The Burger Court Opinion Writing Database

Spence v. Washington

418 U.S. 405 (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

May 29, 1974

Re: No. 72-1690 - Spence v. Washington

MEMORANDUM TO THE CONFERENCE:

The attached proposed Per Curiam opinion does not fully satisfy me. We might perhaps better reverse in one line, citing Smith v. Goguen, even though that is a vagueness holding. However, if five or six will "salute" this draft, I'll let it go. This is one of the minor "thickets" we have been drawn into.

Regards,

WEB

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

From: The Chief Justice

Circulated: MAY 29 1974

Recirculated: _____

No. 72-1690 - Spence v. Washington

PER CURIAM. On May 10, 1970, appellant displayed a flag of the United States upside down outside a window of his apartment in Seattle, Washington. On the flag was superimposed, in black masking tape, a "peace symbol," which consisted of a circle in which was placed a three-pronged design resembling a trident. Three Seattle police officers observed the display, arrested appellant and seized the flag. Appellant was tried and convicted, first in King County Justice Court, sitting without a jury, and then on trial de novo in King County Superior Court, sitting with a jury, of the crime of improper use of the flag under Wash. Rev. Code 9.86.020. Appellant was sentenced to 10 days' confinement, suspended, a fine of $75, and costs. The Washington Court of Appeals reversed, with one judge dissenting, holding Wash. Rev. Code 9.86.020 unconstitutional. 5 Wash. App. 752, 490 P. 2d 1321 (1971). The Washington Supreme Court, with one judge dissenting, reversed the Court of Appeals, holding the statute to be neither vague nor overbroad,

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

CHAMBERS OF
THE CHIEF JUSTICE

June 3, 1974

Re: 72-1690 - Spence v. Washington

MEMORANDUM TO THE CONFERENCE:

I am working on a new draft of the above per curiam and will have it around soon.

Regards,

WEB

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

CHAMBERS OF
THE CHIEF JUSTICE

June 4, 1974

Re: 72-1690 - Spence v. Washington

Dear Bill:

I am now satisfied that I cannot write a reversal in this case either on overbreadth or as applied to Spence. I will likely dissent.

Lewis Powell has expressed views which he could perhaps render into a per curiam but I leave the assignment to you.

Regards,

WEB

Mr. Justice Douglas

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

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1974

Re: No. 72-1690 - Spence v. Washington

Dear Harry:

I think I will say the following in Spence:

"MR. CHIEF JUSTICE BURGER, dissenting:

"If the constitutional role of this Court was to strike down unwise laws or restrict unwise application of some laws, I could agree with the result reached by the Court. That is not our function, however, and it should be left to each state and ultimately the common sense of its people to decide how the flag, as a symbol of national unity, should be protected."

I'd join Bill's dissent if he'd drop the "flummery" which is too harsh and not called for.

Regards,

WEB

Mr. Justice Blackmun

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

From: The Chief Justice

Circulated: JUN 20 1974

Recirculated: _____

No. 72-1690 - Harold Omand Spence v. Washington

MR. CHIEF JUSTICE BURGER, dissenting:

If the constitutional role of this Court was to strike down unwise laws or restrict unwise application of some laws, I could agree with the result reached by the Court. That is not our function, however, and it should be left to each state and ultimately the common sense of its people to decide how the flag, as a symbol of national unity, should be protected.

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

CHAMBERS OF
THE CHIEF JUSTICE

June 21, 1974

Re: No. 72-1690 - Spence v. Washington

Dear Bill:

Even though I have dissented separately, I will also join your opinion.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

LC
ai
1-17-74

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 72-1690

Harold Omand Spence, Appellant, v. State of Washington. | On Appeal from the Supreme Court of Washington.

[January —, 1974]

MR. JUSTICE DOUGLAS, concurring.

I would affirm the judgment for substantially the same reasons given by the Iowa Supreme Court in *State* v. *Kool,* 212 N. W. 2d 518 (Iowa). In that case the defendant hung a peace symbol made of cardboard and wrapped in tin foil in the window of his home and hung a replica of the United States flag behind the peace symbol but in an upsidedown position. The state statute made it a crime to "cast contempt upon, satirize, deride or burlesque the flag." IA. Code § 32.1.

The Court held that defendant's conduct constituted "symbolic speech." The Court in reversing the conviction said:

> "Someone in Newton might be so intemperate as to disrupt the peace because of this display. But if absolute assurance of tranquility is required, we may as well forget about free speech. Under such a requirement, the only 'free' speech would consist of platitudes. That kind of speech does not need constitutional protection."

That view is precisely my own. Hence I concur in reversing this judgment of conviction.

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 29, 1974

Dear Chief:

Please join me in your per curiam in 72-1690, Spence v. Washington.

WOD

William O. Douglas

The Chief Justice

cc: The Conference

P.S. Would you add at the end of the per curiam:

While Mr. Justice Douglas joins this opinion, he also concurs in the views stated by Judge Horowitz in the Court of Appeals, 490 P. 2d, 1321, 1322-1329.

WOD

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

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 4, 1974

Dear Chief:

Re: Spence v. Washington , No. 72-1690.

I have your memo of this date and after talking with Lewis Powell I have assigned the case to him.

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

June 13, 1974

Dear Lewis:

Please join me in your opinion for the Court in No. 72-1690, Spence v. Washington.

WO

William O. Douglas

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 12, 1974

RE: No. 72-1690 Spence v. Washington

Dear Lewis:

I agree and suggest you make it a signed opinion.

Sincerely,

Mr. Justice Powell

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

June 12, 1974

72-1690, Spence v. Washington

Dear Lewis,

I am glad to join your opinion for the Court in this case, and see no reason why it should not be a signed opinion.

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

May 29, 1974

Re: No. 72-1690 - Spence v. Washington

Dear Chief:

I cannot agree with your per curiam in this case, and either Bill Rehnquist or I will circulate a dissent in due course.

Sincerely,

The Chief Justice

Copies to Conference

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 20, 1974

Re: No. 72-1690 - Spence v. Washington

Dear Bill:

Please join me in your dissent in this case.

Sincerely,

Byron

Mr. Justice Rehnquist

Copies to Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 13, 1974

Re: No. 72-1690 -- Harold Omand Spence v. State of Washington

Dear Lewis:

Please join me and also make it a signed opinion.

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

May 31, 1974

Dear Chief:

Re: No. 72-1690 - Spence v. Washington

I shall withhold my vote until I have seen the dissent and any other circulations in this case.

Sincerely,

Harry

The Chief Justice

Copies to the Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 19, 1974

Dear Lewis:

Re: No. 72-1690 - Spence v. Washington

Will you please add the following at the end of your opinion:

"Mr. Justice Blackmun concurs in the result."

Sincerely,

Harry

Mr. Justice Powell

Copies to the Conference

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,

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

From: Powell, J.

Circulated
Recirculated

NO. 72-1690

HAROLD OMAND SPENCE

v.

THE STATE OF WASHINGTON

On Appeal From The Supreme Court of The State of Washington

PER CURIAM.

Appellant displayed a United States flag, which he owned, out the window of his apartment. Affixed to both surfaces of the flag was a large peace symbol fashioned of removable tape. Appellant was convicted under a Washington statute forbidding the exhibition of a United States flag to which is attached or superimposed figures, symbols, or other extraneous material. The Supreme Court of Washington affirmed appellant's conviction. State v. Spence, 81 Wash. 2d 788, 506 P. 2d 293 (1973). It rejected appellant's contentions that the statute under which he was charged on its face and as applied contravened the First Amendment, as incorporated by the Fourteenth Amendment, and was void for vagueness. We noted probable jurisdiction. 414 U.S. 815 (1973). We reverse on the ground that as applied

Replaces Typed Draft

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

1st DRAFT

From: Powell, J.

Circulated:

Recirculated JUN 13 1974

SUPREME COURT OF THE UNITED STATES

No. 72-1690

Harold Omand Spence, Appellant, *v.* State of Washington. } On Appeal from the Supreme Court of Washington.

[June —, 1974]

PER CURIAM.

Appellant displayed a United States flag, which he owned, out the window of his apartment. Affixed to both surfaces of the flag was a large peace symbol fashioned of removable tape. Appellant was convicted under a Washington statute forbidding the exhibition of a United States flag to which is attached or superimposed figures, symbols, or other extraneous material. The Supreme Court of Washington affirmed appellant's conviction. *State* v. *Spence,* 81 Wash. 2d 788, 506 P. 2d 293 (1973). It rejected appellant's contentions that the statute under which he was charged on its face and as applied contravened the First Amendment, as incorporated by the Fourteenth Amendment, and was void for vagueness. We noted probable jurisdiction. 414 U. S. 815 (1973). We reverse on the ground that as applied to appellant's activity the Washington statute impermissibly infringed protected expression.

I

On May 10, 1970, appellant, a college student, hung his United States flag from the window of his apartment on private property in Seattle, Washington. The flag

6, 8, 10, 11

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

SUPREME COURT OF THE UNITED STATES

No. 72-1690

Circulated: _____

Recirculated: 5/13/74

Harold Omand Spence, Appellant, v. State of Washington. | On Appeal from the Supreme Court of Washington.

[June —, 1974]

PER CURIAM.

Appellant displayed a United States flag, which he owned, out the window of his apartment. Affixed to both surfaces of the flag was a large peace symbol fashioned of removable tape. Appellant was convicted under a Washington statute forbidding the exhibition of a United States flag to which is attached or superimposed figures, symbols, or other extraneous material. The Supreme Court of Washington affirmed appellant's conviction. *State* v. *Spence*, 81 Wash. 2d 788, 506 P. 2d 293 (1973). It rejected appellant's contentions that the statute under which he was charged on its face and as applied contravened the First Amendment, as incorporated by the Fourteenth Amendment, and was void for vagueness. We noted probable jurisdiction. 414 U. S. 815 (1973). We reverse on the ground that as applied to appellant's activity the Washington statute impermissibly infringed protected expression.

I

On May 10, 1970, appellant, a college student, hung his United States flag from the window of his apartment on private property in Seattle, Washington. The flag

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 20, 1974

MEMORANDUM TO THE CONFERENCE:

Cases held for Spence v. Washington, No. 72-1690

No. 70-102 Cahn v. Long Island Vietnam Moratorium Committee; Aspland v. Gwathmey

No. 73-574 Farrell v. Iowa

No. 73-380 Sutherland v. Illinois

No. 72-1359 Heffernan v. Thoms

No. 72-1439 Van Slyke v. Texas

There are four appeals and one cert held for the Washington flag misuse case, Spence v. Washington, No. 72-1690. My recommended dispositions are as follows.

No. 70-102 Cahn v. Long Island, etc. (App. from CA2)

This appeal has been on our docket for over three years, having been held for a succession of cases. Immediately prior to Spence, it was held for Steffel v. Thompson, as indicated by Bill Brennan's memo of April 5, 1974. Although summary treatment appears appropriate solely on the merits, I believe the wisdom of that course is confirmed by the vintage of the case.

Two CA2 judgments are covered by the JS in this appeal. The first is the Cahn case. See Long Island Vietnam Moratorium

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 13, 1974

Re: No. 72-1690 - Spence v. Washington

Dear Lewis:

In short order, I will be circulating a dissent in this case.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference

WHR:DRAFT:6/18/74

No. 72-1690

Harold Omand Spence, Appellant

v.

Washington

On Appeal from the Supreme Court of Washington.

MR. JUSTICE REHNQUIST, dissenting.

The Court holds that a Washington statute prohibiting persons from attaching material to the American flag was unconstitutionally applied to petitioner. Although I agree with the Court that petitioner's activity was a form of communication, I do not agree that the First Amendment prohibits the State from restricting this activity in furtherance of other important interests. And I believe the rationale by which the Court reaches its conclusion is both surprising and unsound.

The right of free speech is not absolute at all times and under all circumstances." Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). This Court has long recognized, for example, that some forms of expression are not entitled

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

Memorandum to the Conference:

Re: Spence v. Washington, No. 72-1690

The second draft of the dissent in this case circulated yesterday without marked corrections. This marked draft should be substituted for that circulation.

HHF
H. Bartow Farr

Recirculated 6/19/74

2nd WHR:DRAFT:6/19/74

No. 72-1690

Harold Omand Spence, Appellant

v.

Washington

On Appeal from the Supreme Court of Washington.

MR. JUSTICE REHNQUIST, dissenting.

The Court holds that a Washington statute prohibiting persons from attaching material to the American flag was unconstitutionally applied to petitioner. Although I agree with the Court that petitioner's activity was a form of communication, I do not agree that the First Amendment prohibits the State from restricting this activity in furtherance of other important interests. And I believe the rationale by which the Court reaches its conclusion is unsound.

"The right of free speech is not absolute at all times and under all circumstances." Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). This Court has long recognized, for example, that some forms of expression are not entitled

Uncorrected
Replaces typed 2d draft

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

SUPREME COURT OF THE UNITED STATES

From: Rehnquist, J.

No. 72-1690

Circulated:

Recirculated: 6/21/74

Harold Omand Spence, Appellant, v. State of Washington. | On Appeal from the Supreme Court of Washington.

[June —, 1974]

MR. JUSTICE REHNQUIST, dissenting.

The Court holds that a Washington statute prohibiting persons from attaching material to the American flag was unconstitutionally applied to petitioner. Although I agree with the Court that petitioner's activity was a form of communication, I do not agree that the First Amendment prohibits the State from restricting this activity in furtherance of other important interests. And I believe the rationale by which the Court reaches its conclusion is unsound.

"The right of free speech is not absolute at all times and under all circumstances." *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572 (1942). This Court has long recognized, for example, that some forms of expression are not entitled to any protection at all under the First Amendment, despite the fact that they could reasonably be thought protected under its literal language. See *Roth* v. *United States,* 354 U. S. 476 (1957). The Court has further recognized that even protected speech may be subject to reasonable limitation when important countervailing interests are involved. Citizens are not completely free to commit perjury, to libel other citizens, to infringe copyrights, to incite riots, or to interfere unduly with passage through a public thoroughfare. The right of free speech, though precious,