:

I. NATURE OF ACTION

1. This is an action to order the *Pentagram* newspaper to reverse its rejection of Plaintiff's paid advertisement entitled "Blow the Whistle on Bush's 'Gulf of Persia' Resolution" ("Advertisement"), to declare the rejection to be in violation of the First Amendment of the United States Constitution and other relevant provisions of the United States Constitution, and for the issuance of preliminary and permanent injunctive relief against Defendants requiring them to publish the Advertisement forthwith. Plaintiff also seeks to recover any damages that he has sustained and will sustain, and his reasonable

attorney's fees pursuant to 42 U.S.C. § 1988 and all other provisions of law. Plaintiff also demands a jury trial on all issues so triable.

II. JURISDICTION AND VENUE

2. This action is brought pursuant to 42 U.S.C. § 1983 to prevent certain actions by Defendants in violation of Plaintiff's rights under the First, Fifth and Fourteenth Amendments to the United States Constitution, and for a declaratory judgment pursuant to 28 U.S.C. § 2201.

3. Subject matter jurisdiction over Plaintiff's federal claims is conferred on this Court pursuant to 28 U.S.C. §§ 1331 and 1343.

4. Venue of this action is placed in the Court pursuant to 28 U.S.C. § 1391(b).

III. PARTIES

5. Plaintiff LARRY W. BRYANT (hereinafter "Bryant"), is a Virginia resident, living at 3518 Martha Custis Drive, Alexandria, VA 22302.

6. Defendant DONALD H. RUMSFELD is the United States Secretary of Defense, United States Department of Defense, Washington, DC 20310. Defendant LES BROWNLEE is Acting Secretary of the Army, United States Department of Defense, Washington, DC 20310.

IV. ALLEGATIONS

7. In June 2003, the Defendants, acting through the Department of Defense and/or the Army and/or employees, agents or servants of the Department of Defense and/or the Army refused to print Plaintiff's following paid advertisement ("Advertisement") that Plaintiff submitted on June 7, 2003, for publication in the *Pentagram*:

BLOW THE WHISTLE ON BUSH'S "GULF OF PERSIA" RESOLUTION!
History shows that presidential lying constitutes an impeachable offense. If Bush has lied to the world about his No. 1 reason for waging war against Iraq, then he should be impeached. If enough whistleblowers on this issue decide to come forward, their evidence may be enough to guarantee that impeachment. And if you happen to be (or know someone who is) one of those Deep Throats, please make yourself known to Larry W. Bryant at: 3518 Martha Custis Drive, Alexandria, VA 22302; phone: 703-931-3341; e-mail: overtci@cavtel.net. Armed

with your evidence ("leaked" or otherwise), we can begin establishing a whistleblower reward fund toward achieving Pres. Bush's full accountability as to what he knew (and when he knew it) about the veracity of his statements and acts. (And since our defense officials affirm the efficacy of polygraph testing for their employees, let's demand that Bush undergo a lie-detector test on this issue!)

8. On June 11, 2003, Plaintiff submitted a written request to reverse the rejection of his Advertisement, to Col. Christopher G. Essig, United States Army Garrison, Fort Myer, Virginia.

9. On June 20, 2003, the Defendants, through Col. Christopher G. Essig, upheld the rejection of Plaintiff's Advertisement, by stating:

This is in reply to your June 11, 2003, memo regarding my Public Affairs Office deciding not to print the announcement ad you submitted to the Pentagon newsletter. The Pentagon serves a wide audience and it is important that we hear from readers to let us know that we are covering the kinds of issues that concern the most members of the community.

While my Public Affairs staff value submissions from readers, I empower and trust them to make editorial judgments as to which submissions will be selected for publication. They use criteria including relevance and propriety to our audiences in determining which submissions will appear in the Pentagon's pages. This is consistent with all publications, all of which receive far more correspondence than they can use. The decision is ultimately up to the editorial staff and the publisher, who reserve the right to make those decisions.

Your submission in this case was found not to meet our needs. I fully support the editorial staff's judgment in making those decisions. This does not mean your opinions are not important or valuable -- simply that this particular submission does not meet our needs.

Letter from Col. Christopher G. Essig to Larry W. Bryant (June 20, 2003).

10. By letter dated September 4, 2003, Plaintiff, through undersigned counsel, responded directly to Col. Essig's June 20, 2003, letter, and insisted that the rejection of Plaintiff's Advertisement violated his First Amendment free speech rights. Although a military lawyer subsequently called undersigned counsel to claim that his letter was being reviewed, neither Plaintiff nor undersigned counsel have received any further communication on the matter.

11. Neither the Defense Department nor the Army had any authority to reject Plaintiff's

Advertisement. Although Defense Department requirements reserve *Pentagram* editorial content control to the military, those same requirements gives the *Pentagram's* private sector owner and publisher (which is the Washington Post Company, through its division known as Comprint Military Publications) the final decision to accept or reject all paid advertisements, including Plaintiff's Advertisement. See United States Department of Defense Instruction Number 5120.4 ("DDI No. 5120.4"), Enclosure 4 at §§ E4.1.7.1 and E4.1.7.1 (<http://www.dtic.mil/whs/directives/corres/text/i51204p.txt> - last checked on June 30, 2004).

12. The Defendants, acting through the Department of Defense and/or the Army and/or employees, agents or servants of the Department of Defense and/or the Army, violated the Defense Department's own requirement not to control advertising content of the *Pentagram*, by requiring that Plaintiff's Advertisement not be published.

13. Assuming, *arguendo*, that the Defense Department's own guidelines did not prohibit Defendants from accepting or rejecting advertising in the *Pentagram*, then the guidelines granting such authority are unconstitutional and in violation of the First Amendment, and/or the Defendants misapplied said guidelines and insodoing violated the Constitution and the First Amendment.

14. Plaintiff's Advertisement was submitted by Plaintiff as a paid advertisement in the *Pentagram*. Never did Defendants claim that the Advertisement violated any rules or regulations governing the *Pentagram*. Defendant's Advertisement is protected expression pursuant to the First Amendment to the United States Constitution.

15. Plaintiff believes that his Advertisement is a beneficial communication that serves both the *Pentagram's* readers and society in general.

16. Plaintiff continues to want ot place the Advertisement in the *Pentagram*, and will do so once the Defendant's bar to his Advertisement is removed.

17. Defendants' rejection of Plaintiff's Advertisement is a continuation of Plaintiff's

experience with the Defendants' violating his First Amendment rights, as follows: In 1994, Plaintiff won a partial summary judgment in this Court that enjoined the United States Army from "applying viewpoint-based restrictions in selecting commentary for publication in its Civilian Enterprise Newspapers." Larry W. Bryant v. Secretary of the Army, Civ. No. 93-1289 (Richey, J.) (D.D.C., Order dated Sept. 22, 1994); *see* accompanying opinion at Bryant v. Sec'y. of the Army, 862 F.Supp. 574 (D.D.C. 1994). Defendants' rejection of Plaintiff's Advertisement violates the foregoing partial summary judgment Order.

In 1987, Plaintiff obtained a Consent Judgment for the military to publish advertisements that had been rejected for publication in Civilian Enterprise Newspapers. Larry W. Bryant v. Sec'y of Defense, Sec'y of Army & Sec'y of Air Force, Civ. No. 86-1323-A (E.D. Va. Apr. 15, 1987).

18. DDI No. 5120.4 places unbridled and unconstitutional discretion in Defendants to seek the omission of submitted paid advertisements in the *Pentagram* and other Civilian Enterprise Newspapers ("CEN's"), and to prohibit distribution of the *Pentagram* and other CEN's if unable to exclude the advertisement. For instance, DDI No. 5120.4, § E4.1.7.3 provides that:

Before each issue of a CE publication is printed, the public affairs staff shall review advertisements to identify any that are contrary to law or to DoD or Military Service regulations, including this Instruction, or that may pose a danger or detriment to DoD personnel or their family members, or that interfere with the command or installation missions. It is in the command's best interest to carefully apply DoD and Service regulations and request exclusion of only those advertisements that are clearly in violation of this Instruction. If any such advertisements are identified, the public affairs office shall obtain a legal coordination of the proposed exclusion. After coordination, the public affairs office shall request, in writing if necessary, that the commercial publisher delete any such advertisements.

If the publisher prints the issue containing the objectionable advertisement(s), the commander may prohibit distribution in accordance with DoD Directive 1325.6 (reference (u)).

§ E4.1.7.3 (emphasis added).

19. Plaintiff has a clear legal right to have his Advertisement published in the *Pentagram*. In

refusing Plaintiff's Advertisement, Defendants violated Plaintiff's First Amendment right to free speech and Fifth Amendment right to due process of law.

20. Plaintiff's position in this Complaint is legally sound and supported by fact and law. The Defendants' actions, however, have created a *bona fide* controversy between the parties, and Plaintiff is in doubt as to his rights, privileges and immunities with respect to the Defendants' actions challenged herein. Plaintiff requires, therefore, a declaratory judgment declaring his rights, privileges and immunities. There is a clear, present, actual, substantial and *bona fide* justiciable controversy among the parties.

21. Plaintiff has no adequate remedy at law. No amount of money damages could adequately compensate Plaintiff for the irreparable harm described herein, specifically the deprivation of Constitutionally protected rights.

22. Plaintiffs will suffer irreparable injury if injunctive relief is not granted, and Defendants are permitted to continue rejecting his Advertisement. The loss of rights guaranteed by the First Amendment is so serious that, as a matter of law, irreparable injury is presumed and in such an instance involving the loss of First Amendment rights, damages are both inadequate and unascertainable.

23. The public interest would best be served by the granting of injunctive relief, and, indeed, the public interest is disserved by permitting the continued rejection of the Advertisement, which rejection violates Plaintiff's and the public's rights under the First Amendment to the United States Constitution.

24. All conditions precedent to the institution and maintenance of this cause of action have occurred or have been performed.

25. As a direct and proximate result of the acts, practices, and customs of Defendants, Plaintiff is suffering actual, consequential, and other damages, in addition to the irreparable harm described herein.

COUNT I

THE REJECTION OF PLAINTIFF'S ADVERTISEMENT VIOLATES THE 1994 PARTIAL SUMMARY JUDGMENT ORDER

26. Plaintiff realleges and incorporate herein paragraphs 1 through 25 as if fully restated herein.

27. In 1994, Plaintiff won a partial summary judgment in this Court, that enjoined the Army from "applying viewpoint-based restrictions in selecting commentary for publication in its Civilian Enterprise Newspapers." Larry W. Bryant v. Secretary of the Army, Civ. No. 93-1289 (Richey, J.) (D.D.C. Sept. 22, 1994). Defendants' rejection of Plaintiff's Advertisement violates said 1994 Order.

COUNT II

THE REJECTION OF PLAINTIFF'S ADVERTISEMENT VIOLATES PLAINTIFF'S FIRST AMENDMENT AND DUE PROCESS RIGHTS

28. Plaintiff realleges and incorporate herein paragraphs 1 through 27 as if fully restated herein.

29. Defendants' rejection of Plaintiff's Advertisement, and the regulations applying to such rejection, violate the First Amendment and other rights guaranteed Plaintiff by the United States Constitution, on its face and as applied, denying equal protection of the law in that the rejection and regulations are arbitrary, oppressive and capricious.

REQUEST FOR ATTORNEY'S FEES AND PRAYER FOR RELIEF

30. The actions of Defendants complained of herein were actions designed to deprive Plaintiff of his rights and privileges guaranteed by the United States Constitution.

31. In his legitimate desire to pursue the rights and privileges guaranteed by the Constitution and laws of the United States, Plaintiff has employed the undersigned attorneys to prosecute this action and has agreed to pay them a reasonable fee for same.

32. Accordingly, Plaintiff is entitled to an award of attorney's fees as provided for by 42

U.S.C. § 1988, and by all other applicable provisions of law.

WHEREFORE, Plaintiff respectfully requests that this Court GRANT the following relief:

- a) A declaration that the rejection of Plaintiff's Advertisement is violative of the aforementioned federal Constitutional provisions;
- b) An immediate hearing, to temporarily and permanently enjoin Defendants from continuing to reject the Advertisement;
- c) An award of any and all attorney's fees and costs as authorized by law;
- d) An award of all appropriate damages established by Plaintiff; and
- e) Such other and further relief as this Court deems fit, just, and equitable.

Dated: June 30, 2004

Respectfully submitted,

MARKS & KATZ, L.L.C.

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Attorneys for Plaintiff

DEMAND FOR JURY TRIAL

The Plaintiff respectfully demands a jury trial on all issues so triable.

Jonathan L. Katz