The Burger Court Opinion Writing Database

Smith v. Goguen

415 U.S. 566 (1974)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 21, 1974

Re: 72-1254 - Smith v. Goguen

Dear Harry:

Please join me in your dissent.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 21, 1974

Re: 72-1254 - Smith v. Goguen

Dear Harry:

Please join me in your dissent.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

P. S. (HAB only) It seems to me it would help clarify the final sentence of your dissent if you insert the word "Massachusetts" before the word "court's".

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 22, 1974

Re: 72-1254 - Smith v. Goguen

Dear Bill:

Please join me in your dissenting opinion.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 21, 1973

MEMO TO JUSTICES BRENNAN, STEWART, MARSHALL AND POWELL:

I have put in summary form my conclusions in 72-1254, Smith v. Goguen. As I recall the Conference discussion Bill Brennan affirmed on First Amendment grounds as did Thurgood.

Potter, I recall went both on vagueness and overbreadth.

Lewis, I believe, went only on vagueness.

Anyone can, of course, write his own personal views. My concern at this time is whether we can get a Court.

I have stated my preferences in my memo. But I could, I believe, go on vagueness as well as overbreadth.

Perhaps either Potter or Lewis should write this opinion. Perhaps the five of us should have a brief conference. Friday the 23rd at 3 p.m. would be o.k. with me.

William O. Douglas

Supreme Court of the United States
Washington, D. C. 20543

File Smith v. Goguen

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 21, 1973

Dear Chief Justice:

On going over your Assignment Sheet I notice I am to assign No. 72-5581 Steffel v. Thompson. I assign it herewith to Mr. Justice Brennan.

My memorandum No. 72-1254 Smith v. Goguen is at the printer and should be circulated this afternoon. I come out to affirm.

William O. Douglas

The Chief Justice

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

No. 72–1254

Circulated: 11-21

Recirculated: _____

Joseph Smith, Sheriff of Worcester County, Appellant, v. Valarie Goguen.	On Appeal from the United States Court of Appeals for the First Circuit.

[December —, 1973]

Memorandum from MR. JUSTICE DOUGLAS.

The brief record in this case shows no more than that the appellee wore a flag decal affixed to the seat of his pants, that he was approached by a police officer, and that bystanders were amused at the display or perhaps at the officer's concern. The appellee was not involved in a picket line or a demonstration. Nevertheless it is argued that affixing the flag to the seat of one's pants could be expression of an opposed view just as surely as when an obviously loyal American wears the flag on his suit lapel. Neither may voice any opinion concurrently. The argument is that the flag is a symbol which speaks for itself just as the black armbands did in *Tinker* v. *Des Moines School District*, 393 U. S. 503, though no words are spoken. The flag is always taken to stand for this country and its associated ideology and policies. Wearing a subtle and decorous flag lapel button on one's suit communicates an attitude of approval toward the symbol and things for which it stands. Affixing the flag to one's pants conveys quite a different message; and in this case it aroused the ire of the Leominster police officer and the amusement of the appellee's friends. May a State favor one over the other consistently with the First Amendment?

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 21, 1973

MEMO TO JUSTICES BRENNAN, STEWART, MARSHALL, AND POWELL:

As respects 72-1254, Smith v. Goguen

Lewis says he cannot attend a conference on Friday the 23rd ~~at 3 p.m. But he will~~ be available at 3 p.m. on Monday, November 26th.

WO
William O. Douglas

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

November 26, 1973

Dear Chief:

In 72-1254, Smith v. Goguen

the opinion has been assigned to Lewis.

WOD

William O. Douglas

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

January 8, 1974

Dear Lewis:

Please join me in your opinion in 72-1254, Smith v. Goguen.

WILLIAM O. DOUGLAS

by Sandra

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 10, 1974

RE: No. 72-1254 - Smith v. Goguen

Dear Lewis:

Please join me in your fine opinion in the above. And thank you for making the changes in the last paragraph. They make clear what I thought was implicit.

Sincerely,

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

November 21, 1973

Re: No. 72-1254, Smith v. Goguen

Dear Bill,

I shall be available for a Conference on Monday, November 26, at 3:00 p.m.

Sincerely yours,

P.S.

Mr. Justice Douglas

Copies to Justices Brennan, Marshall and Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

January 9, 1974

Re: No. 72-1254, Smith v. Goguen

Dear Lewis,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Powell
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 17, 1974

Re: No. 72-1254 - Smith v. Goguen

Dear Lewis:

I shall very likely be in dissent in this case.

Sincerely,

Byron

Mr. Justice Powell

Copies to Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: White, J.

Circulated: 2-27-

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 72-1254

Joseph Smith, Sheriff of Worcester County, Appellant, v. Valarie Goguen. | On Appeal from the United States Court of Appeals for the First Circuit.

[March —, 1974]

MR. JUSTICE WHITE, concurring in the judgment.

It is a crime in Massachusetts if one mutilates, tramples, defaces or "treats contemptuously" the flag of the United States. Respondent Goguen was convicted of treating the flag contemptuously, the evidence being that he wore a likeness of the flag on the seat of his pants. The Court holds this portion of the statute too vague to provide an ascertainable standard of guilt in any situation, including this one. Although I concur in the judgment of affirmance for other reasons, I cannot agree with this rationale.

It is self-evident that there is a whole range of conduct that anyone with at least semblance of common sense would know is contemptuous conduct and that would be covered by the statute if directed at the flag. In these instances, there would be ample notice to the actor and no room for undue discretion in enforcement officers. There may be a variety of other conduct that might or might not be claimed contemptuous by the State, but unpredictability in those situations does not change the certainty in others.

I am also confident that the statute was not vague with respect to the conduct for which Goguen was arrested and convicted. It should not be beyond the rea-

pp 1, 2, 5-6, 8

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: _____

Recirculated: 3-19-74

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1254

Joseph Smith, Sheriff of Worcester County, Appellant, v. Valarie Goguen. | On Appeal from the United States Court of Appeals for the First Circuit.

[March —, 1974]

MR. JUSTICE WHITE, concurring in the judgment.

It is a crime in Massachusetts if one mutilates, tramples, defaces or "treats contemptuously" the flag of the United States. Respondent Goguen was convicted of treating the flag contemptuously, the evidence being that he wore a likeness of the flag on the seat of his pants. The Court holds this portion of the statute too vague to provide an ascertainable standard of guilt in any situation, including this one. Although I concur in the judgment of affirmance for other reasons, I cannot agree with this rationale.[1]

[1] There has been recurring litigation, with diverse results, over the validity of flag use and flag desecration statutes. Representative of the federal and state cases are the following: *Thoms* v. *Heffernan*, 473 F. 2d 478 (CA2 1973); *Long Island Vietnam Moratorium Committee* v. *Cahn*, 437 F. 2d 344 (CA2 1970); *United States* v. *Crosson*, 462 F. 2d 96 (CA9 1972); *Joyce* v. *United States*, — U. S. App. D. C. —, 454 F. 2d 971 (1971), cert. denied, 405 U. S. 969 (1972); *Deeds* v. *Beto*, 353 F. Supp. 840 (ND Tex. 1973); *Oldroyd* v. *Kugler*, 327 F. Supp. 176 (N. J. 1970); *Sutherland* v. *DeWulf*, 323 F. Supp. 740 (SD Ill. 1971); *Parker* v. *Morgan*, 322 F. Supp. 585 (N. C. 1971); *Crosson* v. *Silver*, 319 F. Supp. 1084 (Ariz. 1970); *Hodsdon* v. *Buckson*, 310 F. Supp. 528 (Del. 1970); *United States* v. *Ferguson*, 302 F. Supp. 1111 (ND Cal. 1969); *State* v. *Royal*, — N. H. —, 305 A. 2d 676 (1973); *State* v. *Zimmelman*, 62 N. J. 279, 301 A. 2d 129 (1973); *State* v. *Spence*, 81 Wash. 2d

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 10, 1974

Re: No. 72-1254 -- Smith v. Goguen

Dear Lewis:

Please join me in your opinion in this case.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 17, 1974

Dear Lewis:

Re: No. 72-1254 - Smith v. Goguen

I, too, shall very likely be in dissent in this case. If there is no writing, I shall appreciate your noting the following at the end of your opinion:

"Mr. Justice Blackmun dissents."

Sincerely,

Harry

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Mr. Justice Blackmun, J.

No. 72-1254

Circulated: 3/20/74

Recirculated: _____

Joseph Smith, Sheriff of Worcester County, Appellant, *v.* Valarie Goguen.	On Appeal from the United States Court of Appeals for the First Circuit.

[March —, 1974]

MR. JUSTICE BLACKMUN, dissenting.

I agree with MR. JUSTICE WHITE in his conclusion that the Massachusetts flag statute is not unconstitutionally vague. I disagree with his conclusion, and with that of the Court, that the words "treats contemptuously" are necessarily directed at protected speech and that Goguen's conviction for his immature antic therefore cannot withstand constitutional challenge.

I agree with MR. JUSTICE REHNQUIST when he concludes that the First Amendment affords no shield to Goguen's conduct. I reach that result, however, not on the ground that the Supreme Judicial Court of Massachusetts "would read" the language of the Massachusetts statute to require that "treats contemptuously" entails physical contact with the flag and the protection of its physical integrity, but on the ground that that court, by its unanimous rescript opinion, has in fact already done exactly that. The court's opinion states that Goguen "was not prosecuted for being 'intellectually . . . diverse' or for 'speech,' as in *Street* v. *New York*, 394 U. S. 576, 593–594 . . . ." Having rejected the vagueness challenge and concluded that Goguen was not punished for speech, the Massachusetts court, in upholding the conviction, has necessarily limited the scope of the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

November 26, 1973

Gentlemen:

Here is the opinion of the Iowa Supreme Court in Iowa v. Kool, which I mentioned.

The Iowa Supreme Court reversed a conviction under facts quite similar to those involved in Spence v. Washington.

Sincerely,

Lewis

Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall

lfp/ss

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

2nd DRAFT

From: Powell, J.

Circulated: JAN 8 1974

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 72-1254

Joseph Smith, Sheriff of Worcester County, Appellant, *v.* Valarie Goguen. | On Appeal from the United States Court of Appeals for the First Circuit.

[January —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

The Sheriff of Worcester County, Massachusetts, appeals from a judgment of the United States Court of Appeals for the First Circuit holding the contempt provision of the Massachusetts flag misuse statute unconstitutionally vague and overbroad. *Goguen* v. *Smith*, 471 F. 2d 88, aff'g, 343 F. Supp. 161 (Mass. 1972), prob. juris. noted, 412 U. S. 905 (1973). We affirm on the vagueness ground. We do not reach the correctness of the holding below on overbreadth or other First Amendment grounds.

I

The slender record in this case reveals little more than that Goguen wore a small cloth version of the United States flag sewn to the seat of his trousers.[1] The

[1] The record consists solely of the amended bill of exceptions Goguen filed in the Massachusetts Supreme Judicial Court, the opposing briefs before that court, the complaint under which Goguen was prosecuted, and Goguen's federal habeas corpus petition. Appendix 1–36, 42–43. We do not have a trial transcript, although Goguen's amended bill of exceptions briefly summarizes some of the

p. 16

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

3rd DRAFT

From: Powell, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 72-1254

Recirculated JAN 11 1974

Joseph Smith, Sheriff of Worcester County, Appellant, v. Valarie Goguen.	On Appeal from the United States Court of Appeals for the First Circuit.

[January —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

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mp 7
Gr 5-6
16-17

To: The Chief Justice
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]

4th DRAFT

From: [illegible]
Circulated:
Recirculated:

MAR 5 1974

SUPREME COURT OF THE UNITED STATES

No. 72–1254

Joseph Smith, Sheriff of Worcester County, Appellant, *v.* Valarie Goguen.	On Appeal from the United States Court of Appeals for the First Circuit.

[January —, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

The Sheriff of Worcester County, Massachusetts, appeals from a judgment of the United States Court of Appeals for the First Circuit holding the contempt provision of the Massachusetts flag misuse statute unconstitutionally vague and overbroad. *Goguen* v. *Smith*, 471 F. 2d 88, aff'g, 343 F. Supp. 161 (Mass. 1972), prob. juris. noted, 412 U. S. 905 (1973). We affirm on the vagueness ground. We do not reach the correctness of the holding below on overbreadth or other First Amendment grounds.

I

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[1] The record consists solely of the amended bill of exceptions Goguen filed in the Massachusetts Supreme Judicial Court, the opposing briefs before that court, the complaint under which Goguen was prosecuted, and Goguen's federal habeas corpus petition. Appendix 1–36, 42–43. We do not have a trial transcript, although Goguen's amended bill of exceptions briefly summarizes some of the

March 15, 1974

No. 72-1254 Smith v. Goguen

Dear Bill:

I have just read your dissenting opinion and, while I come out differently in this case, I write to say that I greatly admire the eloquence of your last few pages and, in terms of my personal feelings, agree totally with your sentiments about the flag.

Sincerely,

Mr. Justice Rehnquist

lfp/ss

April 8, 1974

LFP

HOLDS FOR SMITH v. GOGUEN, No. 72-1254

MEMORANDUM TO THE CONFERENCE:

Two cases have been held for No. 72-1254, Smith v. Goguen. They are No. 72-1359, Heffernan v. Thoms, and No. 72-1439, Van Slyke v. Texas. Both are scheduled for review at the April 12, 1974 Conference. Heffernan was also held for Steffel v. Thompson, No. 72-5581, and is discussed at pp. 3-4 of Bill Brennan's memo to the Conference on the Steffel holds. I will vote to continue to hold both cases.

No. 72-1359 Heffernan v. Thoms (Cert to CA 2)

In this case, respondent owned a vest fashioned from a U. S. flag which he desired to wear as an act of symbolic protest. He brought a § 1983 action seeking declaratory and injunctive relief against the Connecticut flag defilement statute, which forbids placing extraneous materials on the flag and subjects to criminal liability anyone who "publicly misuses, mutilates, tramples upon or otherwise defaces, defiles or puts indignity upon" a U. S. flag. The District Court declared the statute unconstitutional but did not issue an injunction. The Court of Appeals affirmed.

The case differs from Smith v. Goguen in two ways. One, there was no criminal prosecution. Respondent has not been subjected to criminal liability, as was Goguen. In that posture, the

lack of clarity in the state statute goes more directly to the possibility of "chilling" expression -- i.e., to First Amendment overbreadth -- than to selective enforcement and criminal penalties without warning -- i.e., Due Process vagueness. Two, the parties and the lower federal courts barely touched on the vagueness doctrine. They addressed themselves almost exclusively to First Amendment overbreadth. In Smith, by comparison, both lower federal courts and both parties fully ventilated the vagueness issue.

The District Court in Heffernan held the statute invalid under the First Amendment without mentioning the vagueness doctrine. The Court of Appeals declared that the statute "is overly vague," but did not develop the point and appears to have relied primarily on First Amendment overbreadth. The petition (by the State) does not address vagueness at all; the State seems to read the lower federal court opinions as turning exclusively on overbreadth. The response closes with a parting shot on vagueness but is devoted almost entirely to the Steffel issue and to the First Amendment. To the degree that respondent touches on vagueness, he does not distinguish it from his principal argument that the statute is overbroad under the First Amendment.

In short, in light of the way the parties and the lower federal courts have treated it, Heffernan is not controlled by Goguen. In my view, it should be held for Spence v. Washington, No. 72-1690, where the issue is overbreadth.

No. 72-1439 Van Slyke v. Texas (App. from Tex Ct. Crim. A

Van Slyke burned a U.S. flag, after he had blown his nose on it and feigned an act of masturbation by rubbing the flag against himself. He was prosecuted under a Texas statute that subjects to criminal liability anyone who shall "publicly or privately mutilate, deface, defile, defy, tramp upon, or cast contempt upon" a U.S. flag. He was charged, and the jury was instructed, essentially in the

language of the statute. He moved to quash the indictment on vagueness grounds. He appears to have preserved the point at the Texas Ct. of Crim. App., and he sets it out in his jurisdictional statement. The motion to affirm also addresses the issue.

The case is like Smith v. Goguen in that the vagueness issue has been dealth with by all concerned and in that the Texas statute is stated in the disjunctive and, presumably, permits prosecution solely for casting contempt on the flag. But there the similarity ends. Van Slyke was charged under the full language of the statute, which encompasses acts of physical desecration, in which he obviously engaged. Furthermore, unlike the Massachusetts statute, the Texas statute has been significantly narrowed by the state courts. For example, in Deeds v. States, 474 S.W. 2d 718 (1972), * the highest state court rejected a vagueness challenge to the statute at issue in Van Slyke and held it applicable to flag burning, one of the acts for which Van Slyke was prosecuted. In Delorme v. State, 488 S.W. 2d 808 (1973), ** the highest state court narrowed the statute by eliminating its application to private acts and to spoken expression. In addition, the court noted that the statute as construed has been reduced to language "similar to that of the Federal Flag Desecration Statute . . . ." 488 S.W. 2d at 811-812. Smith v. Goguen leaves open to the states, insofar as the vagueness doctrine is concerned, the possibility of narrowing broad statutes by judicial construction, and it points to the federal statute as an example of a statute drafted to avoid vagueness problems.

It appears, in other words, that most of the vagueness problems posed in Smith are not present here. Texas courts have

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* This opinion came down a year prior to the Texas Ct. of Crim. App's opinion in Van Slyke's case, although it was subsequent to his prosecution.

** Prior to the affirmance of Van Slyke's conviction, but subsequent to his prosecution.

attempted to narrow the sweeping Texas statute, and Van Slyke's behavior clearly violated the statute as narrowed. Thus, if Van Slyke raised only vagueness issues, I would vote to dismiss. However, since he raises First Amendment arguments as well, I think the case should be held for Spence.

L. F. P., Jr.

LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 28, 1974

Re: No. 72-1254 - Smith v. Goguen

Dear Lewis:

Although I agree with Byron's concurring opinion on the vagueness point, I do not agree with it on the constitutional protection accorded to one who sews a flag to the seat of his pants, and therefore will undertake to write separately in dissent on that issue. I will try to get it done in short order.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell

1st DRAFT

From: Rehnquist, J.

Circulated: 3/15/74

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 72-1254

Joseph Smith, Sheriff of Worcester County, Appellant, *v.* Valarie Goguen. | On Appeal from the United States Court of Appeals for the First Circuit.

[March —, 1974]

MR. JUSTICE REHNQUIST, dissenting.

I agree with the concurring opinion of my Brother WHITE insofar as he concludes that the Massachusetts law is not unconstitutionally vague, but I do not agree with him that the law under which respondent Goguen was convicted violates the First and Fourteenth Amendments. The issue of the application of the First Amendment to expressive conduct, or "symbolic speech," is undoubtedly a difficult one, and in cases dealing with the United States flag it has unfortunately been expounded only in dissenting opinions. See *Street* v. *New York*, 394 U. S. 576, Warren, C. J., dissenting, *id.*, at 594; Black, J., dissenting, *id.*, at 609, WHITE, J., dissenting, *id.*, at 610; Fortas, J., dissenting, *id.*, at 615; and *Cowgill* v. *California*, 396 U. S. 371 (1970), Harlan, J., concurring, *ibid.* Nonetheless, since I disagree with the Court's conclusion that the statute is unconstitutionally vague, I must, unlike the Court, address petitioner's First Amendment contentions

The question whether the State may regulate the display of the flag in the circumstances shown by this record appears to be an open one under our decisions *Halter* v. *Nebraska*, 205 U. S. 34 (1907); *Street* v. *New York*, 394 U. S. 576 (1969); *Cowgill* v. *California*, 396 U. S. 371 (1970), Harlan, J. concurring; *People* v. *Radich*, 26