

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: TEXAS, Petitioner V. GREGORY LEE JOHNSON
CASE NO: 88-155
PLACE: WASHINGTON, D.C.
DATE: March 21, 1989
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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 TEXAS, :

4 Petitioner, :

5 V. : No. 88-155

6 GREGORY LEE JOHNSON :
7 -----x

8 Washington, D.C.

9 Tuesday, March 21, 1989

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 1:59 p.m.

13 APPEARANCES:

14 KATHI ALYCE DREW, ESQ., Assistant District Attorney for
15 Dallas County, Dallas, Texas; on behalf of the
16 Petitioner.

17 WILLIAM M. KUNSTLER, ESQ., New York, New York; on behalf
18 of the Respondent.
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P R O C E E D I N G S

(1:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-155, Texas v. Gregory Lee Johnson.

Ms. Drew, you may proceed whenever you're ready.

ORAL ARGUMENT OF KATHI ALYCE DREW

ON BEHALF OF PETITIONER

MS. DREW: Thank you, Mr. Chief Justice, and may it please the Court:

The issue before this Court is whether the public burning of an American flag which occurred as part of a demonstration with political overtones is entitled to First Amendment protection.

The flag burning in this case occurred during the 1984 Republican National Convention in Dallas, Texas. The flag was burning in front of Dallas City Hall at the culmination of a demonstration march through downtown Dallas in the midst of a crowd of demonstrators and onlookers.

The flag burner, who was identified as Mr. Johnson, was convicted under a Texas statute which prohibits desecration of the national flag. His punishment was assessed at one year in the county jail plus a \$2,000 fine.

1 The conviction was affirmed on direct appeal
2 by the Intermediate Court of Appeals. Mr. Johnson then
3 filed petition for discretionary review to the Texas
4 Court of Criminal Appeals. That is the highest court in
5 the state of Texas which hears criminal cases.

6 The court granted his petition, reversed his
7 conviction, and ordered the information dismissed. The
8 Court of Criminal Appeals held that the Texas statute
9 was unconstitutional as applied to Mr. Johnson, since he
10 was a political protester.

11 Judge Campbell of that court found that flag
12 burning constituted symbolic speech within the test
13 enunciated by this court in Spence versus Washington.
14 That court also found that Texas' asserted interests in
15 regulating the act of flag burning were insufficient to
16 outweigh a protestor's First Amendment rights to
17 expression.

18 For purposes of this argument today and with
19 the Court's indulgence, the state will assume the
20 symbolic speech standard and proceed directly to the
21 question of Texas' compelling interest in regulating
22 this type of conduct.

23 Throughout the course of the appellate history
24 in this case Texas has advanced two compelling state
25 interests. One is the preservation of the flag as a

1 symbol of nationhood and national unity. The second is
2 the preservation of a breach of the peace.

3 QUESTION: Prevention of breach of the peace?

4 MS. DREW: Yes, Your Honor, prevention as
5 opposed to punishment for a breach of the peace.

6 I would like to address first the nationhood
7 interest.

8 We believe that preservation of the flag as a
9 symbol of nationhood and national unity is a compelling
10 and valid state interest. We feel very certain that
11 Congress has the power to both adopt a national symbol
12 and to take steps to prevent the destruction of that
13 symbol, to protect the symbol.

14 QUESTION: Now, why does -- why does the --
15 why did the defendant's actions here destroy the
16 symbol? His actions would have been useless unless the
17 flag was a very good symbol for what he intended to show
18 contempt for. His action does not make it any less a
19 symbol.

20 MS. DREW: Your Honor, we believe that if a
21 symbol over a period of time is ignored or abused that
22 it can, in fact, lose its symbolic effect.

23 QUESTION: I think not at all. I think -- I
24 think when somebody does that to the flag, the flag
25 becomes even more a symbol of the country. I -- I mean,

1 it seems to me you're running quite a different
2 argument, not that he's destroying its symbolic
3 character, but that he is showing disrespect for it,
4 that you not just want a symbol, but you want a
5 venerated symbol, and you don't make that argument
6 because then you're getting into -- into a sort of
7 content preference. But I don't see how you can argue
8 that he's making it any less of a symbol than it was.

9 MS. DREW: Your Honor, I'm forced to disagree
10 with you.

11 QUESTION: All right.

12 MS. DREW: Because I believe that every
13 desecration of the flag carried out in the manner that
14 he did here -- and certainly I don't think there can be
15 any question that Mr. Johnson is a hard-core violator of
16 this statute -- if his actions in this case under the
17 facts of this case do not constitute flag desecration,
18 then I really am not quite certain what would constitute
19 flag desecration.

20 QUESTION: They desecrate the flag indeed, but
21 do they make it -- do they destroy the symbol? Do they
22 make it any less symbolic of the country. That's the
23 argument I thought you were running, that -- that we
24 have a right to have a national symbol. And if you let
25 the people desecrate the flag, you don't have a national

1 symbol.

2 I don't see how that follows. We may not have
3 a respected national symbol, but that's a different
4 argument. Now, if you want to run that argument that we
5 have the right to insist upon respect for the flag,
6 that's a different argument.

7 MS. DREW: Texas is not suggesting that we can
8 insist on respect. We are suggesting that we have the
9 right to preserve the physical integrity of the flag so
10 that it may serve as a symbol because its symbolic
11 effect is diluted by certain flagrant public acts of
12 flag desecration.

13 QUESTION: Well, in the sense you're arguing a
14 minimal form of respect for the flag, aren't you? Not
15 that you have to take your hat off or salute when it
16 goes by. Now, the state can't require you -- but at
17 least can it consist that you not destroy it?

18 MS. DREW: Yes, Your Honor. We -- to the
19 extent -- to the extent that we are asking for any
20 respect for the flag, we are asking for respect for its
21 physical integrity. Certainly we do not demand that any
22 individual view it with any discernable emotion
23 whatsoever, only that its physical integrity be
24 respected. And I think that that is a very minimal
25 basis to ask from any individual. And that is really

1 all Texas is suggesting with this is that we have got to
2 preserve the symbol by preserving the flag itself
3 because there really is no other way to do it. There is
4 nothing that would accomplish this particular purpose if
5 you cannot protect the physical integrity of the flag.

6 QUESTION: Well, oh, over -- over the years,
7 over the centuries, the cross has been respected. I
8 recognize one's a religious symbol, the other's a
9 national one, but there's no legislation that has
10 appeared necessary to protect, say, the cross.

11 MS. DREW: That's true, Your Honor.

12 QUESTION: So, it may be that you can protect
13 symbols by public respect and by measures other than the
14 imposition of the criminal law.

15 MS. DREW: Your Honor, I don't believe,
16 though, that a cross has quite the same character that
17 the American flag does because there are many people in
18 this nation who would not view a cross as a symbol.

19 QUESTION: Even probably -- probably maybe
20 arguably less than the flag. I'm not sure of the
21 numbers, but it's been preserved.

22 MS. DREW: And this particular statute, Your
23 Honor, would not go to that sort of a symbol. This
24 particular statute, I believe, in this respect
25 recognizes that the flag is a national property, that it

1 belongs to all people, that all people are entitled to
2 view it symbolically in whatever way that they wish.
3 Some people may give it great respect. Others may not.
4 That's not what we're regulating here. We are simply
5 trying to preserve the flag as a symbol for all people.
6 The issue --

7 QUESTION: Well, you begin by saying that it's
8 a symbol and by acknowledging, at least in this part of
9 your argument, that what the defendant did was speech,
10 is that correct?

11 MS. DREW: We are assuming that standard for
12 purposes today.

13 QUESTION: All right. At this point. What is
14 the juridical category you're asking us to adopt in
15 order to say we can punish this kind of speech? Just an
16 exception for flags? It's just a -- there's just a flag
17 exception of the First Amendment?

18 MS. DREW: To a certain extent, we have made
19 that argument in our brief. With respect to the
20 symbolic speech standard, we believe that there are
21 compelling state interests that will in a balancing
22 posture override this individual's symbolic speech
23 rights, and that preserving the flag as a symbol,
24 because it is such a national property, is one of those.

25 QUESTION: What are the others?

1 MS. DREW: The other state interest advanced
2 Your Honor, is a prevention of a breach of the peace.

3 QUESTION: That's the other state interest.

4 MS. DREW: Yes, Your Honor.

5 QUESTION: But I assume under this statute, of
6 course, it's not just one flag, it's 51.

7 MS. DREW: 51 flags or all 50 state flags but
8 the national flag? I'm confused by your question. I
9 apologize.

10 QUESTION: Well, this statute prohibits the
11 desecration of a state flag as well.

12 MS. DREW: Yes, it does.

13 QUESTION: Of the Texas state flag?

14 MS. DREW: Yes.

15 QUESTION: And I assume if we upheld the
16 statute in every other state it would have the same
17 right?

18 MS. DREW: Yes, Your Honor.

19 QUESTION: So, your category for one flag is
20 now expanded to 51.

21 MS. DREW: The statute does say a state or
22 national flag. That is correct. And we do believe
23 Texas certainly has a right to protect its own flag.
24 And I think that a similar interest would be for sister
25 states. So, the statute says a state or national flag.

1 QUESTION: Could Texas prohibit the burning of
2 copies of the Constitution, state or federal?

3 MS. DREW: Not to my knowledge, Your Honor.

4 QUESTION: That wouldn't be the same interest
5 in the symbolism of that?

6 MS. DREW: No, Your Honor, it would not be the
7 same interest I don't believe.

8 QUESTION: Why not? Why is that? I was going
9 to ask about the state flower.

10 (Laughter.)

11 QUESTION: You're not going to --

12 QUESTION: The state flower?

13 MS. DREW: There is legislation, Your Honor,
14 which does establish the blue bonnet as the state flower.

15 QUESTION: I thought so.

16 MS. DREW: It does not seek to protect it.

17 QUESTION: Well, how do you pick out what to
18 protect? I mean, you know, if I had to pick between the
19 Constitution and the flag, I might well go with the
20 Constitution. I don't know.

21 MS. DREW: Your Honor, I think Texas in this
22 area has made a judgment that certain items -- and the
23 statute itself is not limited to just the flag. The
24 portion that is in question here is limited to the
25 flag. But it has made a judgment that certain items are

1 entitled to more protection.

2 QUESTION: I understand that. But we up to
3 now have never allowed such an item to be declared a
4 national symbol and to be usable symbolically only in
5 one direction, which is essentially what you're
6 arguing. You can honor it all you like, but you can't
7 dishonor it as a sign of disrespect for the country.

8 MS. DREW: No, Your Honor. We're not arguing
9 that at all.

10 QUESTION: Oh?

11 MS. DREW: Not at all. We are in no way
12 arguing that one cannot dishonor the flag or that one
13 cannot demonstrate disrespect for the flag. Individuals
14 have that right.

15 What we are arguing is that you may not
16 publicly desecrate a flag regardless of the motivation
17 for your action.

18 QUESTION: Well, one hardly desecrates it in
19 order to honor it. I mean, you only desecrate it in
20 order to show your disagreement with what it stands for,
21 isn't that right? So, it is sort of a one-way statute.

22 MS. DREW: I don't think that it is exactly,
23 Your Honor, because I think that there are other forms
24 of conduct which are -- equally prohibit -- well, let me
25 put it this way. The same conduct is prohibited,

1 regardless of the motive of the actor. If this --

2 QUESTION: But its motive -- its motive -- his
3 motive will never be to honor the country. It will
4 always be to criticize the country.

5 MS. DREW: Not necessarily.

6 QUESTION: Will you give me an example where
7 one -- somebody desecrates the flag in order to show
8 that he agrees with the policies of the United States.
9 I --

10 (Laughter.)

11 MS. DREW: I think it is possible --

12 QUESTION: Well --

13 MS. DREW: -- that an individual could choose
14 to burn a flag as an honor for all the individuals who
15 died in Vietnam. This is their most prized possession.
16 They're going to take it in front of Dallas City Hall in
17 the midst of a hundred people in the middle of the
18 afternoon, they're going to soak it with lighter fluid,
19 and they're going to ignite it, and they are doing this
20 to honor the Americans who died in Vietnam.

21 QUESTION: They'll probably violate a federal
22 statute while they're doing that, too.

23 MS. DREW: Yes, Your Honor, there is a federal
24 statute that does regulate flag desecration. This man
25 was not prosecuted under it. He was prosecuted under

1 the Texas statute.

2 QUESTION: Your statute would cover that
3 example that you just gave?

4 MS. DREW: Yes, it would, Your Honor, because
5 it does not go to the motive of the actor.

6 If a vandal takes a flag -- same scenario --
7 in front of Dallas City Hall, a hundred people, middle
8 of the afternoon, soaks it with lighter fluid, sets it
9 on fire, they are still liable under this statute. They
10 have desecrated the flag, but they have no intent to
11 dishonor the country. They have no intent to dishonor
12 the flag. They have no intent to do anything except oh,
13 I'm -- just an act of a vandal. I think I'll do this
14 today.

15 QUESTION: Well, actually, Ms. Drew --

16 MS. DREW: Yes.

17 QUESTION: -- I thought this statute only
18 applied if the desecration were done in a way that the
19 actor knows will offend one or more other people likely
20 to discover it.

21 MS. DREW: That is correct, Your Honor.

22 QUESTION: There is that little added
23 requirement, is there not?

24 MS. DREW: Yes, Your Honor, that is correct.

25 QUESTION: And do you think that that added

1 requirement survives analysis under this court's cases
2 in Street and Grayned versus City of Rockford and so
3 forth?

4 MS. DREW: Yes, Your Honor, I believe it does.

5 QUESTION: And why?

6 MS. DREW: Believe I believe the import of
7 that statute. Now, the statutory language there is that
8 it goes to the manner in which the act is effectuated.
9 It goes to the way in which the act is performed, that
10 it has to be in a way that the actor knows will
11 seriously offend.

12 Serious offense does not have to be caused
13 under this statute.

14 QUESTION: Well, I thought that the court had
15 held that it's firmly settled under the Constitution,
16 that the public expression of ideas may not be
17 prohibited merely because the ideas are themselves
18 offensive to some of the hearers.

19 MS. DREW: That's correct, Your Honor.

20 QUESTION: And this statute seems to try to
21 achieve exactly that.

22 MS. DREW: I don't believe that it does, Your
23 Honor, because I believe that the pivotal point is in a
24 way how is the conduct effectuated, how is it done, not
25 what an individual may be trying to say, not how

1 onlookers perceive the action, not how the crowd reacts,
2 but how is it done.

3 If you take your flag into your basement in
4 the dead of night, soak it with lighter fluid and ignite
5 it, you probably have not violated this statute, because
6 the Texas statute is restricted to certain limited forms
7 of flag desecration.

8 QUESTION: Ms. Drew, it's probably of no
9 consequence, but is there anything in the record as to
10 whether this flag was stolen?

11 MS. DREW: Yes, Your Honor, as a matter of
12 fact there is. The — one of the officers who was
13 observing the march testified that in front of the
14 Mercantile Bank Building he saw several of the
15 protestors bend a flag pole and remove an American
16 flag. They then handed this flag to Mr. Johnson, who
17 wadded it up and stuck it under his T-shirt.

18 The march then proceeded. The officer
19 testified that when they got to City Hall, he saw Mr.
20 Johnson remove the flag from under his shirt. He tried
21 to light it with a cigarette lighter. It would not
22 light. Someone from the crowd then handed him the can
23 of lighter fluid. He soaked it, ignited it, the flag
24 burned.

25 QUESTION: But you would be making the same

1 argument If he owned the flag?

2 MS. DREW: Yes, Your Honor, we would be. I do
3 not believe that there is a shred of evidence in this
4 record to support the fact that this was his privately
5 owned flag. I believe just the opposite is very clearly
6 reflected.

7 QUESTION: Was he prosecuted for stealing the
8 flag?

9 MS. DREW: No, Your Honor, he was not.

10 QUESTION: I wonder why not.

11 MS. DREW: I believe, Your Honor, that
12 problems were of proof there in that no one saw him
13 actually take it. In fact, the testimony was that
14 others took it and then gave it to him. And I believe
15 that it was felt that there were so many proof problems
16 that a prosecution was very speculative under those
17 facts.

18 There also might have been some problem with
19 placing a monetary value on the flag for purposes of
20 prosecution, which is necessary under the statute.

21 QUESTION: Isn't the real way of opposing this
22 kind of action by this man to have a large crowd out
23 waving other flags in opposition to his posture rather
24 than putting him in jail?

25 MS. DREW: I'm sorry, Your Honor. I'm not --

1 I'm not afraid I got all of your question.

2 QUESTION: Well, if you were out in front of
3 the building today, there are pseudo-demonstrators of
4 one kind or another, and I'm merely saying isn't --
5 wouldn't it be better policy to rather than have a
6 criminal statute like this to have 500 people out waving
7 flags and hooting him down, so to speak?

8 MS. DREW: Your Honor, I believe that
9 legislatures act in category equal manners, and that --

10 QUESTION: Legislatures act the way they do,
11 all right, no question. You have to be up here
12 defending them.

13 MS. DREW: It is within their judgment to
14 penalize behavior that they feel is offensive to society.

15 QUESTION: But you gave that answer before.
16 You said the legislature has made the judgment. But
17 you're asking us to define and to articulate a
18 constitutional category.

19 And from what I can see, the constitutional
20 category is that we simply say the flag is different.

21 MS. DREW: That is one possibility that we
22 have advanced to this court. That's certainly true,
23 Your Honor. We have also suggested, though, that
24 another route is available to assume the symbolic speech
25 standard and to take a look at what the state's

1 interests are in protecting and in prescribing this type
2 of behavior.

3 QUESTION: Do you suppose Patrick Henry and
4 any of the founding fathers ever showed disrespect to
5 the Union Jack?

6 MS. DREW: Quite possibly, Your Honor.

7 QUESTION: You think they had in mind then in
8 drafting the First Amendment that it should be a
9 prosecutable offense?

10 MS. DREW: Of course, Your Honor, one has no
11 way of knowing whether it would be or not.

12 QUESTION: I think your response is that they
13 were willing to go to jail, just as they were when they
14 signed the declaration.

15 QUESTION: They were hoping they wouldn't get
16 caught.

17 (Laughter.)

18 MS. DREW: Yes, Your Honor. I believe the
19 classic line is "We hang together or separately."

20 QUESTION: That's right.

21 QUESTION: Do you -- you said that this flag
22 may be possibly different from other symbols. You don't
23 argue that there's something unique about this flag?

24 MS. DREW: Of course there is, Your Honor.

25 QUESTION: When it's -- do you think -- when

1 you have an equally strong case for the flag of the
2 State of Texas or the state flower. Do you think
3 they're the same case?

4 QUESTION: Well, Texas may be, we'll say.

5 (Laughter.)

6 MS. DREW: Texas, absolutely, Your Honor.

7 (Laughter.)

8 QUESTION: Are you serious in that answer?

9 MS. DREW: Yes, I am.

10 QUESTION: That the Tex -- that the Texas
11 flower -- and you could make the same kind of argument
12 as for this flag?

13 MS. DREW: No, I don't think you could make
14 the same kind of argument for the Texas flower. I truly
15 do not.

16 QUESTION: But you haven't really made an
17 argument that there's anything unique about this symbol.

18 MS. DREW: Well, Your Honor, I disagree. I
19 think in our brief we have detailed several arguments of
20 what is unique about the symbol.

21 QUESTION: Well, I mean, I've just -- what
22 I've heard this afternoon is all I'm saying.

23 MS. DREW: I think it's very clear that the
24 flag is the manifestation, the visible manifestation of
25 over 200 years of history in this nation, and that it

1 has remained virtually unchanged in design. The 13
2 stripes represent the original 13 colonies, and every
3 state is represented on the field of blue by a star. It
4 is very unique. It is immediately recognizable to
5 almost anyone who would see it.

6 QUESTION: Well, suppose -- suppose somebody
7 burns an American flag with 48 stars on it.

8 MS. DREW: I believe that is reachable under
9 this statute, Your Honor.

10 QUESTION: You believe what?

11 MS. DREW: I do believe that that could be
12 reached under this statute. That is clearly a past
13 flag. Many people probably still own and display
14 48-star flags.

15 QUESTION: It would be just the same?

16 MS. DREW: Yes, Your Honor, I believe that it
17 would be.

18 QUESTION: But 47 wouldn't work because there
19 was never a 47-star flag, is that -- then you wouldn't
20 reach it?

21 MS. DREW: That would depend, Your Honor, on --

22 QUESTION: So, all you have to do is take one
23 star out of a -- out of the flag, and it's okay.

24 (Laughter.)

25 QUESTION: That can't be right.

1 MS. DREW: That would depend, I believe, Your
2 Honor, on how flag is defined. There are certain
3 definitions that are given.

4 Congress itself has defined what it means by
5 the flag of the United States. And, as part and parcel
6 of that definition, there is language that says "The
7 stars and stripes in any number which to an individual
8 who looks at it without -- without deliberation, may be
9 a flag."

10 The flag behind you looks to me to be a flag,
11 but I cannot count 50 stars on it.

12 QUESTION: Now, that -- so, you're saying 47
13 would be okay. I tend to think that's probably right.

14 MS. DREW: If there were any question, I would
15 think that it would be appropriate for a jury to resolve
16 that question, Your Honor.

17 I'd like to turn very briefly, if I may, to
18 the breach of the peace interest. We do feel that
19 preventing a breach of the peace is a legitimate state
20 interest. And, indeed, the Texas Court of Criminal
21 Appeals recognized that preventing a breach of the peace
22 is a legitimate state interest.

23 Again, the Texas legislature has made a
24 judgment in this area that public desecration is likely
25 to lead to violence, that it can lead to violence. And

1 I think the record in this case is abundantly clear that
2 it is merely fortuitous, it is our good luck that a
3 breach of the peace did not occur as a result of this
4 particular flag desecration.

5 The appropriate test to be utilized in this
6 area has not been decided by this court.

7 There are two lines of cases. One is that
8 public desecration of a flag is inherently
9 inflammatory. Another is that immanence must be shown.
10 And I believe that this record is very clear that Texas
11 could regulate under either theory.

12 And, again, the goal is a prevention of a
13 breach of the peace, not a punishment for a breach of
14 the peace. And in analyzing this particular statute,
15 the Texas Court of Criminal Appeals utilized a much
16 higher standard than any court has ever used before.

17 They went to an actual breach of the peace and
18 they said well, there was no actual breach of the
19 peace. That's true. Individuals who were seriously
20 offended by this conduct were not moved to violence. If
21 they were, they exercised restraint.

22 But I don't believe that that is dispositive
23 of the state's interest and because its interest is
24 different, the standard is different. And I believe
25 that the Court of Criminal Appeals suggestions in this

1 regard are a bit too narrow; that if you have to show an
2 actual breach of the peace, your purpose in a flag
3 desecration statute is obviated. Some other statute
4 would serve that interest, but not a flag desecration
5 standard because its purpose is prevention.

6 QUESTION: I suppose you could have such a --
7 if that theory alone is enough to support the statute, I
8 suppose you could have such statutes for Stars of David
9 and crosses and maybe -- I don't know -- Salman
10 Rushdie's book or whatever, whatever might incite people
11 you can -- you can prevent such desecration.

12 MS. DREW: Your Honor, again, there are other
13 sections of this statute where other items are
14 protected, specifically public monuments, places of
15 burial and worship. I don't believe that anyone could
16 suggest that one may paint swastikas on the Alamo in San
17 Antonio. That is desecration of the Alamo.
18 Legislatures made it up --

19 QUESTION: But that -- but that's because it's
20 public property --

21 MS. DREW: True.

22 QUESTION: -- and unless you want to say that
23 the flag is somehow public property of us all and ignore
24 traditional distinctions of property, then your example
25 just doesn't work.

1 MS. DREW: Your Honor, I believe that it
2 does. I believe it does. The amici brief filed on
3 behalf of Mr. Johnson in this case by the American Civil
4 Liberties Union confesses that there is no First
5 Amendment interest in protecting desecrations of either
6 public monuments or places of worship or burial because
7 they are -- and this is a direct quote from Footnote 7,
8 page 18 of their brief -- "Someone else's cherished
9 property."

10 I think the flag is this nation's cherished
11 property, that every individual has a certain interest.
12 The government may maintain a residual interest, but so
13 do the people. And you protect the flag because it is
14 such an important symbol of national unity.

15 QUESTION: If we say so, it becomes so. But
16 it certainly isn't self-evident that -- I never thought
17 that the flag I owned is your flag. I mean --

18 (Laughter.)

19 MS. DREW: Many justices of this court have
20 held that the flag is a national property. Unless the
21 Court has additional questions, I would like to reserve
22 my remaining time for rebuttal.

23 QUESTION: Very well, Ms. Drew.

24 Mr. Kunstler.

1 ORAL ARGUMENT OF WILLIAM M. KUNSTLER

2 ON BEHALF OF THE RESPONDENT

3 MR. KUNSTLER: Mr. Chief Justice, may it
4 please the Court:

5 Some of the steam has been taken out of me by
6 some of the questions and some of the responses and the
7 concession by the state. But I would like to suggest
8 briefly to state that this particular act that we're
9 concerned with here, this 42.09(a)(3) of the Texas
10 statute singles out communicative impact for punishment.

11 Now, Ms. Drew has avoided that by now -- and
12 virtually the state now apparently concedes that you can
13 write out of a statute what Justice O'Connor referred
14 to, the question of whether the actor knows or means
15 that what he's doing will seriously offend one or more
16 persons likely to observe or destroy or discover his
17 particular act.

18 That's out of the statute, apparently,
19 according to the argument because in the reply brief and
20 today she has said essentially what is in the reply.
21 Like Gertrude Stein, "A rose is a rose," they now say "A
22 flag burning is a flag burning." And they read out of
23 the statute under which he was convicted and which went
24 to the jury and the charge on the question of seriously
25 offend, that's all out as far as Ms. Drew is concerned.

1 But it's not out as far as this court is
2 concerned. That's what the conviction was about, that's
3 what the argument to the Jury was about, that's what the
4 charge was about. They all mention that. That's what
5 the witnesses, Stover, Tucker, and Walker, testified to,
6 that they were seriously offended.

7 So, this depends on communicative impact for
8 punishment. They've conceded it's pure speech. They
9 raise no question arguendo, even, essentially that it is
10 not speech, and concede that.

11 QUESTION: Mr. Kunstler, I -- I -- I think
12 you're stretching her argument. I don't think she said
13 that. I -- I think she said that there has to be a
14 fence, but it doesn't have to be the intention to
15 communicate that offense. It doesn't have to be
16 intended offense.

17 MR. KUNSTLER: Well, that's --

18 QUESTION: If -- if you're doing it to honor
19 the flag in your -- in your crazy, mistaken fashion, but
20 it -- but it would obviously offend anyone else, then
21 you would violate the statute. So, I think she -- she
22 still insists that it be likely to offend somebody, but
23 you don't have to intend to communicate a dishonor or
24 offense to the flag.

25 MR. KUNSTLER: I can understand that

1 rationale, but in reading the reply brief, the reply
2 brief said in essence we virtually take that out of the
3 statute. We rewrite the statute now, and we say
4 essentially a flag burning is a flag burning, and that
5 offense goes out of it, offense whether communicated
6 later or not communicated later, whether it occurs or it
7 doesn't occur, I thought that's what the reply brief did.

8 Now, maybe I do misstate her argument
9 slightly, but I don't think I mistake the reply brief,
10 because I got the impression that's -- well, the words,
11 "A flag burning is a flag burning," is in the reply
12 brief.

13 Now, I remember, Justice Scalia, in reading
14 your dissent in Community for Creative Nonviolence that
15 you said essentially, "A law directed at the
16 communicative nature of conduct must like a law directed
17 at speech itself be justified by the substantial showing
18 of need that the First Amendment requires." I subscribe
19 to that wholeheartedly.

20 In fact, you went on and you reviewed all of
21 the cases that you thought were applicable there,
22 Stromberg, Brown, Tinker and Spence, and you made the
23 following statement: "Every prescription of expressive
24 conduct in those cases was aimed at the communicative
25 effect of the conduct."

1 And that's what they had here. That's what
2 the jury got, that's what the testimony was, and that's
3 what the statute says. And I agree with -- I think --

4 QUESTION: I was just on the Court of Appeals,
5 then, Mr. Kunstler.

6 MR. KUNSTLER: I understand.

7 (Laughter.)

8 QUESTION: I may have been wrong, you know. I
9 hope that the elevation doesn't change the thought.

10 (Laughter.)

11 MR. KUNSTLER: In any event, we subscribe to
12 that, of course, in our argument, and I think Justice
13 O'Connor when she wrote Boos she said essentially, this
14 justification, folks, is only on the content of the
15 speech and the direct impact that speech has on its
16 listeners.

17 And in Cohen I think Justice White in his
18 concurrence said that the -- that statute made the
19 communicative aspect of the proscribed conduct a crucial
20 element of the violation. That's the contemptuous
21 treatment statute, and that's what we have here.
22 Everything depends on the communication that is made by
23 the actor which may be communicated to the people on the
24 street, but you know in the statute, Justice Scalia, it
25 goes even further, "likely to observe or discovery,"

1 which could be in the newspapers the next day, for
2 example, as well as being an onlooker."

3 So, I think that given the concession that the
4 statute is pure speech, given the past decisions of this
5 Court on what should happen to a statute that makes
6 communicative impact, the criterion of the punishment
7 that this statute fails that test, it certainly doesn't
8 come under O'Brien because where -- here the
9 government's interest is directly related to
10 expression. It's like Footnote 8 in Spence, and I think
11 what you have here is a statute that depends solely and
12 exclusively on communicative impact on the audience,
13 whether they're there or they read it in the newspaper
14 or they see it on the screen in the evening. It all
15 goes to that.

16 And when you use the word desecrate, you don't
17 mean really in essence praising the flag. Desecrate has
18 a -- has a -- has a meaning, and I just looked at it in
19 Webster's Second International about it, and desecrate
20 means to divest of a sacred character or office, to
21 divert from a sacred purpose, to violate the sanctity
22 of, to profane, the opposite of consecrate.

23 Now, with reference to the compelling state
24 interest, I listened to the argument of flower to star
25 against B.J.F. before here, and I don't want to hurt Mr.

1 Randert's argument In this argument, knowing nothing
2 about the case except what I heard today, but I thought
3 that the protection of a rape victim was a compelling
4 state interest. I agreed with Justice O'Connor's
5 comments on that. That is a compelling interest,
6 certainly.

7 Here you have no compelling state interest
8 that is worth consideration.

9 QUESTION: Mr. -- maybe Mr. Randert would feel
10 different.

11 (Laughter.)

12 MR. KUNSTLER: That may be true. Is he in the
13 room yet? I hope not.

14 QUESTION: He's waving a flag in the back, I
15 think.

16 (Laughter.)

17 MR. KUNSTLER: Now, we're getting back to my
18 argument. With reference to the nationhood and national
19 unity, which Ms. Drew raised and which is filled in the
20 brief, both the reply brief and the main brief of the
21 state, I think -- I thought Barnette set that to rest.
22 I thought that when Justice Jackson said that if there
23 is any fixed star in our Constitutional constellation,
24 it is that no official high or petty can prescribe what
25 shall be orthodox in politics, nationalism --

1 QUESTION: Well, the facts of west -- West
2 Virginia versus Barnette were quite different from
3 this. There the students were required to salute the
4 flag.

5 MR. KUNSTLER: And here, Chief Justice, you're
6 asking -- people are required not to do something.

7 QUESTION: Yes.

8 MR. KUNSTLER: And I think that's a comparable
9 situation. We order you -- we can't order you to salute
10 the flag, we can't order you to do all these obeisances
11 with relation to the flag. Can we order you not to do
12 something to show something about the flag?

13 QUESTION: Well, to me they're quite
14 different. You could say that if you can't do one, you
15 can't do the other. But it seems to me one could quite
16 easily say you can't do one but you can do the other.

17 MR. KUNSTLER: Well, you know, I understand
18 that, but I think that you get into Street, I thought,
19 which also relied on Barnette. There he did exactly
20 what we're talking about here. He burnt the flag in the
21 street over the question of James Meredith being shot in
22 Mississippi in 1966.

23 QUESTION: And what was the holding of the
24 court in Street?

25 MR. KUNSTLER: Well, in Street essentially the

1 court indicated that you couldn't tell whether it was
2 speech or whether it was flag burning and, therefore,
3 the court reversed in the Street case. But in so
4 deciding in relying on Barrette, the court said,
5 essentially I thought, that it was an illegitimate
6 interest in Street to compel respect by prohibiting
7 criticism of the flag, including flag burning.

8 So, I think it's -- I guess we have a little
9 difference of opinion on the facts. I know the facts
10 are somewhat different except a flag was burned in the
11 street by Mr. Street in a political protest over a
12 shooting in Mississippi of a civil rights figure. But I
13 think the analogy is the same. Can you say you can't
14 force them to salute the flag or pledge allegiance to
15 the flag, but can you then say we can force them not to
16 show other means of disrespect for the flag, other means
17 of protest over the flag by saying you can't burn the
18 flag? I think they're the same, in all due deference.

19 QUESTION: Well --

20 MR. KUNSTLER: I don't know if I've convinced
21 you, but --

22 QUESTION: Well, you may have convinced
23 others.

24 (Laughter.)

25 QUESTION: But take -- take, for example, the

1 "Live Free or Die" case. Do you remember that --

2 MR. KUNSTLER: I certainly do.

3 QUESTION: -- from New Hampshire where we said
4 you can't -- New Hampshire can't require you to carry
5 around on your license plate the expression "Live free
6 or die." But certainly New Hampshire could have
7 presumably prohibited -- New Hampshire couldn't compel
8 you to make any affirmative statement on your license.
9 They certainly could have prevented you from making some
10 statements on your license plate.

11 MR. KUNSTLER: No, but I think in wooley, as I
12 recall it, they painted out. They did an affirmative
13 act and painted out the "Live free or die" motto. The
14 Jehovah's Witnesses didn't believe in that, so they
15 painted it out. They did enact and then the question
16 was was that act violating some criminal code.

17 QUESTION: And the court said no, you -- you
18 -- you can't pro -- you can't prohibit that sort of
19 thing, but the -- the reasoning of the Court was that
20 you can't require someone to make an affirmation. To me
21 that's West Virginia versus Barnette.

22 But, if someone applies for a New Hampshire
23 license plate that has a lot of foul language on it,
24 very likely that limited thing can be proscribed.

25 MR. KUNSTLER: I know. That -- I would agree

1 with you on that, but I think that to get away from
2 Wooley against Maynard would be a mistake here. That --
3 that's putting something on the license plate that is
4 profane or whatever. But in -- in Wooley, as I
5 understood it, the act that they, Jehovah's witnesses
6 did, was to paint out. They burnt the flag, in
7 essence. They painted out.

8 I don't think we're going to reach eye to eye
9 on this.

10 (Laughter.)

11 MR. KUNSTLER: I have that distinct feeling.

12 Getting back, then, to the no compelling state
13 interest, though, I don't think there is any compelling
14 state interest in the state of Texas -- and by the way,
15 the national flag does not just mean the American flag.
16 There is a presidential flag -- they don't put it in
17 capitals -- there's a presidential flag that is flown.
18 The Secretary of State has a flag that's a national
19 flag. There are many national flags. I counted 17
20 national flags. Each department here in Washington has
21 a flag. They're national flags, and the State of Texas
22 would also include those as national flags, certainly
23 the President's flag. So, I think that the word
24 "national" flag needs definition in itself.

25 QUESTION: Does the Supreme Court have a flag?

1 QUESTION: What was that?

2 QUESTION: Does the Supreme Court have a flag?

3 MR. KUNSTLER: I don't know, but the

4 Republican Party has one --

5 (Laughter.)

6 MR. KUNSTLER: -- because when they went by
7 the Mercantile Bank Building here -- I just learned this
8 from the record -- the -- one of their witnesses, Jimmy
9 Smith, who is the custodian of the flags at the
10 Mercantile Bank said, "We took down four American
11 flags. We have 16 normally, because we put up four
12 Republican Party flags because the Republican Party was
13 then meeting in its annual convention -- in its national
14 convention." So, I know the Republican Party. If the
15 Supreme Court doesn't have one or has one, I don't
16 know. I think you'd be in a better position than me to
17 tell that anyway.

18 By the way, talking about flags in front of
19 the Supreme Court, when I came by today, the flags were
20 up in the rain, and under 36 U.S. Code, the leading
21 provision there is flags shall not be displayed in
22 inclement weather.

23 QUESTION: Are we going to get back --

24 QUESTION: Exemption one applies to all
25 weather flags.

1 QUESTION: Are we going to get back to this
2 case?

3 MR. KUNSTLER: That's in all weather flags.

4 (Laughter.)

5 MR. KUNSTLER: That could be physical
6 mistreatment under the Texas statute. You get into
7 vagueness.

8 QUESTION: Mr. Kunstler, are you going to get
9 back to the case?

10 MR. KUNSTLER: Yes, I'm getting back to the
11 case.

12 (Laughter.)

13 MR. KUNSTLER: Seems to me we had this three
14 weeks ago.

15 In any event, I don't think that the -- there
16 is a compelling state interest in this flag or any
17 national flag whatsoever. I think the Court has really
18 held that --

19 QUESTION: Mr. Kunstler, let me ask you -- and
20 maybe this gets a little bit away from the case -- do
21 you think there is any public interest at all in any of
22 these regulatory measures about don't display the flag
23 in the rain or don't fly it upside down or so? Is there
24 any state interest at all to support that kind of
25 legislation?

1 MR. KUNSTLER: I don't know, but I don't think
2 it matters because they're not criminal statutes. They
3 are recommendations. It used to be you couldn't fly the
4 flag at night. Now, you can fly it if it's illuminated,
5 and so on.

6 QUESTION: Do --

7 MR. KUNSTLER: They're recommendations. There
8 are no criminal penalties.

9 QUESTION: Do you think the federal government
10 has any power at all to -- to regulate how this flag is
11 displayed in public places?

12 MR. KUNSTLER: I don't believe so. I don't --
13 I'm thinking in my mind whether they have any injunctive
14 power.

15 QUESTION: There's no state interest
16 whatsoever?

17 MR. KUNSTLER: I don't see any state interest
18 whatsoever.

19 QUESTION: I feel quite differently.

20 QUESTION: Can the federal government prohibit
21 use of the flag for commercial purposes? Advertising?

22 MR. KUNSTLER: I don't know. Since Halter
23 against Nebraska, where there was a Nebraska statute
24 against using the flag on beer bottles or beer cans, I
25 don't know whether there can be any prohibition of

1 that. It's used all over for commercial purposes. I
2 notice that Barbara Bush wore a flag scarf, for
3 example. There are flag bikinis, there are flag
4 everything. There are little cocktail flags that you
5 put into a hot dog or a meatball and then throw in the
6 garbage pail. They're flags under the Texas statute,
7 something made out of cloth, but I think they're are all
8 sorts of flags used commercially.

9 I'm not sure in my heart whether I think
10 there's any control over the use of the flag, not on the
11 criminal side anyway. Whether there is a -- in
12 answering Justice Stevens' question whether there is an
13 injunctive process that can be employed or not -- I -- I
14 -- I won't go into it. I don't know. But I have an
15 instinctive feeling that's different, apparently, than
16 Justice Stevens' that there is no control of the use of
17 the flag commercially, although I don't think it's
18 necessary for this case because here we're only talking
19 about a criminal statute.

20 Now, with reference to -- when I read Justice
21 White's concurrence in Goguen, I notice he said that
22 punishment for communicating ideas about the flag
23 unacceptable to controlling majority in the legislature
24 is something that is wrong, to punish people for having
25 a different idea about the flag, different than the

1 Texas legislature has with the flag in its desecration
2 statute.

3 And by the way, that's called the desecration
4 of venerated objects. That's the classification they
5 give to it.

6 And I agree with Justice Scalia that flag
7 burning of a single flag in front of the new City Hall
8 in Dallas doesn't lessen the value as a symbol.

9 QUESTION: Let me go back to the any state
10 interest at all. Do you think the military would have
11 any legitimate interest in disciplining a member of the
12 military who showed disrespect for the flag on public
13 occasions?

14 MR. KUNSTLER: You might have a case there.

15 QUESTION: You might have a case.

16 MR. KUNSTLER: If a person that joins the
17 army, the flag has even a more peculiar significance to
18 people in the army. I would have problems with it. I
19 would represent such a person --

20 (Laughter.)

21 MR. KUNSTLER: -- because I would think that
22 there's something First Amendment in there. But if he
23 destroyed a flag that was the property of the army, I
24 think he'd be court martialed for that. I don't think
25 there's a particular flag statute in the Uniform Code of

1 Military Justice.

2 If you destroy someone's flag, you can be
3 punished. There are many statutes. I think the Texas
4 Court of Criminal Appeals pointed there are some
5 statutes, this statute and that statute that would cover
6 the situation without getting into the First Amendment
7 area. And I'm sure it would violate the article of war
8 -- I used to call it the article of war -- which says
9 "conduct unbecoming a member of the military" if you
10 destroyed a flag -- refused -- even refused to salute a
11 flag under the military code.

12 Now, with reference to the breach of the
13 peace --

14 QUESTION: I was only suggesting that maybe
15 there is some -- some identifiable state interest that's
16 involved here.

17 MR. KUNSTLER: Yeah. I'm not saying -- I
18 don't want you to get the wrong --

19 QUESTION: I think you're acknowledging that
20 there is.

21 MR. KUNSTLER: -- impression that I say it's
22 totally out of reach. I'm not saying that. I'm trying
23 to confine it to this case.

24 QUESTION: You did say that.

25 MR. KUNSTLER: I know I did.

1 (Laughter.)

2 MR. KUNSTLER: I guess I have too much of a
3 First Amendment consciousness, I guess, in my makeup.

4 With reference to breach of the peace, I don't
5 think there's ever -- none of the flag cases that you
6 have before you -- ever had before you -- have involved
7 a breach of the peace. The only one I found where there
8 was any violence was what Judge Tuttle found in the
9 Monroe case, where they burned an American flag in front
10 of the federal building and someone burned an Iranian
11 flag. When the Iranian flag was burned, there was one
12 act of violence, but not when the American flag was
13 burned.

14 And Judge Tuttle pointed out that there was no
15 clear and present danger. He went right into the old
16 Holmesian doctrine of "clear and present danger" just as
17 there wasn't here. If there had been a breach --

18 QUESTION: What about -- what about Finer
19 against New York, remember, where that fellow was
20 speaking up at Syracuse and said President Truman is a
21 champagne sipping bum, whereupon they told him he had to
22 stop speaking because of fear from the crowd was going
23 to attack him?

24 MR. KUNSTLER: Well, I don't think that
25 changes the position yet because it's no different than

1 Terminello, really. You're saying hard things.

2 QUESTION: Well, it came after Terminello,
3 and it went -- It came out the other way.

4 MR. KUNSTLER: I know it, and apparently the
5 imminence there was so Immanent --

6 (Laughter.)

7 MR. KUNSTLER: -- thank you -- was so
8 immanent. But you don't have that here at all. In
9 Terminello, as you know, when I was reading
10 Terminello's remarks in the transcript, there was -- it
11 showed he ducked several times. Apparently someone
12 threw something during his rampage against the Jews, but
13 they held -- this Court held that that wasn't enough.
14 It wasn't really raised very much in the argument.

15 But if it gets to imminent danger where you
16 really have something going on, which you didn't have
17 here, and you haven't had in any of the flag burning
18 cases, there's no breach of the peace here and no
19 imminence of the breach of the peace here at all.

20 QUESTION: Well, then we come close to the
21 Skokie cases.

22 MR. KUNSTLER: Well, Skokie presents a
23 situation, of course, where the attempt to parade
24 through an all white community of black demonstrators --
25 but even there, of course, you can't stop it. You can't

1 stop it.

2 QUESTION: That's my point.

3 MR. KUNSTLER; If you're going to stop it, it
4 has to be so imminent as the Chief said -- It has to be
5 so imminent that it really reaches clear and present
6 danger proportions.

7 That's where Judge Tuttle said in Monroe, and
8 I think that is the rule here. We haven't argued clear
9 and present danger yet, but I think you must at least
10 show some clear and present danger, some imminence.

11 The -- the statute here is not limited to an
12 imminent breach, by the way. It doesn't say imminent
13 breach of the peace at all. It just says "likely" or
14 "might" or, "The actor could reasonably believe that
15 someone might be seriously offended by it."

16 The Texas Court of Appeals treated this, I
17 think, in its opinion. It said, "This statute is so
18 broad that it may be used to punish protected conduct
19 which has no propensity to result in breaches of the
20 peace."

21 Serious offense does not always result in a
22 breach of the peace. The protest in this case did not
23 lead to violence.

24 And, I might add, in this protest they had
25 policemen right along with them, undercover police

1 officers. The crowd was not a large crowd. They
2 estimate between 100, 110, and Texas went on to say, as
3 with most other protests of this nature, police were
4 present at the scene.

5 A witness was obviously seriously offended by
6 appellant's conduct because he gathered the burned flag
7 and buried it at his home. Nevertheless so seriously
8 offended, this man was not moved to violence. Serious
9 offense occurred, but there was no breach of the peace,
10 nor does the record reflect that the situation was
11 potentially explosive.

12 One cannot equate serious offense with
13 incitement to breach the peace.

14 And I think that any breach of the peace
15 argument here falls on its face. It is -- I think when
16 Chief Justice Burger said in O'Brien versus Skinner, "It
17 is not our function to construe -- to construe a state
18 statute contrary to the construction given it by the
19 highest court of the state."

20 They have construed this statute with
21 reference certainly to breach of the peace.

22 On vagueness and overbreadth, I think the
23 vagueness is -- is apparent. It's -- by definition it's
24 vague. What does "serious offense" mean? What is
25 "unserious offense" as against "serious offense"?

1 Some of the ACLU witnesses here testified here
2 they were offended. They thought it was repulsive, one
3 of them said, but they were not seriously offended.

4 And I don't know what seriously offended
5 means. The state says it's in the dictionary, and
6 therefore it must have a meaning. I agree with that.
7 Every word is in the dictionary, or at least in some
8 dictionaries. But just because they're in the
9 dictionary doesn't mean that you can define legally or
10 on the spot what serious offense is.

11 It wasn't a serious offense, for example, to
12 fly the flag outside the Supreme Court in violation of
13 36 USC. The artists' amicus brief, which I think is a
14 most unusual brief, contains many, many of the artists'
15 paintings where you might say that they created
16 paintings that would seriously offend by manipulating
17 the American flag or by cutting it up, destroying it,
18 using it in different ways, many of them to protest
19 situations. Some of them go to the war in Vietnam.
20 Some of them go to other aspects.

21 You don't even know what physical mistreatment
22 means in the statute. Does physical mistreatment mean
23 wearing it, twisting it, burning it? It's just an
24 undefinable statute.

25 As far as overbreadth is concerned and even

1 taking into consideration Justice White's substantial
2 overbreadth argument, this is substantially overbroad --

3 QUESTION: That's the Court's doctrine.

4 MR. KUNSTLER: Pardon me. But I read it and I
5 saw the words "substantial overbreadth" in it, and I
6 think this even meets that higher standard of whether
7 it's overbreadth. It sweeps protected conduct under its
8 aegis and is -- it's just an overbroad statute, so
9 overbroad that I don't think anyone can really doubt
10 it. And, in fact, there's been no real argument against
11 it, against the overbreadth argument essentially the
12 State of Texas.

13 Now, with reference to as applied, we would
14 rely on the Street case. You can't tell here whether he
15 was convicted with reference to this statute as to the
16 flag burning or as to the words or the acts he did
17 before the flag burning because the Texas prosecutor in
18 his summation said as follows: "If you look at this
19 evidence from start to finish" --and they showed a lot
20 of television shots of what was happening in Dallas --
21 "If you look at this evidence from start to finish, the
22 participating in the beginning, the literature, the last
23 notations, RCYB, the shirt, who he is, the chanting, the
24 yelling, the megaphone, the encouragement, the having
25 the megaphone, being there, wanting this to happen,

1 there is no question he encouraged it all. He's as
2 guilty as sin as far as the law of parties is concerned."

3 That's very much the summation -- not as
4 hyperbole in Street as was given in the Street case.
5 Was he really tried and convicted for the flag or for
6 the encouragement or for the literature, the megaphone,
7 the loudspeaker.

8 QUESTION: But he'd been charged with a number
9 of different offenses here?

10 MR. KUNSTLER: No. What happened, he was only
11 charged initially with disorderly conduct.

12 QUESTION: What did the case finally -- what
13 was he charged with when it was submitted to the jury?

14 MR. KUNSTLER: He was charged with -- I have
15 the charge here.

16 QUESTION: I don't mean the judge's charge,
17 but the indictment or information, what offenses?

18 MR. KUNSTLER: It's an information, a
19 misdemeanor. And he was charged eventually only with
20 the flag burning statute or the desecration statute.

21 But initially, Chief Justice, he was charged
22 -- they took in a hundred protestors a half hour after
23 all this happened, and he was charged initially with
24 disorderly conduct. All the rest were let go. And then
25 they dropped the disorderly conduct -- that's in the

1 record somewhere -- the keeper -- the sheriff came and
2 testified that they dropped disorderly conduct and
3 substituted in its place the flag desecration charge,
4 and that's what he was charged with. Disorderly conduct
5 was out of the picture.

6 Now, with reference to -- so, he may easily
7 here have been convicted for the words, the
8 encouragement as against -- by the law of the parties as
9 against the flag desecration itself.

10 I would just like to end my argument -- I
11 think this is a fundamental First Amendment case, that
12 the First Amendment to the written Constitution is in
13 jeopardy by statutes like this.

14 And I wanted to essentially close with two
15 remarks. One Justice Jackson said in Barnette. "Those
16 who begin coercive elimination of dissent soon find
17 themselves eliminating dissenters. Compulsory
18 unification of opinion achieves only the unanimity of
19 the graveyard. The First Amendment was designed to
20 avoid these ends by avoiding these beginnings.

21 And I think that's an important statement over
22 the years from Justice Jackson. And then he goes -- in
23 just a recent article in the New York Times called "In
24 Chicago a Holy War Over the Flag" by J. Anthony Lukas, a
25 very excellent former reporter for the New York Times,

1 he said, "Whatever pain freedom of expression may
2 inflict, it is a principle on which we can give no
3 ground."

4 And I understand that this flag has serious
5 important meanings. The Chief has mentioned many times
6 that it is not just pieces of material, blue and white
7 and red. That has real meaning to real people out
8 there. But that does not mean that it may have
9 different meanings to other people out there and that
10 they may not under the First Amendment show their
11 feelings by what Texas calls desecration of a venerated
12 object.

13 I think it's a most important case. I sense
14 that it goes to the heart of the First Amendment, to
15 hear things or to see things that we hate test the First
16 Amendment more than seeing or hearing things that we
17 like. It wasn't designed for things we like. They
18 never needed a First Amendment.

19 This statute or this amendment was designed so
20 that the things we hate, Terminiello's remarks, burnings
21 of flags, or what have you can have a place in the
22 marketplace of ideas and can have an area where protest
23 can find itself. I submit that this Court should on
24 whatever ground it feels right, should affirm the Texas
25 Court of Criminal Appeals with reference to this statute

1 and this conviction. Thank you very much.

2 QUESTION: Thank you, Mr. Kunstler.

3 Ms. Drew, you have four minutes remaining.

4 REBUTTAL ARGUMENT OF KATHI ALYCE DREW

5 ON BEHALF OF PETITIONER

6 MS. DREW: Thank you, Your Honor. One or two
7 points very, very briefly.

8 There is absolutely nothing in the information
9 that was filed or in the jury charge that was submitted
10 to the court which would have authorized a conviction
11 for any words that had been spoken by Mr. Johnson.

12 It is true that the trial prosecutor did make
13 about half a page in his 20 page summation to the jury,
14 a reference to the law of parties because an individual
15 for a criminal offense in Texas can be held liable as a
16 party if certain factors are shown. And I think that
17 was incumbent upon him, but there is absolutely nothing
18 that would have authorized a conviction for any words
19 that were spoken.

20 I also fail to see how, if I understand Mr.
21 Kunstler's concession, if one can protect government
22 flags why one cannot protect a flag which is not
23 necessarily the property of the government because the
24 danger of a breach of the peace is the same and the
25 denigration to the symbol is the same.

1 Unless the Court has questions, that will
2 conclude my remarks.

3 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Drew.

4 The case is submitted.

5 (Thereupon, at 2:56 p.m., the case in the
6 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:
No. 88-155 - TEXAS, Petitioner V. GREGORY LEE JOHNSON

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BY alan friedman

(REPORTER)

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