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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: UNITED STATES, Appellant

v. SHAWN D. EICHMAN, DAVID GERALD

BLALOCK AND SCOTT W. TYLER; AND

UNITED STATES, Appellant v. MARK

JOHN HAGGERTY, CARLOS GARZA, JENNIFER

PROCTOR CAMPBELL AND DARIUS ALLEN STRONG

CASE NO: 89-1433; 89-1434

PLACE: Washington, D.C.

DATE: May 14, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 UNITED STATES, :
4 Appellant :
5 v. :
6 SHAWN D. EICHMAN, DAVID GERALD :
7 BLALOCK AND SCOTT W. TYLER; : Consolidated
8 and : Nos. 89-1433
9 UNITED STATES, : and 89-1434
10 Appellant :
11 v. :
12 MARK JOHN HAGGERTY, CARLOS GARZA, :
13 JENNIFER PROCTOR CAMPBELL AND :
14 DARIUS ALLEN STRONG :

15 -----x
16 Washington, D.C.
17 Monday May 14, 1990

18 The above-entitled matter came on for oral
19 argument before the Supreme Court of the United States at
20 10:29 a.m.

21 APPEARANCES:
22 KENNETH W. STARR, ESQ., Solicitor General, Department of
23 Justice, Washington, D.C., on behalf of the
24 Appellant.
25 WILLIAM M. KUNSTLER, ESQ., New York, New York, on behalf

1 of the Appellee.
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1 reasons that argue powerfully in support of the
2 constitutionality of this statute.

3 First, Congress acted carefully and with great
4 respect for this Court's decisions concerning flag
5 protection statutes. It took seriously the Court's
6 expressed statement in Texas against Johnson that the
7 inquiry there was bounded not only by the facts of the
8 case, but by the state's statute there in question.

9 In relying on this Court's various writings and
10 decisions, Congress amended the Federal statute in
11 response to Texas against Johnson to eliminate the prior,
12 clearly content-laden language of Section 700, the
13 language, "cast contempt upon" and "publicly."

14 Second, Congress acted very narrowly. It
15 focused, as this Court said in *Smith v. Goguen*, that it
16 could lawfully do, on certain specific areas of conduct
17 where legislative latitude is greater. And Congress
18 carved out a narrowly crafted set of protections as to
19 certain conduct, while permitting robust and uninhibited
20 speech to continue unabated.

21 There was no prohibition on Congress' part
22 against the publication or the dissemination of ideas.

23 Third and relatedly, as I will seek to show in
24 the context of the facts of these two cases, flag burning
25 leaves a major message gap, a gap that needs to be filled

1 in with words, either written or spoken, as happened in
2 both the District of Columbia and Seattle demonstrations.
3 It is, in our judgment, the equivalent of shouting or
4 screaming or using a loudspeaker at full blast to arrest
5 the audience's attention. This is not in our judgment an
6 especially weighty value on the First Amendment scales.

7 Fourth, on the other side of those scales are
8 interests of the highest order in the national community.
9 Those interests are intangible, to be sure, just as the
10 concept of human dignity is intangible. But those
11 interests are no less real, rooted as they are in the
12 Nation's history and experience, and especially our
13 history as a community of people in this century in which
14 so many of our co-members of the national community have
15 been asked to sacrifice so much.

16 To focus now on the facts and the nature of flag
17 burning. In evaluating the expressive content, the
18 content of this conduct, it is useful to examine precisely
19 what happened here and what it is that flag burning
20 conveys. This can be seen by way of example in the
21 statement of Shawn Eichman, one of the District of
22 Columbia appellees. Ms. Eichman's concerns that animated
23 her conduct were quite varied in nature. They ranged from
24 civil rights concerns to concerns about the environment,
25 and concerns about certain aspects of U.S. foreign policy.

1 The same is true with respect to the Seattle
2 demonstration, a videotape of which is in the record. The
3 concerns that were animating the Seattle appellees ranged
4 from a then ongoing labor strike at Boeing Aircraft
5 facilities in the area to the treatment afforded Hispanic
6 Americans and national policies concerning the homeless.

7 Now a passerby happening on these acts of flag
8 burning would, in our judgment, likely and reasonably
9 conclude that the actor is in a state of profound
10 disagreement. But it does not tell us with what. That
11 message, the what, comes, if at all, from the speech that
12 is incident or tied to the conduct as occurred in Street
13 against New York. And that speech, of course, is fully
14 protected, no matter how offensive that speech may be to
15 the majority.

16 QUESTION: General Starr, I don't understand
17 this line of argument. Is -- is it that you're saying
18 that somehow the expression "I hate the United States" is
19 entitled to less constitutional protection than "I
20 disagree with our policy in Eastern Europe"? Is that the
21 point that -- that if it's a political expression, it's
22 too generic, too generalized, it's not entitled to the
23 same degree of protection?

24 MR. STARR: The message itself enjoys the same
25 protection. The question is what message is being

1 conveyed. If one reads the statement --

2 QUESTION: Well, what you convey by burning the
3 flag is, "I hate the United States."

4 MR. STARR: With all due respect, that is not
5 what is set forth in any of the statements in this record.
6 What was animating the conduct in this case is as set
7 forth in the statements in the record. They are in the
8 joint appendix. And with respect to Carlos Garza, his
9 concern, as he stated in his statement, was with the
10 treatment afforded Hispanic Americans. Not a word about
11 hating the United States.

12 QUESTION: By reason of which he felt so
13 strongly about it that it moved him to -- to have feelings
14 of animosity towards the country. What else does burning
15 -- surely burning the flag conveys something. What do you
16 think it conveys if it does not convey the notion that,
17 for whatever particular reason it may be, "I am in
18 opposition to this country"?

19 MR. STARR: I think that assumes too much, with
20 all respect. When Mr. Street burned the flag at issue in
21 Street against New York, his stated concerns were with the
22 failure to provide protection to James Meredith, who was
23 not --

24 QUESTION: General Starr, I wonder if, given
25 Justice Scalia's interpretation of the obvious meaning of

1 this conduct, maybe you should try to ban it on the
2 grounds that it's misleading speech?

3 (Laughter.)

4 MR. STARR: It may in say -- in fact say too
5 much, and more than the actor intended to convey, if in
6 fact Justice Scalia is correct.

7 QUESTION: Are you saying that this is an
8 invalid form of protest?

9 MR. STARR: In our judgment, it is conduct, and
10 conduct gives much greater latitude to Congress as long as
11 Congress does not do as the State of Texas did in Texas
12 against Johnson, and that is, pass a statute that was not
13 viewpoint neutral. The way Texas v. Johnson was presented
14 to this case -- to this Court was that a conviction in
15 that case depended upon the communicative impact. That is
16 not so here.

17 An individual runs afoul of this statute
18 regardless of what message, if any, that individual is
19 seeking to convey. It is the conduct, the six enumerated,
20 proscribed acts that are forbidden, regardless of the
21 message.

22 QUESTION: Well, suppose -- suppose we uphold
23 the statute and sustain your position, and on sentencing,
24 a district judge said, because you have outraged the
25 community, because your protest was so public, because you

1 have offended so many, I'm going to give you a harsh
2 sentence. Is that a proper exercise of the sentencing
3 function?

4 MR. STARR: I think that's one of the reasons
5 Congress saw fit to pass the reform statute that has given
6 us sentencing guidelines. That is precisely the sort of
7 concern --

8 QUESTION: I don't know if it's in the
9 guidelines or not, but suppose that, permissibly within
10 the guidelines, the district court said that. Would that
11 be constitutionally permitted?

12 MR. STARR: As long as it were within the
13 statutory maximum, I believe it would be constitutionally
14 permitted, yes. As long as it's within the maximum.

15 QUESTION: But isn't that precisely what we said
16 could not be done in -- in the Gregory case?

17 MR. STARR: Well, what -- it seems to me that is
18 going on here is that Congress has focused on a specific
19 act of conduct, and it has said, why is it that we are
20 prohibiting this conduct. It is because this symbol is
21 important to us as a nation. And Congress in fact
22 protects that are important to the Nation in a variety of
23 ways, by virtue, at times, of its symbolic importance.

24 But what we have learned from Texas against
25 Johnson and other decisions is that those protections,

1 those prohibitions, cannot be tied to the specific
2 viewpoint. As to the discretion that is afforded to a
3 district judge in taking in a wide variety of
4 circumstances, I think that raises a whole host of
5 considerations that do not *attain with respect to a
6 congress or a state legislature making the policy
7 determination: this is important to us because of its
8 symbolic value.

9 And we can protect it not against criticism, not
10 against criticism -- and it -- and -- and in your district
11 judge hypothetical there may be that danger, but that is
12 not so here. Congress read this Court's decision very
13 carefully, very respectfully, as well as prior indications
14 from this Court, most clearly stated in Smith against
15 Goguen, that nothing prohibits a legislature -- as long as
16 it avoids vagueness concerns, nothing prohibits a
17 legislature from providing physical protection to symbols.

18 In the legislative history it was quite clear
19 that Congress had presented to it by eminent scholars
20 examples of exactly this kind of protection. The statutes
21 in force with respect to prohibitions of desecration of
22 houses of worship, additional protections -- stepped up
23 protections for the bald eagle, not because it is a living
24 thing, not because it is an endangered species -- it's not
25 in all western states -- but because of its symbolic value

1 and because it was chosen by the Continental Congress to
2 be the symbol of the Nation. That is why that criminal
3 prohibition is on the books, in addition to any protection
4 --

5 QUESTION: Does desecration of one's own --
6 one's own self-constructed house of worship --

7 MR. STARR: It may very well -- it may very
8 well --

9 QUESTION: Do you think that would be allowed?

10 MR. STARR: I think that -- I think that
11 raises --

12 QUESTION: It raises the same question we have
13 here.

14 MR. STARR: I don't think so, with all due
15 respect. I think, and I would urge the Court in
16 considering this entire issue of the protection of symbols
17 -- this isn't just flags. It's the protection of symbols.
18 But with respect to the flag, Justice Fortas, the author
19 of the plurality opinion in Brown against Louisiana, the
20 author of the opinion in Tinker against Des Moines School
21 District, a great friend of the First Amendment and of
22 symbolic speech, said in his opinion, his dissenting
23 opinion in Street against New York, the flag is property
24 but only in a sense -- it's not like building your own
25 house of worship -- because the Nation has an interest in

1 that flag.

2 QUESTION: But let's come back to house of
3 worship. Is it your -- your position that -- that it
4 would be constitutional to ban bible burning, an
5 individual burning his own bible?

6 MR. STARR: Well, I think that once we move into
7 the religious area, we are raising other values, namely,
8 values in the establishment clause with respect to how
9 government acts. The government can protect symbols but
10 it cannot protect symbols in a way that runs afouls --
11 afoul of other provisions of the Constitution. And there,
12 in my judgment -- I'm not answering the question
13 authoritatively, but it does seem to me that it clearly
14 raises establishment clause concerns.

15 QUESTION: We prohibit Torah burning and all
16 religious symbols that are sacred to any religious group.

17 MR. STARR: If in fact --

18 QUESTION: That would be all right?

19 MR. STARR: If it is protecting it not from
20 criticism but from physical destruction or
21 mutilation -- that's what we're talking about, physical
22 destruction or mutilation, that one can protect those
23 things that are special to us as a people.

24 The fact that the flag is individually owned, in
25 my judgment, makes the analysis more complicated, but it

1 does not get us home by any means because, as I was
2 starting to say, what Justice Fortas said is that it is
3 property even in the hands of a private citizen in a
4 sense, but only in a sense, because it is property that
5 comes to us with special restrictions and obligations with
6 respect to its use. It is because the flag only exists by
7 virtue of copies. The flags that exist in this courtroom
8 --

9 QUESTION: General Starr, does the record show
10 the ownership of the flag in these particular cases?

11 MR. STARR: In the -- yes, the record does. In
12 the District of Columbia those were individually owned
13 flags. In the Seattle case, in contrast, the flag was
14 property -- we have alleged, they have not admitted but we
15 have alleged that the flag there was the property of the
16 Postal Service.

17 QUESTION: And in Seattle they were also
18 indicted for destruction of government property, were they
19 not?

20 MR. STARR: That is exactly right. Count 1 of
21 the indictment in Seattle charges destruction of
22 government property, and Count 2 of the indictment charges
23 a violation of the Flag Protection Act of 1989.

24 QUESTION: And Count 1 remains pending?

25 MR. STARR: Count 1 remains pending by virtue of

1 this being on a motion to dismiss.

2 QUESTION: We don't like, Mr. Starr, to compare
3 our flag with any other flag, but would you be concerned
4 if in Eastern Europe or some foreign country a government
5 punished demonstrators for marching with a defaced flag in
6 support of the demonstrators' cause for freedom?

7 MR. STARR: I think those are considerations,
8 Justice Kennedy, that are very important for Congress to
9 weigh in the balance. But I would refer the Court to the
10 Senate --

11 QUESTION: Well, but isn't the point that this
12 is a recognized -- internationally recognized form of
13 protest?

14 MR. STARR: It certainly, at this particular
15 stage in our history, is affiliated or associated with
16 forms of protest. We don't deny the fact that these
17 individuals were engaged in a protest. What we are saying
18 is the message of the burning of the flag itself is
19 extremely limited, is -- we are going to have to have
20 additional context including, here, words.

21 QUESTION: Well, you can take it two ways. On
22 the one hand it's limited. On the other hand it's so
23 pervasive, so general. Your original argument was that it
24 was so general, so all-encompassing that it was not worthy
25 of protection. Now you're saying that it's very narrow.

1 I not sure which it is.

2 MR. STARR: I'm sorry. The protections are very
3 narrow in response to this Court's statements time and
4 again and certainly intimations in opinions of the Court
5 that the physical integrity of the flag could be protected
6 as long as, now with Texas against Johnson, it's done in a
7 viewpoint neutral way.

8 One cannot punish a flag protestor because he or
9 she is expressing outrage about policies to the country.
10 What one can do under this Court's teachings in prior
11 cases and as we read Texas against Johnson in terms of its
12 holding, that Congress does and should have power to
13 protect the physical integrity of the flag as long as it
14 is not saying we single out certain viewpoints for
15 disfavored treatment. That is the critical point that
16 Congress was responding to in reading Texas against
17 Johnson and the prior flag cases.

18 QUESTION: But in fact there is only one
19 viewpoint: that you do not mutilate, deface, defile or
20 trample upon the flag in order to show your love for the
21 country.

22 MR. STARR: I would urge the Court, before it
23 came to that view driven by today's newspapers, to read
24 carefully the Senate's brief, the House of
25 Representative's leadership brief which sets forth the

1 history of flag statutes but of instances in the country
2 in our history where individuals were not expressing any
3 outrage at all against the country. They may have been
4 expressing only a specific partisan sentiment.

5 For example --

6 QUESTION: But Mr. Starr, you're missing my
7 point. You made -- General Starr, I'm sorry.

8 MR. STARR: Thank you.

9 (Laughter.)

10 MR. STARR: I was afraid I had been demoted.

11 (Laughter.)

12 QUESTION: You started by pointing out to us
13 that Congress had taken out of the original Section 700(a)
14 the phrase "casts contempt upon the flag," but do you
15 really think that in fact there is any difference so long
16 as the words that they describe to protect the physical
17 integrity of the flag are "mutilate, deface, defile, burn
18 or trample" -- I guess burn is pretty neutral, but if I
19 get a spot on my tie I don't say, gee, I've defiled my tie
20 --

21 (Laughter.)

22 QUESTION: Or if I tear my jacket I don't say,
23 my, I've mutilated my jacket. These are words of -- cast
24 contempt upon.

25 You can take out those words, but the other

1 verbs you've used contain the same suggestions, don't
2 they?

3 MR. STARR: The term "defaces" would in fact
4 encompass activity, conduct. It was inspired by
5 patriotism as in emblazoning onto a flag permanently, not
6 in Spence v. Washington, why did this Court spend a good
7 deal of effort in its opinion emphasizing that Mr. Spence
8 did not deface the flag, did not injure the physical
9 integrity of the flag.

10 An individual may deface the flag by virtue of
11 emblazoning the words onto that flag, "I love the Supreme
12 Court." That constitutes defacement.

13 QUESTION: Well, General, I thought at the
14 outset you suggested that burning this flag really didn't
15 have any message of its own anyway in this case, on the
16 facts of this case, that it was just -- that there was
17 just a flag burning to call attention to some other
18 messages that had nothing to do with the flag. It was
19 just like -- like you burned anything else at the site.

20 MR. STARR: Exactly right. In fact --

21 QUESTION: The only thing is that in this case
22 they burned the flag.

23 MR. STARR: Well, in Seattle they burned in
24 addition -- not these appellees, but during the course of
25 the demonstration there was also burned the McDonald's

1 Golden Arches flag from a nearby restaurant.

2 (Laughter.)

3 Now, I think this is what this Court was getting
4 at when it spoke of, in Spence against Washington, acts of
5 mindless nihilism as opposed to the acts that this Court
6 has focused on in Spence and in other cases where it has
7 found what the Court called an intent to deliver a
8 particularized message. There is no particularized
9 message, I agree, Justice White, being delivered by these
10 individuals here.

11 QUESTION: This is like just an over-loud
12 loudspeaker?

13 MR. STARR: That, I think, is the most apt
14 analogy.

15 I will reserve the balance of my time.

16 QUESTION: General Starr, can I ask you one
17 question?

18 MR. STARR: Please.

19 QUESTION: I may have missed it because there
20 are so many briefs here, but do you know what the
21 experience of our other democratic nations is? Do they
22 all have flag protection acts such as this?

23 MR. STARR: Most do, and as the ACLU's brief
24 points out most go considerably farther, and in fact make
25 punishable acts of defamation, saying words of disrespect

1 to the president of the country and the like.

2 Congress was very clear in response to Texas
3 against Johnson that it wanted the debate to go forward in
4 a robust and uninhibited way and merely to protect the
5 physical integrity of the flag.

6 QUESTION: General Starr -- excuse me.

7 QUESTION: I assume that in a country like -- I
8 assume that in a country like that we would get very
9 annoyed if they let their people burn the American flag.
10 I mean, an ally of ours at least. Let's say the French,
11 who do have a law against burning the Tricolor. I assume
12 our State Department would protest if they allowed people
13 to burn --

14 MR. STARR: We do not. We do not --

15 QUESTION: Don't you think they would protest if
16 we allowed our people to burn the Tricolor, although we do
17 not allow our people to burn --

18 MR. STARR: In response to your question, the
19 State Department does not in fact register protests as a
20 matter of routine policy when a flag of the United States
21 is burned in another country.

22 QUESTION: Now, what if the French feel
23 differently and they protest to our State Department?
24 Isn't it useful for the State Department to say, hey, we
25 can't even stop them from burning our own flag? But

1 assuming they -- assuming that we can stop people from
2 burning our own flag, don't you think the French would
3 have good cause to be insulted if we didn't let people
4 burn the French flag? Or if we allowed it?

5 MR. STARR: Oh, it may be with respect to the
6 consideration of the interests of foreign governments we
7 might in fact seek to provide protections informed by
8 international law, but we would have to be guided, if we
9 were to do that, by Booz against Barry. We could not in
10 fact punish any kind of act of desecration or physical
11 destruction based simply on the viewpoint.

12 QUESTION: So you are saying we could prohibit
13 the burning of the German flag, or, you know, the Iranian
14 flag -- whatever?

15 MR. STARR: I am not saying we could or we could
16 not. I think that has to be informed by international
17 norms. I will admit to the Court that I am not deeply
18 steeped in international norms with respect to flag
19 protection, but what I do know is this, is that Congress
20 was focusing on the flag that it created.

21 This symbol, unlike other symbols -- unlike the
22 bald eagle -- exists only because Congress created it.
23 The flag of the United States is defined by Federal law.
24 Congress created this flag, and it is seeking in a neutral
25 way, without regard to the message, to protect the

1 physical integrity of that flag without -- without in any
2 way interrupting the flow of free ideas in the
3 marketplace.

4 QUESTION: Did Congress identify its
5 constitutional source of authority for enacting the flag
6 statute?

7 MR. STARR: There is nothing to my knowledge
8 specifically in the legislative history. There is nothing
9 in the statute, but I would suggest, in my own view,
10 Justice Kennedy, and that is as an inherent act of
11 sovereignty and certainly even if one draws that into
12 question, certainly with respect to the Army's and the
13 Navy clause, there is, it seems to me coupled with the
14 necessary and proper clause --

15 QUESTION: We have no authority for making a
16 criminal act against something that violates our inherent
17 sovereignty, I take it?

18 MR. STARR: I beg your pardon?

19 QUESTION: There is no authority in this Court
20 for making a criminal act out of something that violates
21 inherent sovereignty?

22 MR. STARR: Oh, if it lies within the proper
23 power of Congress to create, then it seems to me -- as
24 long as one answers that question yes, Congress had the
25 power to create the flag, then it seems to me it has the

1 power to protect that flag neutrally.

2 I would like to reserve the remainder of my
3 time.

4 QUESTION: Very well, General Starr.

5 Mr. Kunstler, we'll hear now from you.

6 ORAL ARGUMENT OF WILLIAM M. KUNSTLER

7 ON BEHALF OF RESPONDENTS

8 MR. KUNSTLER: Mr. Chief Justice, and may it
9 please the Court:

10 We pose the question somewhat differently than
11 was posed by the government. We think the question before
12 the Court is can the government criminally prohibit flag
13 burning, a form of political expression deeply critical of
14 the government and anathema to its officials?

15 And I will address three points, and during them
16 respond to some of the points raised by General Starr.

17 We hold, one, that Texas v. Johnson controls
18 these two cases. Number two, that the Flag Protection Act
19 can simply not be upheld as an attempt to protect the
20 physical integrity of the flag in all circumstances. And
21 three, that there is no basis whatsoever to accept the
22 government's invitation to overturn Johnson.

23 On the first point, that Texas v. Johnson
24 controls, all parties have conceded that the defendants'
25 conduct below was expressive enough to raise First

1 Amendment concerns, and I do not think there is any
2 argument on that.

3 Number two, all parties conceded as well that
4 the congressional intent behind this statute was to
5 protect the flag as a national symbol, and by definition
6 the governmental interest was only harmed by conduct
7 expressing some message of disrespect or dissent, as
8 indicated by Justice Scalia. In other words, the interest
9 was related to the suppression of free expression. Ergo,
10 the strict scrutiny rule applies.

11 Then lastly, that the government interest in
12 preserving this symbolic value is not a compelling
13 interest to justify a criminal penal statute and jail
14 flag-burners. That is what Johnson held.

15 Now, the Court -- I must say to the Court, in
16 rereading what I said last time in the Texas v. Johnson
17 case, I want a little mea culpa. In responding to Justice
18 Stevens, I believe, I said that the government had no
19 legitimate interest in enacting any legislation about the
20 flag. I think I was wrong in that respect, and this
21 Court, of course, did not adopt that argument, and I think
22 rightly so.

23 I am persuaded that there are things the
24 government can do with reference to the flag. They can do
25 many things to persuade people to respect it, to fly it,

1 to indicate how it should be flown, to indicate the
2 dimensions, to indicate the type of flag it should be and
3 how it should appear, and they do that in part under Title
4 36 U.S.C. 173 to 177, but they cannot do it in a penal
5 way.

6 So I express my mean culpa here in response to
7 that question a year ago that Justice Stevens asked of me.
8 They can -- they have a legitimate right to regulate the
9 flag, but not under a penal statute.

10 Now, the government is now arguing, apparently,
11 that there's now a compelling interest that they have in
12 the flag because they passed a new act, because a new act
13 was enacted and became effective on October 28th of last
14 year.

15 If the Court were to accept that argument that
16 the mere adoption of a new act would mean that you would
17 reverse yourself in Texas v. Johnson, then I think it
18 would require reversing Marbury against Madison. But
19 that's not a sufficient reason, merely because Congress
20 says that it is now enacting a new act in an attempt,
21 direct attempt, to get around Texas v. Johnson.

22 And I call the Court's attention that when
23 Johnson was decided there was a prior Federal statute on
24 the books itself. They already had enacted an act, and
25 this Court was quite conscious of the prior Section 700 of

1 Title 18.

2 And lastly, maybe stranger than all, even the
3 congressional amici didn't argue for this position at all,
4 only for the application of a more lenient O'Brien
5 standard or time, place and manner standard. And they
6 cannot change what is obviously the Court's duty in this
7 case merely by passing legislation.

8 Secondly, with reference to the question of the
9 physical integrity in all circumstances that are now
10 claimed by General Starr, this was a claim raised by the
11 congressional amici that it was a content-neutral statute
12 that was enacted here and only to protect the physical
13 integrity of the flag in all circumstances. Well, it's
14 obviously that is not true on the face of the statute
15 itself.

16 First of all, it is not content neutral. It is
17 content and viewpoint base. It singles out a political
18 symbol, one political symbol, and in our brief we
19 indicated what if that political symbol had been instead
20 of the flag the Democratic Party flag or another official
21 flag of the United States.

22 And as Justice Fortas so well put it in Tinker,
23 he said it is also relevant that the school authorities
24 did not purport to prohibit the wearing of all symbols of
25 political or controversial significance. The record shows

1 the students in some of the schools wore buttons relating
2 to national political campaign, and some even wore an Iron
3 Cross. The order prohibiting the wearing of armbands did
4 not extend to these. Instead, a particular symbol, black
5 armbands worn to exhibit opposition to this Nation's
6 involvement in Vietnam were singled out for prohibition.
7 Clearly, the prohibition of expression of one particular
8 opinion is not constitutionally permissible.

9 So it is a content-based statute. It singles
10 out one particular political symbol, just as in Stromberg
11 the red flag was singled out as one particular political
12 symbol.

13 And it is viewpoint-based because it proscribes
14 conduct which was associated with dissent, irrespective of
15 the effect on the physical integrity of the flag. It
16 permits, as the Court knows, conduct which shows respect,
17 and that is the ceremonial burning of the flag, which was
18 put in there in order not to penalize patriotic groups who
19 burn the flag -- old and soiled flags, and burnt them in a
20 ceremonial fashion.

21 And then the language of the statute itself is
22 just to pick up all disrespect examples, all dissenting
23 examples maintained on the floor or ground. Senator Dole
24 wanted that in there because that was days after Fred
25 Scott Tyler, one of the Appellees before this Court, had

1 placed a flag on the ground in that rather well-known
2 Chicago Art Institute exhibit.

3 Physically defiles, that was Senator Wilson's
4 contribution to the statute for -- and he said that's for
5 acts that do not do permanent harm to the flag.

6 Senator Biden said in response to that, well, we
7 have "defaces" in there. We don't need "defiles," but
8 both "defiles" and "defaces" went into the statute. And
9 both Senators Biden and Wilson referred to conduct that
10 does not do permanent damage but injures the flag as a
11 symbol.

12 And the word "defile" has a dictionary meaning
13 of dishonor. And yet it permits conduct which is in
14 essence which is dangerous to the flag such as, I've
15 already mentioned, the burning of worn or soiled flags,
16 but it permits other type of conduct that would be, for
17 example, flying in a hurricane, flying in a thunderstorm,
18 flying in a tornado. And, therefore, it is totally
19 viewpoint based.

20 And as I think Mr. Fried points out in the brief
21 for the ACLU, he says far from protecting the physical
22 integrity of the flag in all circumstances, these terms
23 protect the flag only from those who would hurt it or cast
24 it in a bad light.

25 And any statute, I submit to this Court, even

1 one designed to protect physical integrity, in all
2 circumstances would be content based because Congress'
3 interest is -- ultimately indistinguishable from the
4 flag's symbolic value. Why protect --

5 QUESTION: Mr. Kunstler, excuse me. Can you --

6 MR. KUNSTLER: Oh, pardon me. Thank you.

7 QUESTION: Could the Congress prohibit use of
8 the flag for commercial purposes, let's say a law
9 preventing printing the flag on beer cans?

10 MR. KUNSTLER: I think myself that that could
11 be -- and we've had decisions in that respect --

12 QUESTION: Now that worries me. Why does that
13 differ from your case?

14 MR. KUNSTLER: Well, I think when you're dealing
15 with commercial use of the flag, you're not expressing an
16 idea that I think is worthy of protection under the First
17 Amendment. This is not expressive conduct. It's
18 expressive only in a commercial sense, and this Court has
19 never held commercial speech to have that value.

20 Well, I see what's bothering you because it's
21 the same thing in -- on the surface of it, but it is not
22 expressive -- to me, expressive conduct, which the First
23 Amendment stands for.

24 QUESTION: Well, what about --

25 MR. KUNSTLER: It's unworthy of First Amendment

1 protection.

2 QUESTION: What about an American automobile
3 company that wanted to urge people to buy American cars
4 rather than Japanese cars and could do so more effectively
5 if they -- you know, interspersed replicas of the flag
6 throughout their ads regularly? Why wouldn't that be
7 protected?

8 MR. KUNSTLER: Justice Steven, I don't think
9 that's a worthy purpose. That's a commercial purpose as
10 far as I'm concerned. You're reading into it a sort of a
11 patriotic purpose --

12 QUESTION: And also -- they also think it would
13 help the American economy, say, to do this.

14 MR. KUNSTLER: I know, but also help the company
15 itself, too. So I think that -- to me, that's --

16 QUESTION: Well, maybe the people who burn these
17 flags thought they'd get something out of it, too. Will
18 that mean they lose their rights?

19 MR. KUNSTLER: No, but the -- people that burned
20 these flags --

21 QUESTION: They got a lot of publicity, didn't
22 they?

23 MR. KUNSTLER: -- were, I think, under the First
24 Amendment resorting to politically expressive conduct,
25 politically expressive sentiments that are not present in

1 your example. The only thing that makes your example
2 different than Justice Scalia's is that you are putting
3 into it a competition between American and Japanese cars
4 and giving that a patriotic tinge.

5 But I think it's still commercial speech.

6 QUESTION: So you think if a bunch of college
7 kids at a fraternity party just get together and say, you
8 know, just for a kick let's burn an American flag and
9 they're really not expressing any idea, then the statute
10 would be okay as applied to --

11 MR. KUNSTLER: No, I don't think so. I think
12 the statute, both on its face --

13 QUESTION: I thought that's what you just
14 said --

15 MR. KUNSTLER: No.

16 QUESTION: -- that it hinges on whether you're
17 expressing a political idea or not.

18 MR. KUNSTLER: No. I think the statute is -- on
19 its face is unconstitutional, and I think that if a bunch
20 of college kids burn an American flag you'd come under the
21 facial aspect of the Constitution -- of the statute, that
22 it would be facially unconstitutional. It doesn't
23 differentiate --

24 QUESTION: No, I thought --

25 MR. KUNSTLER: -- it's vague.

1 QUESTION: It's not facially invalid if -- if
2 there is a situation in -- in which its application would
3 be all right and if its application would be all right as
4 applied to these college students who have no political
5 idea, they're just having a grand old time. Let's burn a
6 flag.

7 MR. KUNSTLER: Yes, but it's facially invalid
8 because the student doesn't know on the vagueness argument
9 or the overbreadth argument, doesn't know, one, whether
10 it's the flag of the United States. There are many flags
11 of the United States. And doesn't know that the conduct
12 itself is prohibited.

13 I would put it on the -- on the grounds of --
14 that it would be facially invalid.

15 Now on the grounds that you mentioned, that it's
16 college students -- well, I'd say it's not this case
17 anyway. That's -- I guess that's the best way to worm out
18 of this.

19 (Laughter.)

20 MR. KUNSTLER: If I have to worm out, that's the
21 way I'm going. It's not this case. It's a hypothetical,
22 and it's not this case. Here there is no question, as
23 General Starr indicates, about the political message.

24 QUESTION: But you're making a facial attack,
25 aren't you? I thought your attack was facial.

1 MR. KUNSTLER: We're making a facial attack --

2 QUESTION: You just want us to let your clients
3 off and -- and -- and say, you know, in other situations
4 it may be all right, but here it was no good?

5 MR. KUNSTLER: Well, in --

6 QUESTION: I didn't think that that was the
7 argument you were making, but if you want --

8 MR. KUNSTLER: Well, in Texas v. Johnson we also
9 made a facial attack, and this Court, as the district
10 courts below, did not go into the facial aspect of the
11 statute. They decided, as you did in Texas v. Johnson, on
12 the as-applied standard.

13 QUESTION: So if -- if -- if a person burned a
14 flag in order to stay warm on a cold winter night, you
15 would have -- in order to get your client off on -- on
16 those facts you would get into overbreadth?

17 MR. KUNSTLER: You'd have to get into the facial
18 aspect of it. But that, again, is not this case.

19 QUESTION: But this case is a case involving a
20 special message, as I understand it. And what was that
21 message?

22 MR. KUNSTLER: Well, there were a number of
23 messages. They issue --

24 QUESTION: Well, which one do they convey by
25 burning the flag?

1 MR. KUNSTLER: I think they convey them all.
2 They're saying that -- in burning the flag, that they
3 don't like what the United States is doing or stands for,
4 either on domestic or foreign policy. They all broke it
5 down into specifics.

6 One didn't like the treatment of Mexican-
7 Americans. One didn't like the treatment of women. One
8 didn't like United States military involvement abroad.
9 There were many. But you -- the -- and the burning of a
10 flag, which doesn't specifically say each one of those --
11 that was the argument I guess that General Starr --

12 QUESTION: It doesn't say any one of them; it
13 says all of them. Is that what you're saying?

14 MR. KUNSTLER: General Starr made that -- well,
15 it's one or all. It's one or all. No one seeing the flag
16 burn could fail to get the message.

17 QUESTION: But how -- if I just see the flag
18 burning, how do I know which one it is, or is that
19 irrelevant?

20 MR. KUNSTLER: It's only irrelevant in the sense
21 there are documents being handed out, flyers,
22 declarations, that a person will -- he'll know from that
23 that the burning of the flag exhibited dissatisfaction.
24 He'll know initially that the burning exhibited a
25 dissatisfaction. That person doesn't like something the

1 United States is doing. And then it's broken down.

2 QUESTION: Call this -- call this number and
3 we'll tell you why we burned the flag. Hand out telephone
4 numbers, call this number and we'll tell you what the
5 message is.

6 MR. KUNSTLER: Well, they did -- they did give
7 the messages out, why they burnt the flag. But the
8 burning of the flag itself, I think, even without a
9 message, would convey a message.

10 You see, General Starr says, essentially, that
11 the burning of a flag by itself carries no message. How
12 do you know what they're burning it for, and so on. But,
13 in essence, that's true, his argument could prevail in any
14 non-verbal demonstration. How do you know why anybody is
15 doing anything with a non-verbal expression? What if they
16 drew a picture of Uncle Sam being hanged, for example, a
17 caricature? How do you know what they -- express purpose
18 is? But that's true of all non-verbal communication.

19 And his argument would prevail -- or would be
20 the same I guess for all non-verbal expression. And you
21 can't relegate non-verbal expression to the scrap heap.

22 QUESTION: Well, why just non -- why do you
23 limit it to non-verbal? I -- it's verbal, too. I mean, I
24 assume you're free to say, you know, down with the United
25 States, or down with Germany, or down with anybody you

1 want, right? That's --

2 MR. KUNSTLER: Why you burn the flag.

3 QUESTION: No. Not even burning. I mean, even
4 with verbal expression, you don't have to be precise in
5 order to be protected, do you?

6 MR. KUNSTLER: That's true, you do not have to
7 be precise. But with non-verbal, where you have an
8 imprecise situations -- burning a flag, the burning of the
9 flag I think is significant and it doesn't need a
10 prefatory explanation of why and each reason why the flag
11 is being burnt. In this case you have it. The record has
12 it. You have the declarations, and you have the flyers in
13 the record.

14 QUESTION: Mr. Kunstler, suppose that a
15 defendant broke into government property in violation of a
16 valid statute, took a government flag, burned the
17 government flag and was charged for breaking and entering
18 and for destroying government property, not a flag statute
19 at all. And the judge, on sentencing, then says, you have
20 outraged the community, this is highly offensive, and I'm
21 going to give you the maximum sentence. Permissible under
22 the Constitution?

23 MR. KUNSTLER: I say no; General Starr says yes.
24 Because I think he's basing the sentence on the language,
25 the First Amendment language. I think he can sentence

1 within the guidelines.

2 QUESTION: Then you must -- then you must give
3 the same sentence for spray painting the side of a
4 building that faces a government alley as for spray
5 painting the Lincoln Memorial?

6 MR. KUNSTLER: Within the guidelines, I think
7 the judge can give anything --

8 QUESTION: I'm assuming that it's all within the
9 guidelines, but he gives a maximum because people are
10 outraged, they are offended and the conduct was very
11 public.

12 MR. KUNSTLER: If he says that --

13 QUESTION: He says that.

14 MR. KUNSTLER: If he says that, I think it's
15 unconstitutional.

16 QUESTION: But that happens in sentencing all
17 the time.

18 MR. KUNSTLER: I'm not sure --

19 QUESTION: And -- and -- and based -- and based
20 on your rule, it has to be the same sentence for spray
21 painting the side of a government building that faces an
22 alley and spray painting the Lincoln Memorial?

23 MR. KUNSTLER: No, it doesn't have to be the
24 same because there are other factors to be considered
25 under the uniform sentencing guidelines. There's past

1 record. There are other guidelines --

2 QUESTION: No, I'm assuming everything is -- is
3 the same.

4 MR. KUNSTLER: Everything the same?

5 QUESTION: Sure.

6 MR. KUNSTLER: I think enhancing the sentence
7 because of the nature of the communication would be
8 unconstitutional. And I would certainly appeal.

9 QUESTION: Well, what about the fact that it's
10 public, that people are outraged, that this is highly
11 offensive?

12 MR. KUNSTLER: I still think you're going on the
13 language itself. You're enhancing not for the act but for
14 the language. And I think if you do that, I think it's
15 unconstitutional. And I would appeal that sentence.
16 General Starr thinks it's constitutional, but I don't
17 think so.

18 QUESTION: Well, that's probably why we're here
19 today.

20 (Laughter.)

21 MR. KUNSTLER: Now, with reference -- I'm just
22 -- with reference to the invitation -- oh, by the way,
23 before I leave the flag and the -- I guess the position
24 that this statute was designed solely to protect its
25 physical integrity in all circumstances, I think I've

1 shown that it does not.

2 But I was very interested essentially in what
3 Chief Justice Rehnquist said when -- in his Spence dissent
4 when he said it is the character not the cloth of the flag
5 which the state seeks to protect. And I think that is
6 essentially the truth of this statute, both in the
7 congressional debates and in -- and in the position that
8 was taken below, which has changed dramatically now on the
9 part of the government from the position it took below and
10 from the position it took before Congress when Assistant
11 Attorney General Barr testified before the Senate and the
12 House Judiciary committees.

13 As far as my last point, the invitation to
14 overrule Texas v. Johnson, this is a last resort argument,
15 I think. It's an argument based on a recognition that
16 Texas v. Johnson applies here. There have been all sorts
17 of methods here to try to get around Texas v. Johnson.

18 They've even gone back to the bald eagle
19 argument, which they said down below was a fallacious
20 argument, and they've resorted to that here. But it's a
21 last resort argument. They know -- the government knows
22 that Texas v. Johnson applies. They knew it when Mr. Barr
23 testified before the Senate and House judiciary
24 committees, they knew it in the district court and they
25 know it here -- that it applies.

1 They want -- so they've devised a method by
2 which this Court can say it doesn't apply. And they want
3 you to carve out another exception. They want -- like
4 child pornography. They throw that in. They throw in
5 fighting words again, which was specifically rejected in
6 Justice Brennan's opinion in Texas v. Johnson. They throw
7 --

8 QUESTION: Let's -- let's -- let's try fighting
9 words, Mr. Kunstler. You know Texas v. Johnson was a year
10 ago, and fighting words is no good why? I mean, it's
11 certainly -- it's certainly the case that whenever
12 somebody tramples a flag or burns a flag there is a real
13 potential for causing a riot, isn't there?

14 MR. KUNSTLER: Well, that isn't really what
15 fighting words are as I understand Chaplinski.

16 QUESTION: Well -- it's -- it's -- it's the same
17 -- it's the same thesis, that you don't have any rights to
18 engage in conduct that's likely to provoke a riot.

19 MR. KUNSTLER: It really isn't, Justice -- that
20 isn't really fighting words. Fighting words, as I
21 understand it, is what the Jehovah's Witness did in
22 Chaplinski when he went up to the sheriff and directly to
23 him said words which would lead to a fist fight between
24 two individuals. But much of speech provokes listeners,
25 this Court has said many times, but maybe the highest

1 purpose of speech is to provoke that kind of reaction.

2 Terminello, how far can you go -- I think
3 Terminello indicates how far you can go. At one point
4 they were even throwing things.

5 QUESTION: What do you do with Feiner against
6 New York?

7 MR. KUNSTLER: I don't think that's really
8 applicable here, because -- well, that's not totally a
9 fighting words case. You're not dealing here --

10 QUESTION: It was held permissible for the
11 sheriff to silence the speaker because he would -- the
12 audience was -- was about to riot.

13 MR. KUNSTLER: But -- but there's a point, I
14 guess, where you have a riot develop, and on the verge of
15 developing, where a police officer can stop. And I think
16 everybody would admit that, there comes a point.
17 Terminello I guess was close. Feiner was over the edge.
18 But I think that to burn a flag is not that point. You
19 have no record here of any incident occurring whatsoever.

20 QUESTION: Well, if we had a record, would it
21 make it a different case?

22 MR. KUNSTLER: No, I don't think so, unless it
23 were a record were a riot did ensue and police were forced
24 to come in and take the speaker off the rostrum. That
25 might be a different case. It's certainly not this case,

1 and it wasn't Texas v. Johnson, because I think Texas
2 argued that most stringently here, that it might provoke a
3 breach of the peace, and that was one of the
4 considerations that Texas said we were advancing, outside
5 of the symbolic value. But I think you've got to have
6 more. You've got to go over the -- at least over the
7 Feiner limit -- I'm using Feiner, F-e-i-n-e-r -- in
8 expressing that --

9 QUESTION: So there has to be a high probability
10 of an injury occurring?

11 MR. KUNSTLER: Well, I remember the phrase
12 "clear and present danger" floating around in my cranium
13 at this moment, but there has to be something that is
14 way -- so probable that you are going to have bloodshed
15 here, you're going to have a riot, and that doesn't exist
16 here at all.

17 QUESTION: You don't think a potential -- a
18 potential for a riot is enough? Not a potential?

19 MR. KUNSTLER: I think the potential has to be a
20 probability of a riot, and not --

21 QUESTION: So you disagree with our decision in
22 Austin, that just came down a couple of months ago?

23 MR. KUNSTLER: In Austin?

24 QUESTION: Yes, involving the restriction of
25 corporate speech, and there we said, to quote it, that the

1 mere -- presents the potential for distorting the
2 political process. We said it was not --

3 MR. KUNSTLER: No, I don't disagree with it,
4 because you were going to corruption, to something that
5 would --

6 QUESTION: Oh --

7 MR. KUNSTLER: -- wreck the whole political
8 system.

9 QUESTION: I see.

10 MR. KUNSTLER: And I think that is a little
11 different.

12 QUESTION: Oh.

13 MR. KUNSTLER: Now, I take it from that "oh"
14 that you're not buying this.

15 (Laughter.)

16 QUESTION: I didn't buy it.

17 MR. KUNSTLER: But I think essentially that is a
18 different case, too. It does involve First Amendment, no
19 question about it, in Austin. And the compelling
20 governmental interest was the prevention of the corruption
21 of the entire political process.

22 QUESTION: Is preventing desecration of the flag
23 --

24 MR. KUNSTLER: Well, you're using the word --

25 QUESTION: And defending the sensibilities of

1 the American people?

2 MR. KUNSTLER: Well, I think that's a lot
3 different than what you have in -- going to the corruption
4 of the entire political system. I think you have
5 something here that will offend a lot of people, maybe a
6 majority of the American people, but you know what offends
7 a majority today may not offend a majority tomorrow. We
8 have had many things that offend people. Marching in
9 Birmingham in 19 --

10 QUESTION: More -- more specifically, the
11 potential is for causing a riot. I mean, the potential is
12 for physical harm to people. That is the potential we are
13 talking about. It won't -- but that is a great potential.
14 Whenever somebody does something like this to the flag,
15 people get mad.

16 MR. KUNSTLER: But Justice Scalia, there's
17 always a potential in free speech, but it's got to go
18 beyond -- I think Justice Kennedy used the word
19 probability. It has to go beyond the potential. That's
20 what Texas argued here a year ago, and in this particular
21 statute, the Congress' interest in this statute had
22 nothing whatsoever to do with breaches of the peace. It
23 wasn't mentioned, it didn't come up in the debates and was
24 really not the gravamen of what they were doing.

25 Now, with reference to overruling Johnson,

1 getting back to this argument that they're saying it's
2 like defamation, it's like libel and slander, it's like
3 obscenity, child pornography and fighting words. I think
4 that's where we stop for a moment, with fighting words.

5 They're trying to carve out another exception
6 here. They're trying to say that flag burning is not
7 protected. We should put it aside with child pornography
8 and defamation and libel and slander, and excise it from
9 the First Amendment. That's what they're essentially --
10 what they're saying, the same kind of argument that I
11 guess was rejected by this Court in Cohen against
12 California. And in the area of political speech, a
13 government cannot make judgments of what is overly
14 offensive or unimportant speech. That simply cannot be
15 done.

16 The First Amendment was designed to forestall
17 the majority, forestall their inclination to suppress what
18 the government deems offensive at any one time or another,
19 and many times there have been many things that have been
20 held to be offensive to various parts of our community, or
21 our national community, which this Court has protected
22 against -- protected against government stopping it,
23 arresting it, inhibiting it or deterring it.

24 I would just like to close with the fact that,
25 number one, that respect for the flag must be voluntary.

1 We can understand people's enormous feeling for it. I
2 think that's not difficult to understand. But it must be
3 voluntary, and once people are compelled to respect a
4 political symbol, then they are no longer free and their
5 respect for the flag is quite meaningless.

6 To criminalize flag burning is to deny what the
7 First Amendment stands for, just what was said in Texas v.
8 Johnson: "We do not consecrate the flag by punishing its
9 desecration, for in doing so we dilute the freedom that
10 this cherished symbol represents."

11 I would just like to indicate that when I reread
12 Times -- New York Times against Sullivan and reread
13 Justice Brennan's words about the Alien and Sedition Acts,
14 it was just 193 years ago, virtually to the day -- May 16
15 of 1793 -- that the President of the United States in a
16 special message to Congress asked for a statute which he
17 said would repel insinuations so derogatory to the honor
18 and aggression, so dangerous to the Constitution, union
19 and even independence of the Nation, it's an indispensable
20 duty of the Congress. And they provided him with that
21 statute, and part of that statute, the Alien and Sedition
22 Acts, had in it a punishment -- severe punishment -- for
23 derogatory remarks about the President, the Congress, the
24 government and so on.

25 This Court did not have its review power then.

1 Marbury against Madison was three or four years into the
2 future, into 1803, and the statute was never brought to
3 this Court. It expired by its terms in 1801, but Thomas
4 Jefferson, when he became President of the United States,
5 pardoned everyone who had been convicted under that
6 statute, which is not too dissimilar from what we are
7 talking about here -- pardoned everyone -- and the
8 Congress voted to restore all the fines, and in writing
9 to -- a letter -- Thomas Jefferson said, after becoming
10 President, he said, "Under that statute it is as if
11 Congress had ordered us to fall down and worship a golden
12 image."

13 And essentially, that is what we are dealing
14 here with now -- a statute that attempts to make the
15 American flag a political symbol, cherished as it is by
16 many people, into a golden image, which takes it out of
17 the political arena --

18 QUESTION: Thank you, Mr. Kunstler. Your time
19 has expired.

20 Mr. Starr, do you have rebuttal? You have three
21 minutes remaining.

22 REBUTTAL ARGUMENT OF KENNETH W. STARR,
23 ON BEHALF OF THE APPELLANT

24 MR. STARR: Very briefly, Mr. Chief Justice,
25 this is not a sedition act. This is not, as has been

1 suggested in briefs by our colleagues on the other side,
2 punishment for civil blasphemy. Robust, uninhibited
3 debate goes on, unimpeded.

4 Congress felt very strongly about that.
5 Congress had the deepest regard for this Court's
6 teachings, as well as our system of free expression. What
7 it sought to do was to comply with Texas against Johnson.
8 It heard testimony from eminent scholars who reviewed the
9 entirety of this Court's handiwork in the First Amendment
10 area and in flag protection specifically, and it saw a
11 way, appropriately, respectfully, to, in a narrow way,
12 prohibit conduct, not words.

13 Secondly, it is not so that an act of flag
14 burning means "I hate America." Carlos Garza is one of
15 the Washington State appellees. In his sworn statement as
16 to why he engaged in flag burning, he said "The American
17 flag represents the system and the government for which it
18 stands. I love and respect America. I love and respect
19 the American people. I do not love and respect the way
20 Hispanic-Americans are treated."

21 In his sworn statement, Darius Strong, one of
22 the Seattle appellees, said that his sole objection was
23 with any statute that might in any way prevent someone
24 from doing whatever that person sought to do by way of
25 free expression. This statute does not inhibit free

1 expression. It prohibits a very narrow form of conduct.

2 I thank the Court.

3 CHIEF JUSTICE REHNQUIST: Thank you, General
4 Starr.

5 The case is submitted.

6 (Whereupon, at 11:29 a.m. the case in the above-
7 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. 89-1433 - UNITED STATES, Appellant V. SHAWN D. EICHMAN, DAVID GERALD BLALOCK AND SCOTT W. TYLER: and

No. 89-1434 - UNITED STATES, Appellant V. MARK JOHN HAGGERTY, CARLOS GARZA, JENNIFER PROCTOR CAMPBELL AND DARIUS ALLEN STRONG

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Leona M. May*
(SIGNATURE OF REPORTER)

LEONA M. MAY
(NAME OF REPORTER - TYPED)