

In the

# Supreme Court of the United States

JOSEPH SMITH, SHERIFF OF )  
WORCHESTER COUNTY, )

Appellant, )

vs )

VALARIE GOGUEN, )

Appellee. )

Docket No. 72-1254

Washington, D.C.

November 12 and 13, 1973

Pages 1 thru 53

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	:
Appellant	:
	:
v.	:
	:
VALARIE GOGUEN	:
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No. 72-1254

Monday, November 12, 1973  
Tuesday, November 13, 1973

The above-entitled matter came on for argument from 2:36 o'clock pm. on Monday, November 12, 1973, until 3:00 o'clock p.m. Arguments recommenced at 10:03 o'clock a.m., the following day, Tuesday, November 13, 1973

BEFORE:

WARR E. BURGER, Chief Justice of the United States  
WILLIAM O. DOUGLAS, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice  
LEWIS F. POWELL, JR., Associate Justice  
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

CHARLES E. CHASE, Assistant Attorney General,  
Commonwealth of Massachusetts For the Appellant

EVAN T. LAWSON, ESQ., 14 Beacon Street,  
Boston, Massachusetts, For the Appellee

C O N T E N T SORAL ARGUMENT OF:PAGE:

CHARLES E. CHASE

For the Appellant

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EVAN T. LAWSON

For the Appellee

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REBUTTAL ARGUMENT OF:

CHARLES E. CHASE

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-1254, Joseph Smith, Sheriff of Worcester County, against Valarie Goguen.

Mr. Chase, you may proceed.

ORAL ARGUMENT OF

CHARLES E. CHASE, ESQ.,

MR. CHASE: Mr. Chief Justice, and may it please the Court:

My name is Charles Chase and I'm an Assistant Attorney General for the Commonwealth of Massachusetts. At this time I would like to, with the leave of Court, reserve five minutes of my argument time for rebuttal.

MR. CHIEF JUSTICE BURGER: That will take you just to about termination today.

MR. CHASE: All right.

Your Honors, this is an appeal from a decision of the First Circuit Court of Appeals in which that court ruled that the Massachusetts Flag Statute was vague, in violation of the 14th Amendment, and overly broad in violation of the First Amendment.

The facts in this case are relatively simple. On January 30th, 1970, Valarie Goguen was seen on Main Street in Leominster, Massachusetts, with a small American flag, approximately three by five inches, or four by six inches,



sewn to the seat of his pants in the area of the left buttock.

A police officer saw him standing on the streets of Leominster and saw a crowd of people with him. The police officer approached him and spoke to him about the flag.

Thereafter, the police officer went to the Leominster District Court and sworn out a complaint charging that Valarie Goguen did treat contemptuously the flag of the United States.

Mr. Goguen was tried in the local district court and found guilty by a judge. He exercised his rights for a trial de novo to the Worcester Superior Court.

A trial was had before a jury and the jury returned the verdict of guilty. Mr. Goguen was sentenced to six months in the House of Correction. Execution of this sentence was stayed pending his appeal to the State Supreme Court. On that appeal, the State Supreme Court of Massachusetts affirmed the conviction unanimously in a rescript opinion. After that, on February --

Q What does that mean, "rescript opinion?"

MR. CHASE: Your Honor, as it is used in Massachusetts, I believe it is equivalent to a per curiam opinion, a short, brief opinion in which the issues are not discussed at length.

Q What section of the state law does this

come under?

MR. CHASE: What section of the state law?

Q Where is it located, yes.

MR. CHASE: The Flag Statute, your Honor?

Q No, Leominster, where is that town?

MR. CHASE: That is located approximately 30 or 40 miles to the northwest of Boston.

Q Northwest.

Q Small town?

MR. CHASE: Fairly small town, I would believe, probably 30,000 or 40,000 people.

Q Was the Appellee engaged in any sort of demonstration or anything such as that?

MR. CHASE: The record does not reflect any information.

Q Nothing like that was going on, was it?

MR. CHASE: Not that we can glean from the record.

Q He was just walking down the street. He just decided that day, to put on a pair of pants with the American flag sewed on them, or else to sew the American flag on a pair of pants he had, just to dress that way that day, supposedly?

MR. CHASE: Apparently, your Honor. It is unclear as to what exactly he was doing other than he was on the public streets of Leominster.

Q It does say he was with a group of persons, but it doesn't say whether he was a member of the group or just whether there were other people standing there at the same time.

MR. CHASE: Your Honor, I cannot give any more than what is in that record at this time.

Q You don't know.

MR. CHASE: I don't know.

Q Well, how can you find out what was -- is there any way we can find out what was going on?

MR. CHASE: Well, your Honor, may I say that our office became involved when the federal habeas corpus petition was filed, I believe. My brother represented him at the Superior Court jury trial and possibly he could enlighten the Court here.

Q You mean, there is no record of any kind?

MR. CHASE: You have the entire record before your Honor in the Appendix. By the way, it is just a seven-page -- it is still seven pages of the Appendix. That is the entire Appellate record.

Q That is what I was worried about. That is all we can get?

MR. CHASE: That is all I know of, your Honor. That is all that the federal courts had when they decided this question.

On February 23, 1972, we filed his petition for a writ of habeas corpus and in June of '72 the district court judge granted the writ, saying -- or finding that Mr. Goguen's constitutional rights had been violated, according to this statute.

The First Circuit Court of Appeals affirmed the granting of the writ.

The first point I would press to this Court is the question of whether or not Mr. Goguen properly exhausted his available state remedies in this case. By that I mean, was it proper for the First Circuit to reach a facial vagueness claim in this case in light of the record and briefs that were filed in the Supreme Judicial Court of Massachusetts.

If you study those briefs and tie them in with the short record, it becomes quite clear that the question of whether or not this statute gives fair notice of the conduct it proscribes, whether or not that question was raised in the case here, it becomes clear that it wasn't.

Appellee, in his brief to this Court, tells us that the essence of a 14th Amendment vagueness claim is whether or not fair notice is given and yet, if you will look at the brief that was filed in the Supreme Judicial Court of Massachusetts, you will not see a single case cited for that proposition. You will not see an argument developed along those lines.

I do not deny that in the area of First Amendment rights, many times vagueness and overbreadth are closely connected and intertwined and yet, the question, I think, before this Court is whether or not it was permissible for the Supreme Judicial Court of Massachusetts to handle this case in the way it did relative to Fourteenth Amendment vagueness.

In other words, if you look at the S.J. -- the Supreme Judicial Court Opinion, you will see that they said simply this, "Whatever the uncertainties in other situations, we find no vagueness in the statute as applied here."

So the question becomes, should the First Circuit have reached a facial vagueness argument in light of what the Supreme Judicial Court said?

I think it is a question of exhaustion in not standing because the Supreme Judicial Court never faced the question. If the issue had been pressed to them, and they had said, "No, we find that this man has no standing to raise the facial vagueness argument," then the First Circuit's opinion would have been in line, in other words, a discussion of standing to raise facial vagueness.

But the Supreme Judicial Court of Massachusetts never entertained an argument because one was never made to them. Accordingly, we would urge this Court to find that the exhaustion of state remedies was violated when the First



Circuit Court reached a facial vagueness claim.

Assuming, though, that the First Circuit Court could consider a facial vagueness claim properly, we submit that that issue was wrongly decided by the First Circuit Court and we say that because of the following reasons:

This statute, when you consider whether or not it is vague on its face, has a very narrow subject matter. It deals with United States flags. It is not dealing with loitering or noise or annoyance. It is dealing with flags.

Now, if a person is going to violate this statute, he immediately knows or if he wants notice as to what conduct this statute proscribes, he immediately knows that it has something to do with flags and if he wants to stay clear of violating this statute, he just has to stay clear of doing something to the United States flag.

So the subject matter of this statute is uniquely narrow and we think that that takes some of the vagueness away from the phrase, "Treat contemptuously" in the statute.

Q Does that apply to a paper flag bought in the Five and Ten Cents Store?

MR. CHASE: Your Honor, we would say no. It applies --

Q Why not?

MR. CHASE: -- only to actual flags because the Massachusetts statute --

Q That's good. What is the American flag?

MR. CHASE: The American flag is a cloth flag of certain dimensions. There is an official dimension and there are other dimensions, commercial flags that are put out for uses in parades and whatnot that there are varying sizes to United States flags. But it is a cloth flag that can be affixed to a pole and can be raised and displayed.

Q It doesn't apply to a paper flag?

MR. CHASE: Excuse me, your Honor?

Q It doesn't apply to a paper flag?

MR. CHASE: I would say no, your Honor.

Q Well, then, it is vague. It is automatically vague. If I take it it applies to the paper flag and you don't, don't you think that's vague?

MR. CHASE: Well, your Honor, on the question of vagueness, we have to look to see what the authorities in Massachusetts have said about the statute, since it was enacted in 1899.

Q Well, suppose it was a hand-painted-on-cloth, with 13 stripes and 50 stars, hand-painted? Would that be the American flag?

MR. CHASE: On cloth?

Q Yes.

MR. CHASE: I would say that what the average citizen would surmise or appreciate as a flag, if the

average citizen would consider that the flag, it would be a flag.

Q Suppose it had 11 stripes?

MR. CHASE: Well, this statute is directed at --

Q And 60 stars, would that be a flag?

MR. CHASE: -- United States -- it is directed at United States flags, your Honor?

Q Would that be a flag?

MR. CHASE: By definition --

Q Would that be "a flag of the United States?"

MR. CHASE: By definition, it would not be.

Q Would --

MR. CHASE: Because a flag of the United States has the appropriate number of stars and stripes.

Q What kind of cloth would it have to be?

MR. CHASE: It doesn't have to be any particular cloth, your Honor.

Q But it couldn't be paper?

Q Is there an issue in this case as to whether this was a flag? I missed it, if it were in the briefs.

MR. CHASE: No, your Honor. In the trial court the only dispute was whether or not the flag had to be official by way of size or whatever the official flag is, four by six feet.

Q But it is not disputed that this had the

requisite number of stars and stripes and colors?

MR. CHASE: It was the usual flag with the appropriate number of stars and stripes.

Q Incidentally, Mr. Chase, vexillologist?

MR. CHASE: Flag expert.

Q Vexillologist, what is he?

MR. CHASE: Apparently, he is some sort of an expert on flags, your Honor.

Q What was his testimony about the origin of the flag and the difference in standards, that this one didn't conform to official standards? What was the significance of all that?

MR. CHASE: Well, the defense at that time, Mr. Goguen, said that if he was to be convicted under this statute, he had to have done something to an official flag, and the definition of an official flag by Presidential Resolution or Proclamation, is a flag of a certain size. It is a number of feet. I believe it is four by six feet.

Q I see.

MR. CHASE: And the judge at the trial court denied that instruction.

Q Have you many vexillologists in Massachusetts?

MR. CHASE: Your Honor, I wasn't involved with that case. I never met the man and I don't think I have ever met a vexillologist in my life.

Q I never heard of one until --

MR. CHASE: No.

Q -- a few minutes ago.

MR. CHASE: Besides the fact that this statute deals with the unique, narrow subject matter, namely, flags, we think it is clear from the Supreme Judicial Court opinion that one must also show that the person who is to be convicted under such a statute intended to violate the statute and we think that the question or the point -- the necessity of having to prove intent, again, narrows the reach of this statute. Inadvertent or careless acts are not proscribed by the statutory language.

Again, when you talk about the vagueness of this statute, there are accepted principles of statutory interpretation and construction which easily apply to the words of this statute.

By the way, the first 26 words of the Massachusetts statute are directed toward flag desecration. The remainder of the statute talks about commercial uses or commercial misuse of the flag and those first 26 words, the key desecration words, go something like this, "Whoever publicly mutilates, tramples upon, defaces or treats contemptuously the flag of the United States is guilty of a misdemeanor."

We urged upon the First Circuit Court the principle that when specific and general words are



associated with one another in a statute, the more general words take on the color of the specific, or a meaning analagous to those of the specific words and what we urged upon the First Circuit Court was that the phrase, "Treats contemptuously," is directed at the same type of act that the first three desecration words in the statute are directed at, namely, acts that physically dishonor the flag or affect the physical integrity of the flag.

Q Well, and then, I suppose, you further argue that the Appellee's actions in this case did so?

MR. CHASE: Yes, your Honor.

Q Why, and how?

MR. CHASE: We say that the act of affixing a flag to that part of the anatomy physically dishonors the flag in the common estimation of the people in this country.

Q Well, the flag was sewn on his trousers. What if it had been sewn on his lapel?

MR. CHASE: Your Honor, it would not be proscribed under the language of the statute.

Q Why?

MR. CHASE: Because of the common usage of flags in this country. Because of what an individual would read or would see from that specific act. If I saw you with a flag on your lapel, I wouldn't think you were trying to treat the United States' flag contemptuously. I don't see

many people wearing something on the seat of their pants, though, where they intend to give honor or respect to it.

Q Well, you see some pretty odd costumes these days.

MR. CHASE: Certainly. Yes, your Honor.

Q Suppose you had taped it to the rear bumper of your car?

MR. CHASE: Your Honor, again, I think that is a fairly neutral act. At least the way usage and custom has developed in this country, the whole history of this country, you see so many war movies where the military vehicles have flags affixed to them to designate their country or origin and you see in this country a number of vehicles with flag decals and whatnot.

It is common accepted usage. That act, you don't hear people jumping up and down and saying, well, that act is holding up the flag to dishonor. It is a fairly neutral act. You cannot tell by that specific conduct what, exactly, the person intended who has affixed the flag to the bumper or to the rear window, a decal or whatnot.

Q I've seen bathing suits with a flag. What about that?

MR. CHASE: Well, your Honor, I have not seen a bathing suit with a flag, but I would think that if an entire American flag was on a bathing suit, if it was on the

posterior side, as the facts are in this case, that it would be proscribed by the wording of the statute.

Q I suppose there are quite a number of contemptuous acts, the term you use, that may go unprosecuted?

MR. CHASE: Well, your Honor, I'm not sure --

Q All the acts which may be subject to a particular statute are not necessarily the subject of a prosecution.

MR. CHASE: Well, that is true, your Honor. Of course, I haven't seen any instances in Massachusetts where people have worn flags on the seat of their pants.

Anything having to do with the flag, at least in the Greater Boston area, gets reported, as this case was widely reported.

The First Circuit seems to make the point that they think a lot of conduct that may or not be proscribed by the statute has sort of gone by the boards because people have been arrested and then the prosecution wouldn't be pressed and the people's rights are being infringed upon.

To the best of my knowledge, that is just a gratuitous conclusion. Any conduct involving the flag receives wide publicity and --

Q To you go through that five-block area around the Statler Hotel in Boston?

MR. CHASE: I've been there, your Honor, many

times, yes.

Q You haven't seen any flags sewn on seats of pants?

MR. CHASE: No, your Honor. As a matter of fact, my office abuts Boston Common which is the area for speech-giving and whatnot.

Q And you haven't seen any?

MR. CHASE: And I haven't seen any flag desecration at all.

Q I guess I was there at the wrong time.

Q Mr. Chase, your argument, I think, leads up to what you call in your brief, "A description of the statute as protecting only the physical integrity of the flag."

MR. CHASE: Yes, your Honor.

Q Do you have many Massachusetts cases, even in lower courts, which so describe the statute?

MR. CHASE: Your Honor, no, I cannot point to any authority other than what has already been presented to the Court. I believe I have given all of it to the best of my knowledge. I would make reference, though, to certain opinions of the Attorney General of Massachusetts over the years which indicate that we are dealing with flag legislation and the only things that the statute directs itself to are actual flags, not symbols or emblems that might

look like the flag or whatnot.

Additionally, I would point out to the Court that the term "flag" in the Massachusetts statute means "flags" in contradistinction to the other statutes that courts have dealt with over the past few years. Many flag statutes define the flag to mean, not only the actual flag but stars and stripes and hearts or emblems or symbols or whatnot. Even the federal flag statute gives a very broad definition of the word "flag" and --

Q Mr. Chase, I know that the rescript opinion doesn't seem to rely primarily on federal cases and cases in this court. Aren't there any decisions construing this statute?

MR. CHASE: As far as I know, your Honor, this is the first case dealing with the flag desecration words in the statute that has arrived at the Supreme Judicial Court of Massachusetts, the only case that --

Q I just noticed that this opinion doesn't cite any other Massachusetts cases.

MR. CHASE: This is the only case I am aware of, your Honor.

Q Well, are there many prosecutions under this statute?

MR. CHASE: Your Honor, I'm aware of none other than this one. I don't know if my brother --



Q What you are suggesting, though, is a number of arrests for violation of it?

MR. CHASE: Your Honor, I didn't mean to confuse you. The First Circuit suggests -- suggested that and I believe it is sort of gratuitous because --

Q But you don't know of any arrests?

MR. CHASE: I am unaware of any, your Honor.

The most recent interpretation of the statute prior to this opinion is the opinion of the Attorney General, Attorney General Richardson in 1968 dealing with a painting where there was a swastika in the place of the stars.

Q That is the one that you have appended to your brief?

MR. CHASE: To the jurisdictional statement, yes, your Honor.

Q Yes, Mr. Richardson's opinion.

MR. CHASE: Yes, your Honor.

The First Circuit also spoke about First Amendment overbreadth.

Q As I recall, the panel of the First Circuit contained no Massachusetts judge

MR. CHASE: That is true, your Honor. I would point out to the Court that the district court judge was a Massachusetts judge. He was just then appointed to the Federal District Court. He has since gone up to the First

Circuit Court of Appeals.

Q That's Justice Campbell?

MR. CHASE: That's right, your Honor, yes.

I would think that that matter should be kept in mind relative to the exhaustion point that we made initially. It seems to me that although we didn't press exhaustion before Judge Campbell, we presented him with the entire state court record with the understanding, as is usual when we defend federal habeas corpus petitions, that he would look to that state court record to make sure that the matters being pressed before him had been raised and decided in the Supreme Judicial Court of Massachusetts.

Q I guess I'd be right that Judges Kaufman and MacInfield, at least, had a long experience dealing with Massachusetts problems, haven't they?

MR. CHASE: Massachusetts what, your Honor?

Q Problems.

MR. CHASE: They certainly have.

Q Judge Hambley was from out -- from the Ninth Circuit but --

MR. CHASE: We thought that --

Q -- you'll find that Judges Kaufman and MacInfield are not strangers to Massachusetts law.

Q But you have pointed out there is no Massachusetts case that you know of.

MR. CHASE: This is the only case we know of.

Q So there is no particular familiarity with the flag statute.

MR. CHASE: That is right, your Honor, and I think a point that should be borne in mind is that the First Circuit Court didn't look to any of the rescript opinion of the Supreme Judicial Court, not at all. They didn't speak about intent. They didn't speak about the narrow definition of flag.

I would just like to say a few words about the First Circuit's conclusions on First Amendment overbreadth.

The First Circuit said, in so many words that all flag conduct is closely akin to pure speech, very close, in the opinion of the First Circuit.

I think that many courts would disagree with this. If you start from that starting point, though, that all flag conduct is closely akin to pure speech, it is very difficult to come up with valid state reasons as to why this legislation is not directed towards the First Amendment and conduct under the First Amendment.

It seems to me, though, that from the citations in the Massachusetts opinion, the Massachusetts opinion recognized two interests, namely, the very diffuse meaning of the United States flag for all American citizens. It can't be constricted and equated to a promotion of

patriotism and loyalty, as the First Circuit said. It is much broader than that. It includes that. But it is so much broader for all Americans. The flag means so much that, to constrict and restrict the meaning of the flag just to that I think does a disservice to what the flag means for Americans.

Number two, as the opinion of the Supreme Judicial Court shows, they cited Halter; they cited Chaplinsky and they cited Sutherland v. DeWulf. All of these opinions go to the question of a preservation of the public peace.

Now, you know this Court has said, say, in Cohen versus California, that an undifferentiated fear of a disturbance is not enough to restrict First Amendment rights but I think, when you think about the flag and when you think about the various states that have passed legislation in this area, I think the determination they have made is that flag desecration is the type of conduct that, per se, is likely to incite a breach of the peace and I think that, though there is no evidence in the record before you, that an immediate breach of the peace was going to occur.

I don't think that goes to defeat this interest. I think a legislature can make a valid determination that certain types of conduct are so offensive to normal community standards that they are very likely to create a breach of the peace and that in the interest of the welfare

of the community, certain types of conduct can be proscribed, such as flag desecration.

Thank you.

MR. CHIEF JUSTICE BURGER: We'll let you begin the first thing in the morning, at 10:00 o'clock, Counsel.

[Whereupon, at 3:00 o'clock p.m., the Honorable Court was adjourned until the following morning at 10:00 o'clock a.m.]

MR. CHIEF JUSTICE BURGER: We will resume arguments in number 1254.

Mr. Lawson.

ORAL ARGUMENT OF

EVAN T. LAWSON, ESQ.,

MR. LAWSON: Mr. Chief Justice, and may it please the Court:

My name is Evan Lawson and I represent the Appellee in this case.

At the close of argument yesterday, I was considering some of the questions that the Court had asked my brother, Mr. Chase and I felt that they justified some immediate answers from me because I have more personal knowledge of the case than he does.

The question was raised as to what is a vexillologist? A vexillologist is a flag historian. The particular gentleman who was involved in this case,



Mr. Whitney Smith, is the Secretary General of the International Federation of Vexillology and he has written the definitive book on the subject of flags and their history.

Q A best seller?

MR. LAWSON: I don't think it is a best seller, but he did also write the section on flags in all of the encyclopedias which are published in this country.

His purpose in testifying was really two-fold.

Number one, his testimony was directed to whether the flag involved in this case conformed to the official standards and although the record indicates that he testified that it did conform to the official standards, that is actually a misprint and, in fact, he testified that it did not conform to the official standards.

Q That is, the size?

MR. LAWSON: Well, the proportions. There are no official standards regulating a given size, four by six, three by five, that is not what is denoted by an official flag.

The proportions, however, the relation of height to the width and the size and relative proportion of the stripes and the field where the stars go are all regulated by a Federal Executive Order pursuant to statute, federal statute.

Q Under that order you could have a flag of any size just as long as long as the proportions conform to the terms of the order?

MR. LAWSON: That is correct.

That is correct and this flag in this case did not conform to those proportions. Secondly --

Q Would you say that forbids the state from making a criminal act out of flag desecration as long as the state identifies the flag --

MR. LAWSON: I am not saying that. However, I think that the state should, to avoid vagueness, specify whether it is referring to, in fact, the flag as defined officially or whether it is referring to any representation that could look like the flag.

Some statutes in some states refer only to representations, other statutes do not indicate whether they apply to strictly the flag or just the stars and stripes design.

Q Of course, in this case, we don't know what the proportions were because it was either three by five or four by six and those are different proportions.

MR. LAWSON: That is correct. However, at the trial, Mr. Smith testified that he was familiar with the type of flag that the defendant was supposed to have been wearing. In other words, a small, commercially-produced

cloth flag and he testified that those flags -- that he was a consultant to the firms which produced those flags and those flags do not conform to the Executive Order.

Q Does it appear whether Goguen himself sewed this flag on the seat of his pants?

MR. LAWSON: It did not appear.

Q Or was it manufactured pants with the flag on it?

MR. LAWSON: The record was silent. The pants were not, I can state from my own knowledge, manufactured that way. But the record is silent as to whether he sewed them or not and, in fact, that is something that I wish to bring up at a later time and now that you have mentioned it, my brother has argued rather strenuously that this statute applies to the physical integrity, protecting the physical integrity of the flag.

I think that making that argument really highlights the vagueness in this case because it seems to me, at least, that there is no possible justification for saying on the record in this case that this defendant affected the physical integrity of the flag by doing what he did, which was merely displaying it.

If, in fact, you assume that he, himself, sewed it, there is a question as to whether he sewed it publicly. There is no evidence of that, which is also an element of the

statute.

If you treat this as a continuing offense so that his sewing and then his display in some way constitutes a public sewing, even by that stretch of the imagination, the question of whether sewing something onto a larger piece of cloth, let's say, affects its physical integrity. It is certainly seriously open to question. I would strongly argue that it does not. Further --

Q Mr. Lawson?

MR. LAWSON: Yes?

Q Does any part of your presentation here depend upon what you describe as this "misprint in the record?" because I can imagine some problem. I gather your opposition counsel wasn't present at the trial.

MR. LAWSON: That is correct.

Q Or that there may be some problem as to any sort of a stipulation or anything like that.

MR. LAWSON: I don't think that anything that I have to say this morning really hinges on that misprint in the record. I would only point out that my brief is -- my brief in the state court is reproduced in the record and in that brief, there is a section dealing with the official flag. I believe it is page 25 of the Appendix. And in the brief, we do refer to the testimony as saying that it did not conform to the official standards with a citation to the

bill of exceptions.

Q To the extent that it is important, we must take the record as it comes here --

MR. LAWSON: I agree.

Q -- because there are ways that you could have corrected that.

MR. LAWSON: I agree and I think that this is really a matter of very small importance to my argument.

The second question that was asked was whether there were any prosecutions in Massachusetts under this statute other than this one and my brother was not aware of any. I am personally aware of at least five. I represented two other individuals who were prosecuted under this statute for displaying flags on various portions of their anatomy, a young woman who had her flag displayed on the seat of her pants and a young man who had a flag displayed in the crotch area of his pants.

I further represented an individual who was charged with flag burning, which is really distinguishable from this case and I am aware of a prosecution of an individual for displaying a flag upside down on the back of a jacket in Massachusetts.

I am also aware of another flag burning prosecution in Massachusetts, so that this is by far not the only prosecution and there have actually been enough to raise some

significance.

Q Has the defendant here served any part of the six-months' sentence?

MR. LAWSON: He served about 13 or 14 days of that sentence and, of course, one of the issues here is whether someone who does what this Respondent did, should be sentenced to six months in prison. I mention this not merely to generate some sympathy for the Respondent, but also to point out that in the area of First Amendment rights there is the rubric of chilling effect and, certainly, the widely publicized imprisonment or sentence in this case of six months is clearly a chilling effect to be had.

Q Did those other prosecutions result in convictions and secondly, if so, is there any record of them and any printed court opinions, decisions?

MR. LAWSON: I can, first of all -- I can answer the second question first. There is no record of them in any printed court opinions. The girl who I represented who had a flag on the seat of her pants was -- wrote an essay on what the flag means and received a lecture from the judge and had her case -- there is a procedure in Massachusetts called, "continuing without a finding." She had her case continued for six months without a finding and after that it was dismissed.

The young man who was wearing a flag upside down on



his jacket was fined in the district court and appealed that to the Massachusetts Superior Court for a jury trial and that case is still pending. I don't know the outcome of that case.

In one of the flag burning cases which, as I say, I think are really not factually on point with this case, the defendant, who was a high school student, was sentenced to, I think, three months in the Massachusetts District Court.

On appeal to the Superior Court, the Superior Court Judge agreed to continue her case without a finding, provided that she would walk from Harvard Square, I think, to downtown Boston, carrying an American flag and she did that and that was how that case was disposed of. So that some of these cases have been disposed of in noncriminal ways.

One case that I am aware of, the District Court judge, which is the lowest court in Massachusetts, ruled that the statute was unconstitutional but this was before the State Court had ruled in the Goguen case and I presume that his ruling is not reported anywhere.

Q How is it, as precedent in Massachusetts practice of a rescript opinion?

MR. LAWSON: It is as good precedent as any opinion. It is, as I say, it is closely akin to -- as Mr. Chase said, closely akin to a per curiam opinion in this Court and this rescript is rather -- at least, in my

experience, is a rather strange rescript in that it says a little bit more than the ordinary rescript does, but it says a lot less than, of course, an opinion which is carefully laid out.

Q Was that opinion rendered after an oral argument?

MR. LAWSON: Yes, it was. It was rendered after oral argument and I might say now that my brother has said that we cannot raise the question of Fourteenth Amendment vagueness here because it wasn't presented to the State Court and asks you to conduct what appears to me to be an essay contest, where you grade our briefs and determine whether they are acceptable as good legal writing.

However, in his answer, in the Federal District Court below, he admitted that we had raised the issue and had he not admitted it, had he raised the question of the Fourteenth Amendment vagueness being exhausted in the State Court, I might have been in a position to introduce some testimony and some evidence on whether this matter was, in fact, discussed at oral argument.

Q Of course, that is on the assumption that you raised before Judge Campbell in the District Court, the same things that the First Circuit ultimately went off on.

MR. LAWSON: That is correct and I think that we did -- I think if you look at the petition that we raise both

vagueness in the Fourteenth Amendment sense of lack of fair notice and we specifically use the phrase, "Made it impossible for law enforcement officers to enforce the statute fairly," and we also raised overbreadth in the First Amendment sense.

Q Mr. Lawson, you mentioned having tried a couple of flag-burning cases. You said they were different factually. Obviously, they are. If you had a flag-burning case here this morning, would you be making the same arguments, one, as to vagueness and two, as to the First Amendment, that you make in your briefs?

MR. LAWSON: Well, I don't think I could make the flag-burning argument as to vagueness because the statute does, in fact, specifically say that you may not burn a flag in Massachusetts. I would be making the same overbreadth argument. The difference would be in the analysis of the overbreadth argument from the point of what is the legitimate state interest, if any, in passing this kind of legislation.

Certainly, if this Court found a legitimate state interest in protecting the physical integrity of the flag, that interest would be served by a statute prohibiting flag burning, but would not be served by a prosecution and conviction in the case at Bar where there was no conduct affecting the physical integrity of the flag.

Q You are saying there may be a different state interest in a flag-burning case than from that in this

case?

MR. LAWSON: That is correct. From my point of view, there is no different interest. I would urge upon the Court that the state has no interest in protecting the flag per se. However, I can see that cases should be mitigated in the context in which they arise and that, therefore, either this Court could say, for example, that there may be a state interest in protecting physical integrity, but that it is not necessary to decide that in this case.

Q But your view is that the state has no legitimate interest in protecting a flag from physical or other desecration in any way whatsoever?

MR. LAWSON: That is correct and as long as the point has been raised, I'll try to develop that argument.

I think the question --

Q We are assuming during all of this that the flag is not somebody -- doesn't belong to somebody else?

MR. LAWSON: That is correct. It belongs to the individual himself. Obviously, a statute which prohibited burning or destroying someone else's property --

Q Public property or somebody else's property.

MR. LAWSON: -- would be perfectly Constitutional and there would be no argument whatsoever that one could destroy public property or someone else's property in the interest of free speech.

I think the analysis really begins with this Court's decision in Broadrick. In Broadrick, which was discussing First Amendment standing, the Court talked about how First Amendment protection becomes attenuated as the fact situation moves along a continuum from the spoken and printed word to overt conduct, which may be otherwise harmful.

At one end of the spectrum you would have a speech and at the other end of the spectrum you would have a political assassination, both of which are arguably communicative. The speech is clearly protected. The political assassination is clearly unprotected.

We argue that the conduct in this case is so closely akin to pure speech, under prior decisions of this Court and under the Broadrick analysis, that you don't apply symbolic speech tests such as the O'Brien test here, you apply a direct spoken word test and my precedent for that would be, for example, in the Stromberg case, displaying a red flag, in the Tinker case, wearing a black armband, in the Barnette case, refusing to salute the flag.

All of those cases involve conduct which is otherwise totally harmless. In the words of Barnette, "No rights of any other individuals were infringed upon by the conduct of the appellee," and, therefore, this case should be treated strictly as a free speech case and not as a case



involving symbolic speech or conduct.

Even if you were to treat this as a symbolic speech case and apply the O'Brien test, I would urge that this statute and the facts in this case, both on their face and as applied to this Appellee, fail the O'Brien test miserably and one area of the O'Brien test, which was the track that I was on, was the question of whether there is a legitimate state interest in protecting the physical integrity of the flag.

Now, I can think of but three state interests which you could postulate for protecting the physical integrity of the flag. One would be to protect against breaches of the peace. Clearly, this statute is not narrowly drawn enough to do that and, secondly, it is very clear that on the facts of this case, there was no breach of the peace, eminent or otherwise.

A second state interest might be to protect --

Q The facts of this case, such as we have them, in a very fragmentary and skimpy way --

MR. LAWSON: Yes, I agree that he --

Q -- seem to indicate that he was with a group. Was there some sort of demonstration going on?

MR. LAWSON: I think I can amplify on that. There was no general demonstration. There was a normal group of people on the street and when the policemen began



questioning Goguen, who was talking to this group of people, the people in the group started laughing. But this was not a demonstration by anyone other than Goguen. We contend, however, that this very clearly was a demonstration of one and that Goguen himself was expressing opinion.

Q Was this so-called "group" just the strangers who were ordinarily on the street? Or were they a self-appointed group?

MR. LAWSON: I think I can amplify on the record and say that Goguen got out, left his house, walked downtown and met some friends of his standing around the street corner and, basically, that was the group that was involved in this case.

But the fact of the matter is, Goguen is still engaging in expressive conduct here.

Q What was going on when the officer came up?

MR. LAWSON: When the officer arrived, Goguen was standing talking to a group of people.

Q That is, just a casual conversation?

MR. LAWSON: As far as I know, it was just a casual conversation. This is something akin to the situation where one of us must place a political bumper sticker on our car for the purpose of expressing some political --

Q You mean, this wasn't in the context of a Vietnam war protest or something like that?

MR. LAWSON: Not in the context -- not in the limited factual context of the group. However, in the context of the times, one can certainly infer this was at the height of the protest movement.

Q Well, do we suppose that the officer then simply took exception to the fact that the flag was up on the seat of his pants?

MR. LAWSON: Well, I think not only did the officer take exception to the fact that the flag was on the seat of Goguen's pants, but Goguen obviously conveyed to the officer a powerful feeling of contempt for the flag and, in fact, in the facts of this case, there is necessarily a finding by the jury, in order to convict Goguen, that he was expressing contempt for the flag.

Q You mean, merely by wearing it, or because of something he was saying?

MR. LAWSON: By the way he was displaying it. Now, this is very much --

Q What was he trying to express?

MR. LAWSON: Well, I don't think that I can precisely define what he was trying to express.

Q Certainly there is nothing in the record.

MR. LAWSON: There is nothing in the record. That is correct and there was a good reason for that at the time, which doesn't appear in the record.

Q He did not testify?

MR. LAWSON: He did not testify, on my advice.

In any event, what he was trying to express cannot be precisely defined, I'll grant you. However --

Q If he didn't take the stand, and there is nothing in the record to show it, I don't think you can show it.

MR. LAWSON: Well, I think I can show it from what he did. First of all, there is a finding on the part of the jury that he expressed contempt for the flag and this Court has said in Street that that kind of an expression is Constitutionally protected.

Now, precise expression has never been a prerequisite for First Amendment protection. I would, for example, refer you to the Pappish case, which was decided by this Court in March. In the Pappish case, the defendant was displaying a cartoon which showed -- among other things, she was displaying a cartoon which showed a police officer raping the Statute of Liberty --

Q But I thought in the Street case we had a whole record of a full trial.

MR. LAWSON: I don't believe you have the record of a full trial, but you certainly had the words of Street, which were used in that case.

Q That is right.

MR. LAWSON: That is true, but what I am urging upon you is that when you communicate, not with words but through the use of symbols, a black armband, for example, is -- can be ambiguous.

A red flag can be ambiguous.

Q There is no statute about black armbands, is there?

MR. LAWSON: No, but in the Tinker case, there was a school regulation forbidding the display of a black armband and in the Stromberg case, there was a statute forbidding the display of a red flag and in the Goguen case there is a statute forbidding the display of contemptuous feelings about the flag, so that, in each case, there is a proscription, an official proscription, against the particular symbolic form of expression which the actor is trying to use.

Q So are you saying that in a particular case there was a specific school regulation against the wearing of armbands?

MR. LAWSON: I don't believe that it was a specific school regulation against the wearing of armbands. There was a specific school regulation against engaging in certain kinds of conduct which was deemed to be harmful, and the school authorities then interpreted the wearing of the black armbands as being harmful.

Q Well, apparently, I misunderstood your

former statement.

MR. LAWSON: I apologize if I misstated it.

In the Pappish case, this cartoon, which showed a police officer raping the Statute of Liberty, could certainly be subjected to varied interpretations. It could mean, for example -- it could be anti-police. It could be anti-law enforcement generally. It could be anti-America. The fact that the cartoon is susceptible of many interpretations did not, in the Pappish case, relieve it of Constitutional protection.

Similarly, I'd urge that varied forms of display of the flag, which expressed contempt, similarly, are protected, even though you can't precisely define what the particular actor is saying.

A classic example is poetry. If each of us read a poem, we might derive a different meaning from the words of the poem, and in that sense, the poem is as ambiguous as Goguen's conduct here, but no one would argue that a poem isn't Constitutionally protected, or words to a song.

I'd like to get back to the state's interest in prosecuting Goguen.

Q Before you do, you have talked a couple of times about the Pappish case --

MR. LAWSON: It is not cited in our brief.

Q And I am not familiar with it. Do you have

the citation?

MR. LAWSON: Yes, I do. It was decided in March of 1973. I have a citation to the Supreme Court Reporter which is --

Q Wasn't it coupled --

MR. LAWSON: Excuse me?

Q Wasn't it coupled with Branzburg?

Q No.

MR. LAWSON: I don't think it was.

Q It was a school deal.

Q School kids.

MR. LAWSON: This was Pappish versus Board of Curators of Missouri and it is 93 Supreme Court 1197.

Q Pappish v who?

MR. LAWSON: The Board of Curators of the University of Missouri.

Q 1197?

MR. LAWSON: That is correct.

Q It came from district court, three judges?

MR. LAWSON: Yes, it did, it was a -- well, it came from the court of appeals. It was a case involving an expulsion and a suit brought to reinstate.

Q Do you know the court of appeals citation?

MR. LAWSON: 464 Fed 2nd 136.

Q Thank you.



MR. LAWSON: The state interest, which I would like to discuss is the state's interest in protecting the flag in and of itself as some sort of a symbol. Beside the fact that the symbolic significance of the flag has been recognized, certainly, by this Court in Halter and in Barnette, the Court also has recognized that the state has no interest, the Government has no interest in protecting that symbolic significance from use by citizens. Barnette expressly, I think, said that. Street certainly said that. Chief Judge Lombard, in the Cahn case also examined a hypothetical state interest in protecting the flag as a symbol and found that there was no state interest and, of course, Judge Coffin in this case arrived at a similar result.

Q Which was Judge Lombard's case?

MR. LAWSON: Long Island Vietnam Moratorium Committee versus Cahn.

Now, in arriving at that result --

Q Are the proceedings at the trial lodged here, the evidence, the transcript of the testimony?

MR. LAWSON: There is no transcript of testimony because none was presented to the Supreme Judicial Court of Massachusetts and in Massachusetts, this appeal was pursuant to the Bill of Exceptions, which set forth a summary of the testimony.

Q Are the proceedings in the Supreme Judicial

Court here?

MR. LAWSON: There are no proceedings.

Q I mean, is the record lodged --

MR. LAWSON: There is no record of the proceedings there, only the opinion of the Court, the rescript opinion of the Court.

Q So the district court here did not have that record before it?

MR. LAWSON: It had no record before it of what had transpired, either in the Supreme Judicial Court or in the State Superior Court where the jury trial took place.

Q But the Supreme Judicial Court of Massachusetts only had a bill of exceptions before it.

MR. LAWSON: That is correct.

Q It couldn't have a more complete record than the district court.

MR. LAWSON: That is correct. It had nothing more than the bill of exceptions.

Q Well, the bill of exceptions summarized the testimony, though?

MR. LAWSON: That is correct.

Q And the district court did not have that before it.

MR. LAWSON: Yes, it did have the bill of exceptions before it.

Q That is what I asked. Is the bill of exceptions that was filed here?

MR. LAWSON: Yes, the bill of exceptions is a part of the Appendix here and was before the United States District Court in this case.

Q Okay.

MR. LAWSON: And the Court of Appeals, for that matter.

I see my time is almost up.

One thing that I would suggest to you is that if there is an interest in protecting the flag in and of itself, that interest is subjected to almost limitless extension. If you are going to protect the flag, why not protect the State Seal as well, or the Federal Seal? Why not protect the National Anthem, as, in fact, Michigan has a statute which prohibits playing the National Anthem in other than the normal notes or the prescribed notes.

Q There are some statutes prohibiting, I think, the use of certain seals for commercial purposes, for example. Would you regard that as an infringement of the First Amendment?

MR. LAWSON: No, I don't, sir. I don't quarrel with that at all in the slightest.

Q Is that because it is a restraint on commercial use?

MR. LAWSON: Well, I would say that that is the reason. I think that the rationale behind that reason is that there is a finding that it is harmful to have this symbol used for commercial purposes.

Q But you think that is all right?

MR. LAWSON: I think that that is all right. I think, under the Broadrick analysis, for example, there is no problem in differentiating between the two because, as in here and Broadrick and Street and Stromberg and Tinker, the conduct is harmless. It is passive. It doesn't impinge on the rights of anyone else.

When you are talking about using the flag or using the State Seal for commercial purposes or using it, perhaps reproducing it for purposes of counterfeiting or something of that sort, then the conduct moves from the area of being harmless into the area of being harmful and the state does have an interest, certainly, in regulating harmful conduct, even if there are, arguably, speech elements involved.

Q Well, then, what you are telling us, really, is that there is no harm in wearing the flag on the seat of your britches, but there is harm in having the Seal of the United States used in a commercial enterprise, let's say, on a pawn shop or --

MR. LAWSON: That is correct, and the reason is --

Q -- or selling girlie magazines?

MR. LAWSON: That is correct and I think the reason for it is that a passerby, seeing the State Seal, could be mislead, for example, into thinking that -- that whatever the product was, was federally-approved or federally-sanctioned and that that would be, could be harmful to the public.

Q That is the only harm you see in it? It isn't the matter of the contempt element?

MR. LAWSON: No, I don't see -- I don't think that, from the point of view --

Q There is no denigration factor in your mind in that analysis?

MR. LAWSON: No, there is not. I would agree with that. I don't think that, consistent with the First Amendment, and consistent with the history of this country, that one can say that it is Constitutionally permissible to punish denigration.

Now, the whole idea of flag desecration implies that there is some mystic or sacred power connected with the flag and, historically, of course, it was only at the turn of this century that there was any legislation at all passed regulating conduct relating to the flag.

England, in 1,000 years of history, has never regulated conduct concerning its flag so that our tradition,

or democratic tradition, I think, shies away from that.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Lawson.

You have a few minutes left, Mr. Chase. Do you have anything further?

MR. CHASE: Yes, your Honor.

REBUTTAL ARGUMENT OF

CHARLES E. CHASE, ESQ.,

MR. CHASE: May it please the Court:

I'd just like to address myself to a few points brought out by my brother during his argument.

One point he made was the question of whether or not the activity involved in this case amounts to an attack on the physical integrity of the flag and he takes exception at that phrase, "physical integrity." That is the phrase I basically use in my brief, but it is not a sacrosanct phrase. It doesn't exhaust the state interest. I would just cite this Court to the opinion of Hoffman versus United States 445 Fed. 2nd 226, where they spoke about conduct that physically dishonors the flag and I think probably that that phrase, "physically dishonor," is more the aspect of this particular case.

It was a dishonoring of the flag and it was a physical dishonoring of the flag because of the affixing of the flag to the posterior anatomy of this particular



individual.

Q Well, General Chase, just so I can be clear, tell me if I am wrong, as I understood it, the provisions of Section Five under which Mr. Goguen was convicted were these: "Whoever publicly treats contemptuously the flag of the United States." Wasn't that it?

MR. CHASE: Yes, your Honor.

Q Not physically dishonor or physically --

MR. CHASE: Well, your Honor, we would urge the --

Q That was the statutory language?

MR. CHASE: And that was the phrasing in the complaint, yes, your Honor, "treat contemptuously."

Q "Publicly treats contemptuously the flag of the United States."

MR. CHASE: We would, as I yesterday urged upon this Court, the accepted principle of statutory interpretation, which has long been recognized in Massachusetts, that when specific words and more general words are associated with each other in a statute, the more general words take on the color and connotation of the more specific and are, in a sense, restricted to the meaning of the more specific words.

Q Well, your Supreme Court did not rely on that, did it?

MR. CHASE: No, your Honor, but that is an accepted principle of statutory construction in Massachusetts

and there are four or five cases in our brief showing that principle in operation.

I cannot deny that they didn't mention that principle, but I think that it is clear that the phrase, "treats contemptuously" is directed at acts of the same type, the same nature, namely, acts --

Q Such as "mutilate, trample upon, defaces?"

MR. CHASE: Yes, your Honor. I believe all three of those first phrases are directed towards physical acts --

Q They are.

MR. CHASE: -- acts that affect the physical integrity of the flag.

My brother also made mention of the fact that the sentence in this case would "have a chilling effect upon First Amendment rights," but a chilling effect on what? The conviction here has not outlawed the use of the flag in any manner of means. It has said that acts that desecrate the flag will be punished. But there are many other acts that protestors, if they want to use the flag, they can use the flag in all sorts of demonstrations. They are just supposed to not desecrate that flag. They can speak all manner of vile and contemptuous opinions about it, as the Supreme Judicial Court noted in this rescript opinion.

It cited the Street opinion and said he was not prosecuted for words. It took note that words, no matter how

contemptuous about the flag, are not prosecutable.

Q But the physical desecration which you say the statute is confined to has to be a desecration that publicly casts contempt on the flag, doesn't it?

MR. CHASE: Yes, your Honor.

Q So that you still -- still involved in the statute is a communication process.

MR. CHASE: Well, your Honor --

Q A communication process. The desecration has to be contemptuous of the flag. Is that right?

MR. CHASE: Yes, your Honor, but as I point out in my brief, there are certain acts which the conduct is so egregious that you do not have to go into any surrounding circumstances at all for men of common intelligence to agree that this --

Q Did the instructions in this case -- did the instructions to the jury in this case say that the jury had to find that the defendant intended to cast --

MR. CHASE: I believe --

Q Did and intended to cast contempt on the flag?

MR. CHASE: They had to find an intent on the part of the defendant to treat the flag contemptuously.

Q And that he did it?

MR. CHASE: Yes, your Honor, that is my understanding of the rescript opinion and my understanding of the

rescript is that the Supreme Judicial Court will require the prosecution to prove intent and the intent --

Q You just don't have -- there is no extant record of the instructions in the case, I take it?

MR. CHASE: No, your Honor. You have the entire record before you, including the briefs that were presented to the Supreme Judicial Court.

Q Well, I noticed that, apparently, the defendant filed certain requests for instructions and two of them at least, three and four, were denied and so something was -- the defendant requested, I gather, in the way of --

MR. CHASE: You have what was before the Supreme Judicial Court, your Honor. I am not entirely sure of everything that was before the Massachusetts Trial Court.

Q What rule does the Supreme Judicial Court of Massachusetts follow where you appeal on a bill of exceptions? Are you permitted to challenge the giving or refusal to give of an instruction?

MR. CHASE: Anything that is contained in the bill of exceptions or anything that the defendant saves for argument on appeal. In other words, I believe my brother did save the fact that two instructions were refused to him at the trial court. I believe he saved those to be argued before the Supreme Judicial Court.

Q Well, how can the Supreme Judicial Court of

Massachusetts pass on that without knowing what other instructions were given? Because, frequently, a trial judge's refusal to give an instruction may be based on the fact he thinks it is covered in another instruction.

MR. CHASE: Well, your Honor, I don't know, but the only thing I can say is this, that the Supreme Judicial Court is bound by the bill of exceptions. They can't go beyond that and it is up to the parties in the court below to make sure that everything that is relevant gets into the amended bill of exceptions, or bill of exceptions.

Q Well, that would mean that the prosecution in this case would have had the burden of showing what instructions were given if they were resting on the proposition that the rejected instructions were redundant, as Mr. Justice Rehnquist suggested.

MR. CHASE: Yes, your Honor, but --

Q Are you sure you want to answer "yes" to that?

MR. CHASE: Well --

Q If you have got an Appellant that is trying to show that the instruction was erroneously refused, might it not be up to him to show that not only the instruction was refused, but that it was not covered by the other instructions?

MR. CHASE: Well, your Honor, I would just say this, that from my knowledge of how appeals are taken in Massachusetts, that the losing party has the burden of



putting the material in the record that is going up on the bill of exceptions. The prosecution has no burden to compile that bill of exceptions. The losing party does and then they get together and confer with the trial judge and there is an agreement as to whether or not everything in the bill of exceptions should be there and it is generally worked out by agreement with the trial judge on both sides, but it is the losing party who has the initial burden of going forward to compile the bill of exceptions.

I see that my time is up. I want to thank the Court --

Q Just one more question, General Chase.

Am I to take it that your argument is, in part at least, that whatever communication was involved here in the acts of the Respondent, it was communication by conduct?

MR. CHASE: Certainly, your Honor. That is the basis of my argument. I think it seems, or is quite clear that whatever communication was involved could have come through much more clearly with some words which would not have been prosecuted.

MR. CHIEF JUSTICE BURGER: Thank you.

MR. CHASE: Thank you, your Honor.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:41 o'clock a.m., the case was submitted.]