In the

Supreme Court of the United States

HAROLD OMAN SPENCE,

Appellant,

V.

THE STATE OF WASHINGTON

No. 72-1690

Washington, D. C.
January 9, 1974

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v. No. 72-1690

THE STATE OF WASHINGTON

Washington, D. C.
Wednesday, January 9, 1974

The above-entitled matter came on for argument at 10:07 o'clock a.m.

BEFORE:

WARREN 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:

PETER GREENFIELD, Esq., 3230 Rainier Avenue South, Seattle, Washington 98144; for the Appellant.

JAMES E. WARME, Esq., Deputy Prosecuting Attorney, King County, W554 King County Courthouse, Seattle, Washington 98104; for the Respondent.

C O N T E N T S

P R O C E E D I N G S

We will hear arguments first this morning in No. 72-1690, Spence against Washington.

Mr. Greenfield.

ORAL ARGUMENT OF PETER GREENFIELD, ESQ.,

ON BEHALF OF THE APPELLANT

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

I think to give some perspective to the question before the Court this morning, I will relate a piece of history that I learned just in the last week involving President Lincoln's favorite clown. It was discussed in an article that appeared in the New York Times Magazine of December 30th.

The clown in question was named Dan Rice, and he dressed himself up in an outfit that was designed to look like the American flag. It was an irreverent expression I think in the tradition of people like Mr. Goguen, whose case was argued only recently before this Court.

Mr. Rice called himself Uncle Sam, and the image which he conveyed has remained with us in various forms, and I think it is fair to say that Uncle Sam has been in cartoons and at the head of parades, a violator repeatedly of the kind of statute which is before the Court this morning.

This case comes here on appeal from the Supreme

Court of Washington. And my client, Harold Spence, was convicted for flying a privately owned American flag with a black tape peace symbol superimposed on it from the window of his apartment in Seattle, Washington.

Q Before you proceed, who was Mr. Rice?

MR. GREENFIELD: Mr. Rice was the clown who, at least according to the New York Times, was President Lincoln's favorite.

Q He is not a party [laughter].

MR. GREENFIELD: He is not a party to the facts, Your Honor. I believe his reign extended in the mid-nineteenth century.

Q He is not your client.

MR. GREENFIELD: No, he is not.

Q Did I see somewhere in the record that the flag was also upside down?

MR. GREENFIELD: I'm not sure whether that appears in the record, Mr. Justice Blackmun, but in fact it was suspended upside down. That does not constitute a violation of the statute here at issue. As I understand it, an upside down flag is traditionally a symbol of distress, and I think it was consistent with the message which Mr. Spence was attempting to convey. However, he was not convicted as a result of the position of the flag but merely because there was something superimposed on the flag. That something could

have been under the broadly worded statute of our state words such as "I love America." The content would not have been of consequence.

This case does not have any of the complicating features that some of the recent political protest cases have had that have been before this Court. It does not involve, as the Tinker case did, the black arm bands that were worn in a school room. The location was a cause of some concern. Unlike the Papish case, the political cartoon that was published on a college campus, it does not involve any question of the right of college campuses or the state to regulate activity on college campuses. It does not involve any trespass on public or private property or any destruction of property or government records, as was the case in United States v. O'Brien.

The only factor which makes this case at all complicated or indeed at all interesting is that it involved an American flag. And as to whether or not that makes the case difficult, I would remind the Court of the observation of Mr. Justice Jackson in West Virginia v. Barnette; that is, that the underlying principles arising out of the First Amendment are simple ones. And the only problem in a case like this is going beyond the emotional preconceptions that we have when our flag is involved and getting to those fundamental and basically simple principles.

Basically there are two kinds of statutes that are currently the subject of a great deal of litigation throughout the country, criminal statutes, promulgated by the states and referring to flags. There are the desecration statutes, the kind of statute that was at issue in the Goguen case, which punishes behavior which reflects some kind of contempt or intentional desecration of the flag, either by words or by some other form of conduct. That kind of statute is not at isse here today.

The Washington statute, under which Mr. Spence was prosecuted, deals with what is referred to in the title as improper use of the flag. And I should start by saying that "flag" is defined very broadly in this statute.

A flag--Ibelieve the definition says flag et cetera defined--refers to any flag, emblem, shield, or color of the United States or of the State of Washington or any picture or representation of the flag of any substance, that is, of metal or stone.

The buttons which have flags on them and have the face of a political candidate are equally punishable under Washington's statute, as was, according to the Supreme Court of Washington, the conduct engaged in by Mr. Spence. And once again--

Q I think the state flag bears no resemblance to the American flag.

MR. GREENFIELD: Right. The statute applies both to the state flag and the flag of the United States, and I do not know of any case in which the state flag has been at issue. I do not know whether the average citizen of the State of Washington could recognize or describe the flag of the State of Washington if asked.

Q They probably do not own one, I would guess.

MR. GREENFIELD: Pardon?

Q At any rate, they probably do not own one, the average citizen.

MR. GREENFIELD: I certainly assume that that is true, Mr. Justice Rehnquist. I think that if the average citizen of Washington were asked whether the flag of our state is a green flag with the face of the first president on it or a picture of Mount Rainier or a pine tree, that the distribution of answers would probably be approximately equal.

Q In any event, however vague or perhaps however broad the definition of flag may be in 9.86.010, in this case this was a flag without question; there is no controversy over that. This was not an emblem or standard or ensign or shield or copy or picture or representation; it was a flag, was it not?

MR. GREENFIELD: Right. I do not believe there is any question that this was a flag; whether or not there was a violation of the statute depends on some other things

which are in fact much more complicated because judges, including Judge Lumbard in the Second Circuit, in Long Island Moratorium Committee v. Cahn, perhaps the most detailed explication of a statute of this sort in a case that is pending before this Court--that is, the jurisdictional statement was filed several years ago--suggested that one could not read a statute of this sort literally because the results are too bizarre. And consequently we get into something which I think it is fair to characterize as symbolic speech as distinguished from literal speech in a statute, which presents serious problems.

The kinds of examples which Chief Judge Lumbard gave of what seemed to him to be obvious violations of the New York statute, which is very similar to the Washington statute, were such things as the buttons which every presidential candidate in recent history, including several chief justices of this Court, have displayed--that is, pictures of the American flag or part of it, with their faces superimposed.

It would go to the various magazine covers that have--almost every magazine of national circulation in the last few years has had one or another, with a flag a part of it and the title of the magazine and various stories superimposed.

Many examples of these kinds of seemingly patent

violations of statutes of this sort occur in the appendix to the brief filed with this Court, the reply brief for appellant in Radich v. New York. That is No. 169, October term, 1970.

I think, though, that we all have some familiarity with these kinds of things. I noticed on the plane, flying east, United Airlines distributed to me a brochure advertising a telephone. I will leave a copy of this with the Clerk, if anyone would like to see it, a patent violation of the statute. The breadth of the statute--

Q The statute says improper use.

MR. GREENFIELD: Mr. Justice Marshall, the statute prohibits the placing of any mark or word or sign or decoration or design on a flag as defined in the statute.

Q It did not have the word improper?

MR. GREENFIELD: No. The title is "Improper Use," but there is no rule for interpretation that a court could pick up on a word such as "improper."

The argument that the state makes is that because there is no distinction made between what we would, as a matter of common sense, perhaps think of improper use, disrespectful use or some other, that the statute is therefore neutral and poses no threat to First Amendment activity. But this kind of neutrality is nonetheless--if it is in fact neutrality--a neutrality which imposes a burden on First

Amendment rights. If we cut out the tongues of all adult citizens, this may be neutral relative to their political persuasion, but nonetheless it inhibits their ability to engage in First Amendment protected activity.

Q What about the copyright statute in which the Federal Government prohibits the use of copyrighted works? That certinly impairs some people's First Amendment activities, does it not? Supposing you client had wanted to get up and perform one of George M. Cohan's flag songs and it was copyrighted. The statute would say, I would take it, he could not make a public performance of that. Do you think there are First Amendment implications to that?

MR. GREENFIELD: I think that if a statute were to, for example, prohibit criticism of one of these works, that there would clearly be First Amendment implications. If I owned a copy of a book that was copyrighted and I made some marks in the margin that were critical and that were viewed as prohibited by the copyright laws, I think that would hold serious First Amendment problems.

Of course, the purpose of copyright protection is extremely different than the purposes that both the Supreme Court and the state tender as justification for this kind of statute.

Q I gather the state is saying, "We want to protect the integrity of the flag or whatever you want to call

it. We do not want people changing it, in effect."

So, certainly your client would have a legitimate claim, I would think, under your argument to say, "I thought it particularly apt from my kind of protest to perform a George M. Cohan song to a meeting, and yet the copyright law prohibited me from doing so."

MR. GREENFIELD: It is interesting that the state does not make the argument that the purpose of the statute is to promote respect for the flag. The state concedes--I think that it is at page 12 of their brief--that if the statute were designed to promote respect for the flag, to require citizens to give this evidence of their respect for what the flag symbolizes, that that wo-ld be directly contrary to the holdings in this Court in such cases as Street v. New York, and I do not know whether they cite it, but additionally West Virginia v. Barnette.

The state argues, and I think the sole argument which they make here is, that the purpose of this flag is to prevent breaches of the peace.

Q Supposing they say, "We are not insisting on any sort of affirmative respect at all. So, West Virginia v. Barnette is outmoded. All we are saying is that you shall not tmper with the physical integrity of a flag."

MR. GREENFIELD: If the flag can be treated that way, that is--

Q How about burning the flag as a protest? Your irgument would reach that, I suppose.

MR. GREENFIELD; I think that burning the flag poses a substantial--

Q Or cutting it up.

MR. GREENFIELD: I think that either of those cases--cutting it up I think is closer to this case. Let me take them one at a time.

Cutting it up is actually what was done by the President of the United States when he campaigned by use of a button with his image superimposed. That is, there was not a tearing, but the statute reaches metal as well as other kinds of flags.

Q What you are suggesting is that because the president did this, this statute is constitutional; is that your argument? It seems to be.

MR. GREENFIELD: Your Honor, wat Chief Judge Lumbard argued--

Q Just answer the question. How about cutting up the flag? May the state prevent that or not?

MR. GREENFIELD: In my opinion, it would be no. That is, I think in order to answer that question, we have to consider what interest the state might have in preventing a cutting of the flag. If we find--and there is no dispute on this record--that the appellant was engaged in an attempt to

convey a political message, assuming that that is the kind of situation we have, which I think is the simplest case but not, I would say, the only case in which the activity is protected, then we have to determine what is the state's interest in preventing a physical alteration or tearing of the flag.

Q You say it is not sufficient to override anybody's desire to deliver a political message through dismembering the flag?

MR. GREENFIELD: Your Honor, I say that I do not know what the state's interest might be. If the interest is that which the state here urges, that is, to prevent breaches of the peace, then I think it is simply implausible--that is, the average violation of one of these statutes, and they are pervasive in our society, simply does not spur the average citizen to violent retaliation. And I think that that is really the position that the state is pushed to in order to defend the position that it has taken here.

Q Where do we get support for the conclusion that that conduct does not disturb the average citizen to violent reaction? That is your argument, not--

MR. GREENFIELD: Let me say firstly that what we are dealing with here is basically an anology or an attempt to apply the doctrine of the Chaplinsky case. It was always thought, and I assume that it is still the case, that the state has the burden to show that the conduct which it seeks

to punish poses an imiment threat to the peace. In Finer v. New York, for example, this Court found and over some dissents that the group which the defendnt was addressing was ready to fight. Finer was warned, I believe, on three occasions to desist from the activity in which he was engaged, and he refused to do so. And, consequently, he was arrested.

In this case, as far as the record discloses, nobody except the police saw the flag.

Q Are you suggesting that every statute of this kind must have as its predicate that the statement show that it has the fighting words implication of the Chaplinsky case?

MR. GREENFIELD: That is the position, I think, that one is lead to if one assumes, as the state argues, that the purpose of the statute is to preserve the peace. That is, here what happened, my client flew his flag from his window. The police cme in and adverted to it, and Mr. Spence said that he had no idea there was anything wrong with this. He would be happy to take it down.

Contrast that to Mr. Finer, who refused after being asked by the police to desist from speech. But what happened in this case was that Mr. Spence was summarily arrested and taken off to jail.

The appellant has cited in its brief most of, if not all of, the cases that this Court has heard that have

involved various uses of the flag. In none of them has there been even a suggestion that some kind of violent reaction by any of the observers was likely to follow. And I know of no such incident, and the state has made no attempt to cite it.

Surely here, where only three policemen observed the appellant's conduct, it stretches the imagination to ask this Court I think to conclude that there was an imminent threat of violence. But I would repeat that I think it is presumptuous of the state to ask this Court to judicially notice that the average citizen of the State of Washington, when confronted with a flag with, for example, "I love America" superimposed on it, is going to to be moved to violent reaction.

And I do not think I can emphasize too much the breadth of this statute. The flag which is displayed in this courtroom is in blatant violation of the Washington statute that is under review here. It has attached to it a yellow fringe, and there is nothing in Title 4 in the description of the flag that makes the flag red, white, blue, and yellow. That fringe is attached in the same sense as Mr. Spence's peace symbol was attached to the flag. And yet he was prosecuted, and I assume that no prosecution will arise out of this instance.

Q We are not in the State of Washington.

MR. GREENFIELD; The District has a comparable statue under which, I am sorry to advise the Court, the flag I think is a blatant violation [laughter].

Q I would suspect that we could uphold the statute and still let that flag stay there.

MR. GREENFIELD: I am sorry, I could not hear you.

Q I would suspect that we could uphold the Washington statute and it would not apply to that flag.

MR. GREENFIELD; I find it difficult in a way to see how, Mr. Justice Marshall. That is, this Court could rewrite the statute and read into it, for example--

Q What in the statute says it cannot have a fringe on it?

MR. GREENFIELD: It says that one cannot attach a design.

Q That is no design.

MR. GREENFIELD: Well--

Q What about the top of the flagpole; is that in there too? Is that not bad with the statute?

MR. GREENFIELD: One of the problems with this kind of statute is of course it is always difficult to say.

Q The difference is that your statute was in the man's front window. Was this thing sewed on?

MR. GREENFIELD: No. The record indicates that Mr. Spence used a form of tape so that there would be no harm

done to the flag. There is nothing again--the state does not contend--

Q How many people, do you say, in the State of Washington knew what he meant when he put the peace symbol on the flag?

MR. GREENFIELD: I think the average viewer would have known it.

Q Would have known what?

MR. GREENFIELD: Would have known what he was trying to communicate.

Q Which is what?

MR. GREENFIELD: Which was a protest to the then immediately preceding events, the invasion of Cambodia--

Q How in the world could he know that?

MR. GREENFIELD: Well, Your Honor, I think that--

Q He could have been protesting the invasion of Timbuktu.

MR. GREENFIELD: Let me give the Court an example. If somebody is standing on a street corner with a big sign that says, "Stop" or "Peace Now," this is a fairly ambiguous sign as is most language, unless you put it into some specific context.

Q Suppose he put the peace symbol on the flag now, what would it mean today?

MR. GREENFIELD: Today?

Q Yes.

MR. GREENFIELD: I think that it would depend in large measure on--

Q On what?

MR. GREENFIELD: --on where it was displayed, by whom, and for whom.

Q Suppose it was displayed outside of this building, across the street on an American flag right now; what would the message be?

MR. GREENFIELD: It might well--

Q You do not have the slightest idea what it would mean.

MR. GREENFIELD: I would certainly concede that it would be ambiguous. However, in this situation I do not think that it was at all ambiguous, and I would refer the Court to the state's brief at page 2 and 3, where it fills in the background which I think gave very clear meaning to Mr. Spence's words, that is, to his expression. The United States had just invaded Cambodia. And I think, as the state observes, millions of Americans had this on their mind; also the tragedy of Kent State University had just occurred.

Q Do you think that there were some people in Washington that did not even know what the peace symbol meant?

MR. GREENFIELD: The police officers who arrested Mr. Spence identified it.

Q Do you think some people other than police officers in Washington might not have known what the peace symbol meant at all?

MR. GREENFIELD: I am sure that that is the case, Mr. Justice Marshall, just as I am sure that in any--

Q Then you would agree it was not a clear message.

MR. GREENFIELD: Not to certain people. But I think that if we impose too heavy a burden of clarity on people who are attempting to convey First Amendment messages, then perhaps the average citizen is going to have to remain silent. The record also clarifies to a substantial extent, and I think the state concedes, what the message that my client was attempting to convey was.

This case, of course, comes here on a stipulated set of facts, and the message is, I think, part of the stipulation. The state paraphrases the testimony of Mr. Spence, which I think again, if it does not convey something so clear that it could be reduced to a mathematical formula--

Q I am not quarreling about what he meant to say; I am quarreling about what people understood him to say.

MR. GREENFIELD: If somebody is parading in front of the State Department with a sign that says, "Peace Now," it is not possible, I do not think, to infer from that sign just what their program for peace might be.

Q It might be peace in Washington, D. C.

MR. GREENFIELD: It might. But I wonder whether on that ground this Court would want to go so far as to say that the message is not protected, that if one cannot pinpoint a precise political program that therefore one is foreclosed from speaking. And I think under the circumstances, this was a relatively clear political message. It should, I think, an opposition to the policies of the Administration at that time, and I think the average citizen would have taken it to advert both to the Cambodia incident and to that at Kent State University.

Q Your first question attacks the statute as applied.

MR. GREENFIELD: Correct.

Q And it is your second question that attacks it facially?

MR. GREENFIELD: Correct, Your Honor. And here I think that the argument which appellant makes is precisely that which Judge Lumbard made in Long Island Moratorium Committee v. Cahn.

Q You mean the facial attack?

MR. GREENFIELD: Correct. The state characterizes that I think inaccurately as applying only to the specific symbol which appeared as an appendix to that opinion, but the language of Chief Judge Lumbard's opinion I think is

absolutely clear. He was disqualifying the statute on its face. This is the kind of statute that led Judge Craven of the Fourth Circuit in Parker v. Morgan to observe that for people in North Carolina with such a statute on the books, it was dangerous to possess any obsect that was red, white, and blue.

If there are no further questions--

Q Mr. Greenfield, did you ever answer the question as to your view where a flag is burned in public?

MR. GREENFIELD: I did not, Mr. Justice Powell, and I would say that under this particular statute, flag burning would not be a violation.

I think a state could properly design a statute which would prohibit burning of anything on the street for safety reasons and which could reach a flag. I think just as the copyright example that Mr. Justice Rehnquist gave, we are not saying that the state has its hands tied whenever anyone attempts to communicate a message.

However, if the statute only applied to American flags rather than to, for example, Canadian flags, that were burned on the street, then the obsect of the statute would be to get at the message and not to protect the safety of passersby from burning obsects. And I think that runs squarely counter to the theory expressed by this Court in West Virginia v. Barnette. It elevates the flag to the level

of an idol.

Q When you refer to safety, I take it from what you have said, you are not thinking about possibility of breach of the peace but of someone being burned?

MR. GREENFIELD: Correct.

Q Come back a moment to the statement that you made, that you thought the statute was void on its face. Is that because of vagueness or overbreadth?

MR. GREENFIELD: It is both. I hope that I may reserve some time for rebuttal, but let me in response to your question say that the statute is overbroad because all of these examples, beginning with the flag in this courtroom and the buttons which Chief Justice Lumbard--Chief Judge Lumbard referred to in Cahn, would be prohibited and it was inconceivable to that court and I think that it would be inconceivable to this Court that that kind of traditional expressive conduct could be a violation of any properly drawn statute.

If the purpose is to promote respect for the flag, then the statute is overbroad if it prevents a citizen from saying, "I love the flag," or as one of the exhibits in this case exemplifies, prints in a newspaper, the Declaration of Independence superimposed on the flag on the occasion of Independence Day. This is a plain violation of the statute, and it is for that reason overbroad.

The vagueness argument basically takes off from the proposition that most of the courts who reviewed these kinds of statutes had said they cannot be taken literally because, if they do, they have all these absurd consequences; and consequently one has to guess as to whether this flag constitutes a violation and Mr. Spence's flag does not. And if one has to guess, the statute is vague.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Warme.

ORAL ARGUMENT OF JAMES E. WARME, ESQ.,

ON BEHALF OF THE APPELLEE

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

I have taken some time in my brief to set out the facts in this particular case for the Court. And I intended to convey to the Court that the state does not consider the equities in this particular case to be overwhelmingly on its side. Mr. Spence was certainly one of the most pleasant people that it has ever been my duty to prosecute, and I recognize the equities in Mr. Spence's position. But that does not mean that the statute itself is unconstitutional. And I think if we concede the equities and deal solely with the stitute, then we will be in a much better position to determine whether or not the statute itself is constitutional.

Q Do I correctly read the record that the essence

of his defense was that he was not showing contempt or disrespect but he was showing respect for the flag by associating it with the concept of peace?

MR. WARME: That was his defense. That defense was rejected as a matter of law by the trial court.

Q That was his testimony essentially, was it not?

MR. WARME: It was his testimony, but it was not relevant, and the jury was instructed that that was not relevant.

The Court should understan the statutory scheme in the State of Washington. There are two statutes. The first statute and the statute which we are considering here is the improper display of the flag statute, which is a misdemeanor. There is a second statute, which is a flag desecration statute in the same chapter, which is a gross misdemeanor, more serious crime, and which makes it a crime to cast contempt upon an American flag or to defile an American flag, which would be the case if there were some type of burning or a dismemberment.

Now, that statute has been construed by the State of Washington, State v. Turner, to require an intent to desecrate. So that the ambiguous act of burning a flag may or may not constitute a desecration of the flag under that statute.

Q That would protect a person, would it not, who

has an old, worn out, tattered flag and follows the procedure recommended in some congressionally published flag book that the thing to do with such a flag is not throw it in the garbage pail but to cremate it.

MR. WARME: That is correct.

Q So that he would be protected because his purpose was a benign purpose.

MR. WARME: That is correct. And it was originally the position of Mr. Spence and the trial court that he was protected under the same doctrine, because the display was a benign disply, that his intention was good. The court said as a matter of law that is not an element and it is not a defense, that it is a malum prohibitum act, the improper display of the flag, and that it is not a crime in which intent is an issue.

Q In some of the history books there is a picture of the kind your friend referred to, of I think the campaign perhaps of Grover Cleveland in McKinley's day. One of the campaign documents was the American flag with the picture of the candidate Grover Cleveland superimposed over it. If that were done today, that would violate the Washington statute, would it not?

MR. WARME: If it were a picture of the flag?

Q No.

MR. WARME: If it were the flag itself?

Q The flag itself.

MR. WARME: If it were the flag itself, it would violate the statute, that is correct.

Q But you say if it were reproduced as it is in the history book, it would not be.

MR. WARME: It would not be.

Q Just the picture of a flag, not a flag.

MR. WARME: That is correct.

I think it is important to point out to the Court that the statute is very, very broad, as counsel has urged. But the--

Q Excuse me, I do not understand that answer. This says the word "flag, copy, picture, or representation thereof."

MR. WARME: That is exactly right, and that is the point I am coming to. The statute itself is very, very broad. As interpreted by the state supreme court in the case of Washington v. Spence, the statute is severable, and we were only dealing with an actual American flag. At the superior court level, the court of appeals level, and the state supreme court level, Mr. Spence always urged that the statute had to be considered as a whole, that you have to consider the words "picture, representation, color scheme," what have you.

The Washington State Supreme Court said not so.

They said in their opinion, and I will quote the words of the court: "The only"--

Q What page of the appendix is that on again?

MR. WARME: It is, I believe--

Q Forty-seven? Yes, 47.

MR. WARME: Is it? "The only interdiction of free speech so far as this case is concerned is that one cannot alter or deface a flag of the United States and perhaps other official symbols which are not before us."

Although it was urged that these symbols were properly before the Court, they said no; in interpreting the statute we do not have to consider these other parts of the sratute because we consider them severable, not an integral part of the statute. That has always been the rule in the State of Washington, most recently set out in State v. Anderson, which we have cited in our brief and which is also the federal rule on interpretation, which is--

Q Of course, we are concluding by whatever interpretation your--

MR. WARME: That is my position, Your Honor. That is my position. So that the question of the pictures, the representations, the buttons, the telephone with the red, white, and blue color scheme, are not properly before this Court under this statute, because the state supreme court has said, "We can consider those separately."

Q What happens to the battalion flag of a regiment that has ribbons on it?

MR. WARME: The battalion flag or the American flag?

Q The American flag which the battalion puts on it all of its battle ribbons.

MR. WARME: I do not believe that they are generally attached to the flag. I believe they are usually attached to the staff of the flag itself.

Q And they hang on down?

MR. WARME: And they hang on down. And that is not prohibited under the statute.

Q Suppose it were attached to the flag.

MR. WARME: That would be a violation. That would be a violation.

Q I would like to see the State of Washington try to enforce it.

MR. WARME: I have never seen a violation of it, Your Honor, in the State of Washington. I think generally in that type of situation where you have a military situation there are rules of protocol which are enforced by the military itself. So, it is a hypothetical problem, but I do not think it is an actual problem.

And I think that sufficiently answers the over-breadth argument of counsel. I think that the state supreme court interpretation is such that it is not an argument

anymore.

Clearly the most overwhelming part of the argument is that this statute does constitue a violation or an infringement upon the appellant's First Amendment rights.

Q As applied.

MR. WARME: As applied, that is correct, Your Honor. I think that is really at the heart of this particular case.

There are a number of cases which deal with the distinction between symbolic speech and free speech, and of course--or pure speech. In pure speech we have the clear and present danger test. In symbolic speech we have U. S. v. O'Brien where the interests are somewhat different.

Q How about Tinker beyond that?

MR. WARME: Tinker followed O'Brien. They said there is not legitimate state interest. O'Brien analyzed the Tinker case.

Q Tinker, I gather, treated the wearing of the armband as if it were spoken words.

MR. WARME: That is correct. And I am assuming--

Q And is that not the problem here?

MR. WARME: This is not pure speech. But for the sake of argument, let us assume that it is.

Q Is it not arguably like the Tinker--

MR. WARME: I think that it is arguably like it.

I will assume for the sake of argument that it is. Although I do not think that we have to go as far as the cases--the clear and present danger cases--because I think we only have to go as far as O'Brien since what we are talking about is symbolic speech, which O'Brien has somewhat limited. But I am going to address myself to the clear and present danger, this legitimate state interest in prohibiting this type of conduct.

There are three interests which I have heard the Court discuss with counsel. And I think that they have to be distinguished.

The first interest is the interest in promoting respect for the flag. That is not a legitimate state interest. I conceded that throughout my brief, that the state government cannot control people's attitudes about the flag, totally improper; whether it be through symbolic speech or pure speech, an improper state interest.

Q But you do not suggest that goes so far as to say the state may not prevent someone from showing disrespect by burning the flag?.

MR. WARME: That would come under the other section of Title 9, Chapter 86.

Q I do not care what it comes under. You suggest that the state may not do that?

MR. WARME: I am--

Q In other words, you are not giving away your defilement statute that you referred to before?

MR. WARME: No, I am not giving away the defilement statute, although I think about that statute and--

Q I would think that if you were going to give that away, you would give this statute away a fortiori.

MR. WARME: I thought about that, and I think the answer is--

Q I would think you would.

MR. WARME: I think the answer is no to that particular argument.

Q Why?

MR. WARME: Because in that particular statute what you attempt to control is people's attitudes towards the flag, again an improper state interest.

Q I suppose you suggest though that the state has an interest in protecting the integrity of the flag.

MR. WARME; That is the second interest that I was going to talk about. That was the interest which the state supreme court found. They said that the state has an interest in protecting the integrity of the flag and keeping it away from external adornmentts.

Q But you have not taken that position here.

MR. WARME: I am not going to say that the state supreme court is wrong, but that was not the grounds that we

urged before the state supreme court, and that is not the grounds that I am urging before this Court.

Q Maybe they felt something was wrong with your ground.

MR. WARME: Obviously they did, Your Honor.

Q We are reviewing their judgment, not yours.

MR. WARME: You are reviewing a statute, as I understand it. It is not a question of either my judgment--

Q We are reviewing the judgment of the state supreme court.

Q The judgment but not necessarily its opinion.

MR. WARME: That is correct.

In the third state interest, which--

Q The second has escaped me. What was the second one?

MR. WARME: The second one is preserving the integrity of the flag.

Q What does that mean, do you think?

MR. WARME: It means that the state has established the flag as the national symbol, and it has the same rights in the flag, for instance, as Mr. Cohan would have in his song.

Q No, those are property rights. Those are statutory property rights that are protected by the copyright law, and that is for the appropriation of somebody else's

property. The state has no property right in the flag, does it, vis-a-vis any individual citizen of the United States or of the state?

MR. WARME: I do not particularly think so, but I think that is what the state supreme court said in its opinion. But I do not think that is what the state legislature said either.

Q You are not defending what the state supreme court said.

MR. WARME: I am not defending what the state supreme court said.

Q But you are not abandoning it either.

MR. WARME: I am not abandoning it [laughter], but I am not defending it. That is correct.

Q What do you rely on?

MR. WARME: We rely upon the state interest of preserving the peace. This was the same state interest that was found in Radich v. New York, the only other case which came from the Supreme Court. That was a case without an opinion, where the New York court said there was a legitimate interest in preserving the peace.

I think that same interest applies in a desecration statute, and I think if it is a public desecration of the flag, then the state interest is there. If it is a private desecration or defilement of the flag, I do not think that

there is a legitimate state interest. And I think this answers Mr. Justice White's obsection.

Q Then you have to read that into your statute. Certainly there is nothing in the statute which speaks of--

MR. WARME: Of preserving the peace?

Q Right.

MR. WARME: I appreciate that, Your Honor. In reviewing all of the criminal laws, I do not know that any of them say that the state interest which we are promoting here is written into the statute. The determination of state interest is a proper judicial determination, and it is not dependent upon the wording of the statute nor is it a question of fact to be proven at the trial court.

Q But your state supreme court did not.

MR. WARME: Pardon me?

Q Did your state supreme court read it in the statute?

MR. WARME: No, they did not.

Q They did not.

MR. WARME: They did not, that is correct.

Q So, how can we?

MR. WARME: We are talking about statutory interpretation. And the question in terms of--

Q You admit that you urged this on your supreme court and your supreme court rejected it.

MR. WARME: No, the supreme court did not answer it at all.

Q Did not answer it at all. They did not accept it, right?

MR. WARME: Right.

Q You are saying we should accept it even though they refused to accept it.

MR. WARME: That is correct.

Q You really are not talking about statutory interpretation, are you? You are talking about bases on which the statute as written might be constitutionally sustained.

MR. WARME: Absolutely correct.

Q So that you do not need to say that the legislative shows this or the supreme court interpreted it to mean this if, in effect, you can sell five justices of this Court on the idea.

MR. WARME: I believe that is correct; since we are not talking about a practical construction of the statute, then the rules of interpretation are not binding on this Court. What we are talking about is the underlying state interest which this Court has to decide.

Q Can we decide that when the Washington court decided it was something else than you are urging here?

MR. WARME: I think so. I very definitely think

so. I think if--well, I think that this Court has consistently found the proper state interest or lack of proper state interest, regardless of the opinion of the state supreme court.

For instance, if the state supreme court were to say there was a proper state interest in preserving respect for the flag under this statute, this Court would not hesitate to say, "No, that is improper."

Q The real question that no one has asked you is, Why do you not at least partially advance the thesis of the Washington State Supreme Court?

MR. WARME: I have set it forth in my brief. I think it is there to be considered. But I do not think it is the strongest argument. That is quite frankly my feeling. I feel that the the stronger argument is that there is a legitimate state interest in preserving the peace, and that is what the statute stands for.

Q Even though the Washington Supreme Court has not said so?

MR. WARME: Even though they said there were other grounds that they thought were sufficient for the statute, there were other legitimate state interests.

Q Did they say that really?

MR. WARME: Yes, they did. They said that--I do not have the quote--but they said that the nation has established

a symbol, ind the state has a legitimate interest in preserving its integrity and keeping it free from extraneous adornment.

Q May I ask this question: Does the record show whether or not this statute has been uniformly applied? Suppose, for example, somebody mentioned what had been placed on the flag was something like "God save America." Have you ever broght a prosecution or had any occasion to consider bringing one?

MR. WARME: I never brought a prosecution. I have never seen a prosecution brought. I have never seen the flag used that way either.

Q Is this the only prosecution that has ever been brought?

MR. WARME: As far as I know, this is the only prosecution that has ever been brought under this particular statute in the State of State of Washington; that is correct. The record is devoid of any type of arbitrary enforcement by prosecutors or police forces, although it has been asserted in the brief of the appellant that such arbitrary enforcement does exist; I have not seen it, and the record is devoid of any type of proof of that.

Q Would this on the flag not be as much a protest as this peace decal?

MR. WARME: It certainly would. And it would be

prohibited for the same reason, that it is an improper vehicle; the flag is an improper vehicle for conveying political or social ideas--

Q Why, because of the breach of the peace argument?

MR. WARME: That is correct. And I appreciate that on this Court and in this courtroom there probably a greater proportion of people who do not attach the emotional involvement to the American flag that the general population does. I think as you become more and more educated and you start thinking about things like, particularly I suppose, the rise of Naziism in Germany, you become very suspicious about chauvinistic tendencies. And, as a consequence, more educated people, I think, tend to have a tendency to shy away from strong emotional identification with symbols. But that does not mean either that it is improper for people to have that particular strong emotional identification or for the state to recognize that people have that particular strong emotional identification.

Q How much disorder would "God save America" on the flag provoke?

MR. WARME: It depends on the circumstances. It would depend upon the circumstances.

Q I suppose it might mean God save America from somebody.

MR. WARME: God save America from Richard Nixon would probably be a feeling that would invoke a certain amount of ire in a substantial portion of the population.

Q In this case the only ire was three policemen. Am I right?

MR. WARME: That is not exactly correct, Your Honor. If I can explain the record in this particular case very briefly, the Washington rules provide for a stipulated statement of the facts. Mr. Spence was indigent. The state agreed that we would stipulate to the relevant facts and come to this Court on a stipulation of what those facts were. The evidence at the trial was that a passerby first called the police. That evidence was rejected, although the state offered that evidence, by the trial court before it ever went to the jury on the grounds that that was not relevant evidence to any element of the statute, that it was a malum prohibitum statute, and that the actual response of the people to the statute was--

Q It aroused the ire of four people.

MR. WARME: Again, my point is that the response of the people to the statute does not determine the constitutionality or unconstitutionality of the statute itself, that that has to be determined from examining the statute. If we require that for the statute to be constitutional there there be an actual present danger, then we come

into the position where it is only a crime to yell "Fire" in a crowded theatre if the people actually react violently.

Q Then all you have to do is pass a statute and say nobody can say anything about anybody else. It would be awful hard to get a fight then, would it not?

MR. WARME: It would be hard to get a fight, but that is not--

Q In this particular case, the man was not on the street; he was in his own apartment.

MR. WARME: That is correct.

Q How far up was the apartment?

MR. WARME: He was on either the second or the third floor.

Q And he had his flag in his window?

MR. WARME: Out his window.

Q Out his window.

MR. WARME: That is correct.

Q And he never went out in the street?

MR. WARME: He never went out on the street. I think he had it out about five minutes when--

Q And that just completely disrupted the peace of the queen?

MR. WARME: No, it did not. But I do not think that in order for the statute to withstand constitutional scrutiny there would have to be actual violence.

Q Why did you need three policemen?

MR. WARME: I appreciate, Your Honor, that my position would be much stronger if one police officer had given the man a citation. I would prefer to be in that position. But that still does not change the fact--

Q You would not have sent three?

MR. WARME: No, I would not have sent three police officers there. Even the police officers had a discussion about whether to give him a citation, but that does not have anything to do with the statute itself.

Q Since Mr. Greenfield relied on historical examples, you might offer Barbara Fritchey to support the possibility of public outrage at the waving of a flag from a window.

MR. WARME: That is an interesting observation, Your Honor. I would--

Q Has the attorney general of your state taken a position in this case?

MR. WARME: No, the attorney general has not. The attorney general has no criminal jurisdiction in the State of Washington.

Q Who does? Just the local prosecutor?

MR. WARME: The local prosecutor, who is an elected official.

I would direct this Court's attention to the case of

Halter v. Nebraska, which probably is inappropos in the face of the challenge to the First Amendment but is not inappropos to the observation that was made by the Court at that time in recognizing the dynamic nature of the symbol of the flag and where the Court said, recognizing the legitimate state interest that we are urging here, "Insults to the flag have been the causes of wars and have on occasion been punished summarily by those who hold it in reverence." That is the type of situation that we are talking about here.

The flag is not a proper vehicle for expressing certain types of ideas. And in order to avoid the constitutional problems of deciding or favoring ideas, the state has made the prohibition absolute. It says not only can we not express favorable ideas such as supporting the nation in an armed conflict, rallying behind the Congress--

Q Suppose he had not put this peace symbol on the flag but simply put the peace symbol on his window.

MR. WARME: No problem at all.

Q Would that not have provoked as much disorder as putting it on the flag?

MR. WARME: No, because the nature of the offense--

Q At that time in that context.

MR. WARME: Well, I do not think so, Your Honor. There were a lot of peace symbols in Seattle at that time. But the nature of the offense is not--the nature of the insult

is not to the policy so much as it is to the flag.

Q But the First Amendment, in any event, whether or not it provoked disorder, would have protected the display merely of a peace symbol, not of the peace symbol on the flag, if he just put the peace symbol on his window?

MR. WARME: If the peace symbol was on his window and there were an actual disturbance, then--

Q The First Amendment would not protect him?

MR. WARME: I do not know that the First Amendment would not protect the display, but I think the police would be authorized to take appropriate action to preserve the peace. And if that appropriate action were under the circumstances--

Q This would be only if in fact there were disorder, you are suggesting?

MR. WARME: That is correct, because what we are talking about is--

Q And if there were none, the mere fact that he displayed it, he could and would be protected by the First Amendment.

MR. WARME: Absolutely correct.

Q Suppose the peace symbol was pasted against the window and the flag was directly behind it but was not attached to it.

MR. WARME: Under the statute, it would not be a

violation.

Q That is right.

MR. WARME: Under the statute it would not be a violation; that is correct.

Q But all of the problems could happen as a result of that.

MR. WARME: If--

Q And there is nothing you could do until the problem, until the disorder occurred; am I right?

MR. WARME: That is correct. That is correct.

Q So, the only thing here is that it touched the flag?

MR. WARME: That is correct.

Q And that was the harm, touching the flag.

MR. WARME: That is correct, but I think if the Court dwells on the facts, it tends to minimize the nature of the offense. And if we go back to Chaplinsky, where we had the citizen calling the police officer "a goddam Fascist," I believe was the term that they used there, this Court recognized that whether or not--whether or not--the police officer became aroused or whether or not the citizenry became aroused, the nature of the insult was such that it was the type of insult likely to provoke a disturbance of the peace. And in Halter v. Nebraska, relying on the same test, they said the use of the flag is the same type of personal

insult that is involved in Chaplinsky. And I think this is to be distinguished from Cohen v. California, where they had the young man who wrote, "Fuck the draft" on the back of his coat and wore it into the courtroom. No one, I do not think, was personally insulted by this person's particular opposition to the draft. I do not think the draft is something that people have strong personal feelings about.

If he had written this same obscenity perhaps on an American flag and substituted "America" for "the draft," then you would have people who wwold be personally affronted by this particular type of obscenity. And that is the distinction that the Court made in Cohen.

Q I am wondering if your grounds for upholding the statute are as different from those of the Supreme Court of Washington as you intimated at one time, where basically your argument is that people may become aroused by insults to the physical integrity of the flag--is it not?--and that the state may use that as a basis for legislating?

MR. WARME: I had not thought of it in that term, but I can appreciate that the supreme court may have been thinking that an just had not gone as far and said the reason for preserving the integrity of the flag is to prevent people from insulting the flag.

Q At least there is some overlap, I would think, between the argument that you are making and the one used by

the Supreme Court of Washington.

MR. WARME: Yes, I think so.

Q It is clear that you concede that putting the words "God bless America" over the flag would be as much a violation of the statute as the present case.

MR. WARME: It would. The problem that we have is the City Police of Chicago v. Mosley, where they said, "Now, you can protest labor disputes in front of the public schools, but you cannot Protest racial segregation." You have a selective type of choosing by the state. We are going to favor certain attitudes; we are going to favor certain expressions and we are going to suppress others. Then you have very serious constitutional questions.

Q Your friend says that one of the reasons this statute is overbroad is because it would prohibit both of these expressions equally, the favorable and the ambiguous one. That is the core part of his argument on overbreadth.

MR. WARME: That is the core part of it, but I think, Your Honor, that it is also appropriate for the Court to consider that using the flag, even for the purpose of what one person may consider to be a benign purpose may be considered by others to be a cause of insult, as was in this particular case. The ambiguous nature of the symbol in this case could be interpreted either of two ways.

If there are no further questions, then I will

submit my argument.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Greenfield, do you have anything further?

REBUTTAL ARGUMENT OF PETER GREENFIELD, ESQ.,

ON BEHALF OF THE APPELLANT

MR. GREENFIELD: Let me just clarify that personal in the sense that Mr. Warme was using it is slightly different, I think, than personal in the sense in which it was used in Chaplinsky. That is, the fighting words doctrine involves words directed at a person, not something that one may, as a matter of his own feelings, find to be troubling.

And let me say in response to Justice Powell's question, there are two examples of selective enforcement in the record in this case, Exhibits 1 and 2, one of which is an American flag and a picture with the Declaration of Independence superimposed. There have been many such examples in the State of Washington, and none of them have resulted in prosecution.

The Washington Supreme Court did not narrow the statute in its decision here. It simply refused to consider what it regarded as hypothetical examples, rejecting what appellant had asked that it invoke, namely, the First Amendment overbreadth argument that would allow other instances to be considered than a statute as overbroad as this one.

and I think that they threaten to make the American flag just the kind of golden image which would have horrified Thomas Jefferson.

Q Did your research, Mr. Greenfield, reveal anything that would cause you to disagree with your brother that this is the one and only prosecution under this statute in the history of the state?

MR. GREENFIELD: There are no other reported opinions, Your Honor, and there have been other flag prosecutions none of which have reached, so far as I know, the constitutional issues involved but I think that they were under the desecration statute.

Q So far as you know, under this statute, this the one and only, first and last prosecution since the statute was enacted in 1919?

MR. GREENFIELD: Correct. And since it was upheld, people in Washington will not know whether they dare wear a campaign button of the kind that has been exemplified or use any of the other flag related messages that are simply part of Americana.

Q Mr. Greenfield, you say in Chaplinsky, and of course rightly, that it was personally directed to an individual. On the other hand, Finer--as I recall, Finer referred to President Truman as a champagne sipping bum, or words to that effect, to an audience. And the suppression

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there was not based on remarks addressed to the individuals but the reaction of the individuals to remarks about a third person.

MR. GREENFIELD: I think precisely the significance of Finer was that one did not simply look at his words, because I think Finer's words in a different context would have been protected beyond question. But it was the fact that there was a crowd that was getting uneasy and that the court found was about to erupt into violence, that Finer had been warned to desist, and that he refused after three warnings to do so. That was what enabled the court to find there was an imminent threat of violence; and, therefore, under the fighting words doctrine, Finer could be prohibited from continuing with his speech.

But here the state says it can erect a conclusive presumption that because of the uneducated people of Washington, that anyone who sees a flag with "God bless America" over it is likely to respond by violent retaliation. And I submit that that is simply implausible, that none of the flag cases in any jurisdiction support in effect a judicial notice by this Court that the people of this country conform to that degree to the description of Hobbes.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:09 o'clock a.m., the case was submitted.]